APPEAL NO. 011287
FILED JULY 26, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 9, 2001. The hearing officer determined that the respondent (carrier) is not liable for the cost of spinal surgery for the appellant (claimant). On appeal, the claimant contends that because her second opinion doctor concurred with the recommending surgeon's proposed spinal surgery, the carrier should be liable for the cost of such surgery. The carrier urges affirmance.

DECISION

Affirmed.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) establishes a spinal surgery second opinion process to be followed if spinal surgery is recommended and the need for spinal surgery is disputed. Under this procedure, both the claimant and the carrier choose a second opinion doctor from a list of surgeons provided by the Texas Workers' Compensation Commission (Commission). A determination is made by the Commission as to whether or not the second opinion doctors concur with the recommendation for surgery. Rule 133.206(a)(13) defines "concurrence" as follows:

> Concurrence - A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e. cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to improve as a result of the surgical intervention. Types of spinal surgery include but are not limited to: stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

Rule 133.206(14) defines "nonconcurrence" as follows:

> Nonconcurrence - A second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed.

Rule 133.206(k)(4) provides as follows, if a spinal surgery determination is appealed to a CCH:

> Of the three recommendations and opinions (the surgeon's, and the two second opinion doctors'), presumptive weight will be given to the two which had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

Rule 133.206(l)(1) deals with resubmitting the issue of spinal surgery and provides as follows:

> If the injured employee has a change of condition at any time after a nonconcurrence, the treating doctor or surgeon may submit a TWCC-63 [Recommendation for Spinal Surgery] to the division and to both the second opinion doctors with documentation indicating the change of condition as defined in subsection (a)(16) of this section. The second opinion doctors will review the documentation for the purpose of evaluating the presence of criteria listed in subsection (a)(16) prior to submission of an addendum report. If in the doctor's opinion the documentation does not meet the criteria of subsection (a)(16), the second opinion doctor shall submit a report to the division and the treating doctor or surgeon indicating there is no change in condition. If documentation meets the criteria in subsection (a)(16), the second opinion doctors shall issue an addendum to the original decision and send a copy to the division, the treating doctor, the surgeon, and the carrier with the word "ADDENDUM" clearly indicated on the narrative report. Addendum decisions, reports, records, and payments, and appeal to a CCH are governed by all of the provisions of this section. If the addendum second opinions result in carrier liability, any pending appeal shall be dismissed.

In the present case, the claimant's treating surgeon, Dr. D, originally recommended spinal surgery on August 14, 2000. The claimant was then examined by two other doctors, for the purpose of receiving second opinions. On September 13, 2000, Dr. S, the carrier's second opinion doctor, indicated that he did not concur with the recommendation for surgery. On September 28, 2000, Dr. L, the claimant's second opinion doctor, initially indicated that he did not concur "at this time" because he was "unable to review diskograms." The Commission issued a letter dated October 3, 2000, indicating that because neither of the doctors had concurred with the recommendation for spinal surgery, it had been denied. The record does not indicate that the claimant appealed from this determination. Subsequently, on December 11, 2000, having learned that a diskogram had not been performed, Dr. L submitted a form indicating that he concurred with Dr. D's recommendation for surgery. On February 21, 2001, Dr. D resubmitted the recommendation for spinal surgery with a change in the recommended surgical procedure. The evidence reflects that neither Dr. S nor Dr. L provided the information required by Rule 133.206(l).

The hearing officer found that the spinal surgery resubmission process had not been complied with and remains incomplete; that the initial denial of surgery, dated October 3, 2000, remains in effect; and that the carrier is not liable for the cost of spinal surgery. These findings are sufficiently supported by the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Because the resubmission for spinal surgery procedure apparently has not been complied with by either of the second opinion doctors and remains incomplete, we must affirm the determination that the carrier is not liable for spinal surgery.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. Although I agree that, based on the record before us, the spinal surgery resubmission process has not been complied with and remains incomplete, I disagree with the outcome of leaving this case in its current state of limbo. Unlike in other cases, the Texas Workers' Compensation Commission (Commission), through the Medical Review Division, has very specific duties in preparing a case for a spinal surgery contested case hearing. In my opinion, where, as here, those duties are not carried out, we only compound the problem by making a decision that we cannot make a decision. I believe that this case should be remanded and the hearing officer should be asked to coordinate with the employees in the Hearings Division and the Medical Review Division that are responsible for implementing the spinal surgery second opinion process and preparing for spinal surgery hearings to ensure that the Commission satisfies its obligations under the resubmission process. Specifically, the employees who are responsible for the spinal surgery process needed to forward the resubmitted surgery request to the two second opinion doctors and to obtain their opinions concerning their concurrence or nonconcurrence with the proposed surgery request. In turn, that information should have been provided to the hearing officer so that he could resolve the issue of whether the carrier is liable for the proposed spinal surgery. Finally, I note that it would seem to have been a better practice for the hearing officer to have attempted to obtain the missing information essential to his resolution of the issue before writing his decision in this case.

Elaine M. Chaney
Appeals Judge