APPEAL NO. 011560
FILED AUGUST 23, 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 was held on June 19, 2001. The hearing officer gave presumptive weight to two concurring opinions on spinal surgery.

The appellant (carrier) has appealed, and argues that the opinion of the respondent's (claimant) second opinion doctor is not a true concurrence in the recommended procedure, when the narrative is considered along with the Spineline Fax Response Form. The carrier asserts that this doctor also misread a discogram. The carrier asks that the determination be reversed. There is no response from the claimant.

DECISION

Reversed and remanded.

This case is remanded first for the purpose of obtaining compliance with HB2600, which amended Section 410.164, effective June 17, 2001. Section 410.164 was amended by the addition of subsection (c), which provides as follows:

> At each [hearing], as applicable, the insurance carrier shall file with the hearing officer and shall deliver to the claimant a single document stating the true corporate name of the insurance carrier and the name and address of the insurance carrier's registered agent for service of process. The document is part of the record of the [hearing].

The procedure to be used for implementing the statutory amendment is contained in the June 19, 2001, Texas Workers' Compensation Commission (Commission) memorandum to hearing officers entitled "Required Insurance Carrier Information." A rehearing on remand is required to obtain the required information from the carrier and to admit it into evidence.

Second, we agree that clarification is needed regarding the claimant's second-opinion doctor's agreement to the type of, and the need for, spinal surgery and consequently reverse and remand.

The claimant is in his early 30s. He injured his back. A June 24, 2000, MRI shows what is described as a "bulge" at L5-S1, slightly displacing the S1 nerve root but not impinging on the thecal sac. The medical evidence indicated that the claimant continued to complain of back pain radiating down his left leg, and that he worked light duty for his employer. He was assessed at maximum medical improvement on February 6, 2001, with a 13% impairment rating. Six percent of this was for overall lumbar range of motion deficits. The examining

doctor found that sensation and strength were normal in both legs.

The claimant underwent a discogram on March 19, 2001. The disc at L3-4 indicates a normal response and no pain. The disc at L5-S1 has normal resistance, no pain or pressure, and normal radiographic appearance. The conclusion states that the L5-S1 disc is "architecturally abnormal" but that its injection was not painful.

The claimant's treating doctor, at some point, referred him to surgeon Dr. Z. None of Dr. Z's reports are in evidence, but his Recommendation for Spinal Surgery (TWCC-63) is in evidence, dated March 20, 2001. He recommends a laminectomy and a fusion, with entry posteriorly and anteriorly, a procedure referred to as a "360 degree" fusion. Instrumentation was also part of the recommendation, and the claimant testified that he believed this referred to a few "screws." In response, the carrier exercised its right to seek a second opinion, and chose Dr. B.

Dr. B examined the claimant on April 17, 2001, and was unequivocal in his disagreement with the need for surgery. He noted that the claimant had a normal gait, and that there was no tenderness, spasm, rigidity, or trigger points upon palpation. It was Dr. B's opinion that the claimant did not demonstrate radiculopathy. He stated that there was no supportive basis for the proposed operative procedure, and predicted that the claimant's problems would increase following surgery.

The claimant chose a doctor, Dr. E, for his own second-opinion doctor. Dr. E examined the claimant on May 10, 2001. Dr. E noted that the x-rays forwarded to him were those of another person. He reviewed the MRI and said that it showed a left-sided herniation at L5-S1. Dr. E stated that he "understood" that the claimant's discogram confirmed a reproduction of symptoms at L5-S1. Finally, he closed with the following, after noting the proposed procedure:

> I think surgery is certainly indicated in this patient. Choices of surgery can vary from a simple diskectomy all the way to complicated fusion procedure. A 360 degree fusion is proposed here. While I would not be this aggressive with the surgery at this point in time, such a decision is certainly in the area of judgment between the patient and surgeon. It may well be a good idea to fuse the L5-S1 segment following the diskectomy and obviously this can be accomplished in many ways. I therefore agree with the surgery and have tried to make sure that the patient understand that there are a variety of options here.

Dr. E checked the Spineline Fax Response Form block that states: "Yes, I agree that the recommended procedure is needed".

The carrier received permission to depose Dr. E on written questions. There were five questions. Dr. E stated that he had not received copies of the claimant's x-rays from Dr. Z to substitute for the incorrect x-rays he received. He agreed that the discogram report was

provided to him. The final question and answer was:

> **Q- Finally, in your report you state that this patient is a surgical candidate, but that you would not be so aggressive at this point as to proceed with a 360 degree fusion. What surgical procedure would you recommend for this patient if you were his treating doctor?**
>
> A- Several surgical options were discussed with the patient. Further comment would be a medical expert opinion, which I am not prepared to render.

The hearing officer found that Dr. E concurred, based upon his Spineline Fax Response Form. The hearing officer gave presumptive weight to the two concurring opinions.

Under the spinal surgery rules in effect at the time of the recommendation made here, a second opinion doctor must not only concur with the need for surgery but he must also concur with the type of surgery proposed. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §133.206(a)(13) (Rule 133.206(a)(13)). A narrative report is required as part of the second-opinion doctor's opinion. Rule 133.206(i)(3). In fact, the narrative is considered so essential to the examination that a second-opinion doctor will not be paid pending its receipt by the Medical Review Division. Rule 133.206(j)(1). There is no comparable requirement that the TWCC-63 be accompanied by a narrative, although the surgeon is responsible for sending medical records to the second-opinion doctors. Rule 133.206(e)(3). The narrative should be considered as part of the opinion. *See* Texas Workers' Compensation Commission Appeal No. 000349, decided March 31, 2000; Texas Workers' Compensation Commission Appeal No. 990059, decided February 19, 1999. The trier of fact should not read just the "FAX" sheet but also the underlying report as the "opinion" of the doctor.

The legislature has demonstrated, through the second-opinion process, that the liability of the carrier and the need for spinal surgery is no longer left to "the judgment of the doctor and patient" but is subject to a formal peer review process on request before liability of the carrier is incurred. It is troubling, therefore, when Dr. E states in his answers on deposition that he declines to render an expert medical opinion, as that seems to be precisely what it is incumbent upon the second-opinion doctors to do.

We are also concerned, and tend to agree with the carrier on this point, that Dr. E based his recommendation on an impression that the discogram showed a reproduction of pain, when the opposite appears to be the case from the discogram report in evidence. There is also the matter of Dr. E not having the correct x-rays.

Nevertheless, the crux of the carrier's argument is that Dr. E's evident ambivalence about a 360-degree fusion is not a "concurrence." Rule 133.206(a)(13) provides the following definition of concurrence:

> (13) 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.

In Texas Workers' Compensation Commission Appeal No. 001401, decided July 25, 2000, the Appeals Panel addressed the issue raised by the carrier and stated thusly:

> In order to qualify as a concurrence under Rule 133.206(a)(13), the second opinion doctor must agree on the proposed type of spinal surgery and the region (cervical, thoracic, lumbar, or sacral) of the spine involved. However, the second opinion doctor does not have to agree on the approach (anterior, posterior, instrumentation, cages, etc.) or on the number of levels within the region in which the recommended surgery will be performed.

There have been other cases reciting this language. *See* Texas Workers' Compensation Commission Appeal No. 010099, decided February 28, 2001; Texas Workers' Compensation Commission Appeal No. 010270, decided March 6, 2001.

Because the hearing officer appears to have considered the Spineline Fax sheet without Dr. E's underlying letter, we reverse and remand. The hearing officer should also consider whether Dr. E may have misunderstood the discogram results, which appears to have been an important part of his opinion. We reverse and remand also for further clarification from Dr. E about his understanding of the discogram results.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings,

pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Government Code in the computation of the 15-day appeal and response periods.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge