APPEAL NO. 020055
FILED FEBRUARY 21, 2002

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 December 10, 2001. The hearing officer resolved the disputed issue before her by determining that the respondent (carrier) is not liable for the cost of lumbar spinal surgery, and that lumbar spinal surgery is not approved. The appellant (claimant) appealed. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

At issue in this case is the proper interpretation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206). Rule 133.206 sets forth the procedures to be followed during the spinal surgery second opinion process. The events leading up to the hearing on this matter are largely undisputed. On December 15, 2000, the claimant's treating doctor, Dr. R, submitted a Recommendation for Spinal Surgery (TWCC-63), which recommended a spinal fusion with instrumentation; on January 29, 2001, the carrier's spinal surgery second opinion doctor, Dr. G, submitted a report in which he did not concur with Dr. R's spinal surgery recommendation; on August 1, 2001, the claimant's spinal surgery second opinion doctor, Dr. D, submitted a report in which he stated, "I am unable to recommend back surgery at the present time. I need additional testing, including repeat MRI with Gadolinium, lumbar discogram, plus neurological testing. Once these additional tests are completed, I will reevaluate the patient for the back surgery." On his fax response dated July 31, 2001, Dr. D checked the box indicating that he did not concur at the time because further testing was needed before he could render an opinion; on August 21, 2001, the claimant underwent the additional tests requested by Dr. D; the results of the tests were forwarded to Dr. D, but were not sent to Dr. G; by addendum report dated September 18, 2001, Dr. D concurred with the surgery recommended by Dr. R; on September 21, 2001, the Texas Workers' Compensation Commission (Commission) issued a letter approving the claimant's spinal surgery.

The hearing officer determined that the carrier is not liable for the cost of lumbar spinal surgery and that lumbar spinal surgery is not approved. In reaching this determination, the hearing officer found as fact that, "The Commission acted beyond its authority in issuing a decision in favor of spinal surgery as two nonconcurrences were received and the procedure for properly resubmitting the request for spinal surgery was not complied with by the treating doctor or surgeon and the new tests results were not forwarded to both second opinion doctors." Rule 133.206(l) provides in pertinent part that if an injured employee has a change of condition at any time after a nonconcurrence, the treating doctor or surgeon may submit a TWCC-63 to the Commission and both second opinion doctors with documentation indicating the change of condition. Rule 133.206(a)(16) defines "change of condition" as, "[a] documented worsening of condition,

new or updated diagnostic test results and/or the passage of time providing further evidence of the condition, or follow up of treatment recommendations outlined by a second opinion doctor."

We conclude that the hearing officer erred in determining that there was a change in condition which required Dr. R to resubmit his TWCC-63 and start the process anew. The facts of this case are distinguishable from those contained in the Appeals Panel decisions cited by the hearing officer to support her decision. We note that in the case before us, there is no evidence that the Commission ever sent out a notice of nonconcurrence; that Dr. D specifically noted that he was unable to render an opinion regarding spinal surgery until he received additional test results; that the claimant promptly underwent the additional tests requested by Dr. D and forwarded the results to him; and that Dr. D promptly amended his opinion after receiving the test results. We conclude that this is not a case where there has been a change in the claimant's condition requiring her treating doctor or surgeon to resubmit a TWCC-63 pursuant to Rule 133.206(l), but rather a case where a second opinion doctor prudently withholds rendering an opinion until he has all of the necessary data. We view the additional testing which the claimant underwent to be part of the original request for spinal surgery, as it was required by one of the treating doctors in order for him to render an opinion; that there is no evidence that the claimant's condition had changed nor that the testing was performed in an effort to show a change in condition; and because the Commission had not yet issued a letter of nonconcurrence. The fact that the results were not forwarded to Dr. G is a harmless procedural error in that the claimant has concurring opinions from Dr. R and Dr. D.

The hearing officer's decision and order that the carrier is not liable for the cost of lumbar spinal surgery and that spinal surgery is not approved is reversed, and a new decision and order is rendered that the carrier is liable for the cost of lumbar spinal surgery and spinal surgery is approved.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

Gary L. Kilgore
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Edward Vilano
Appeals Judge