APPEAL NO. 021050
FILED JUNE 13, 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 (CCH) was held on April 4, 2002. The hearing officer determined that the respondent's (claimant) request for spinal surgery is approved. The appellant (carrier) appealed, arguing that there are not two concurring opinions recommending the proposed surgery. In addition, the carrier filed an addendum to its appeal to support its argument that the claimant's request for spinal surgery not be approved. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that his surgeon is Dr. B; that the carrier's choice of second opinion doctor is Dr. Bo; that the claimant's second opinion doctor is Dr. C; that Dr. B recommended spinal surgery, specifically a two-level lumbar laminectomy, discectomy and fusion with instrumentation (L4-L5; L5-S1); that Dr. C recommended spinal surgery, specifically, a single-level lumbar laminectomy and fusion at L5-S1; and Dr. Bo did not agree that surgery was necessary.

The hearing officer did not err in determining that the claimant's request for spinal surgery be approved. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (Rule 133.206(k)(4)) provides that 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 unless the great weight of the 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(a)(13) defines "concurrence" as a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. This definition goes on to describe how "need" is assessed and identifies certain types of spinal surgery. Rule 133.206(a)(14) defines "nonconcurrence" as a second opinion doctor's disagreement with the surgeons' recommendation that a particular type of spinal surgery is needed.

The carrier asserts that Dr. C's recommendation does not concur with Dr. B's recommendation for spinal surgery. A medical report dated December 5, 2001, reflects that Dr. B opined that "the [claimant] will need posterior lumbar discectomy with interbody fusion from L4 to S1 to treat his discogenic back pain." A medical report dated February 28, 2002, reflects that Dr. C opined that "I think that [the claimant] would do quite well with a simple laminectomy at L5-S1 and fusion. I am not sure that he needs to have 4-5 included in the procedure." The carrier asserts that Rule 130.206 requires concurrence of the "type" of procedure recommended. The carrier argues that Dr. C recommended a different procedure, and that the claimant did not need to have

the procedure performed at the L4-5 levels as recommended by Dr. B. However, Dr. C concurred with Dr. B concerning the type of procedure (decompression and fusion) and the area of the spine on which the operation was to be performed (lumbar). Therefore, we find no error in the hearing officer's application of Rule 133.206(a)(13) or in finding Dr. C's opinion was a concurrence.

With regard to the carrier's addendum to its appeal, we will only consider the evidence admitted at the hearing. We will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The carrier asserts that the addendum to its appeal is correspondence from Dr. C dated April 23, 2002, that responds to a letter sent to him from the carrier is "newly discovered evidence." The carrier argues that the "newly discovered evidence" supports its contention that the claimant's request for spinal surgery should not be approved. However, the carrier does not provide evidence or an explanation as to why the addendum could not have been obtained earlier had due diligence been exercised. We do not find that the correspondence that the carrier attached as an addendum to its appeal is newly discovered evidence as it does not meet the criteria for considering evidence on appeal that was not admitted at the CCH.

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

HOWARD ORLA DUGGER
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Gary L. Kilgore
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Robert W. Potts
Appeals Judge