

ERIC H. SCHEFFEY, M.D. <i>Petitioner</i>	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
TEXAS WORKERS' COMPENSATION	§	
COMMISSION AND HOUSTON	§	
INDEPENDENT SCHOOL DISTRICT,	§	
<i>Respondents</i>	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This case is a dispute over whether Eric H. Scheffey, M.D., should be reimbursed for the cost of spinal surgery. The Administrative Law Judge (ALJ) concludes the Houston Independent School District (Carrier) is liable for the surgery under applicable Texas Workers' Compensation Commission (Commission) rules.

A hearing was held in this case on April 2, 2003, before the undersigned Administrative Law Judge. The Carrier was represented by W. Jon Grove, Attorney. Dr. Scheffey appeared through his Account Representative, Linda S. Townsend. The hearing concluded on April 2, 2003.

I. Discussion

A. Evidence

Dr. Scheffey asked the Carrier to approve a lumbar laminectomy and fusion on an injured worker (Claimant).¹ The Carrier refused. Second and third opinion doctors were consulted and gave the following opinions:

- On February 19, 2001, Michael E. Seiff, M.D., a neurosurgeon, said

I believe surgery is indicated, however I would not perform a fusion at this time. Rather I would perform a two level discectomy, a right L4-L5 and a left L5-S1 hemilaminotomies and discectomies. . . . However, if both options are presented to the patient . . . and she still preferred to undergo the fusion at the initial setting in efforts to avoid another surgery which she may never need, then under those circumstances I think it would be reasonable to fuse her in the same sitting. I would have to have her return for another appointment if this discussion were to take place, however at this time my recommendation would be for a two level discectomy without a fusion.²

¹Ex. 3 at 10.

²Ex. 3 at 13-14.

- On March 19, 2001, R. McIver Hay, M.D., an orthopedic surgeon, said

It is proposed by Dr. Sciff (sic) that she have lumbar laminectomy and fusion. I would agree with this proposed procedure.³

Dr. Scheffey performed spinal surgery on the Claimant on June 5, 2001. The surgery consisted of several procedures, including: bilateral laminectomy at the L3-L4, L4-L5 and L5-S1 spinal levels with foraminotomy at L3, L4, L5 and S1 roots bilaterally; lateral transverse fusion at L4-L5, L5-S1, and S1-S2; and posterolateral facet fusion at L4-L5, L5-S1, and S1-S2.⁴

On April 4, 2001, the Commission issued a letter saying because one of the second opinion doctors agreed with the requested surgery, the Carrier would be liable if it did not appeal.⁵ However, on April 30, 2001, the Commission reversed course by issuing another letter saying that because neither of the second opinion doctors agreed on the need for surgery, the Carrier is not liable; this letter informed Dr. Scheffey of his right to appeal.⁶

The Commission's Medical Review Division recommended denial of the claim based on the April 30, 2001, letter saying the two second-opinion doctors did not concur that the surgery is needed; and Dr. Scheffey's failure to timely appeal that determination.⁷

B. Analysis

The ALJ believes the claim should be granted because Commission Rule § 133.206(b), applicable to this case, says

(b) Carrier Liability for Spinal Surgery Costs

(1) . . . the carrier is liable in any of the following situations for the reasonable and necessary costs of the proposed type of spinal surgery and the medically necessary care related to the spinal surgery. . . . The Carrier is liable in the following situations:

. . .

³Ex. 3 at 17-18.

⁴Ex. 3 at 40.

⁵Ex. 3 at 19.

⁶Ex. 2. Dr. Scheffey did not appeal.

⁷Ex. 1.

(E) no timely appeal after two second opinions, only one of which is a concurrence;

....

Dr. Seiff's second opinion letter was not a concurrence because he said he would concur with the fusion recommendation only if the Claimant's options were explained to her and she chose a spinal fusion in order to avoid the possibility of two operations and she consulted with Dr. Seiff again. There was nothing in the record to show those conditions occurred.

Dr. Hay's letter was a concurrence. His statement, "I would agree with the proposed procedure," is an unequivocal concurrence with Dr. Scheffey's recommendation. It is undeniable that his statement, "It is proposed by Dr. Sciff that she have lumbar laminectomy and fusion" (emphasis added), has caused confusion because there is no Dr. Sciff relevant to these proceedings. However, he was most likely referring to Dr. Scheffey because Dr. Scheffey, rather than Dr. Seiff, proposed the surgery.

The Carrier argued it is not liable because § 133.206(k) provides: an employee may appeal if there is no second opinion concurrence; and the appeal must be filed within 10 days after receipt of notice from the Commission regarding carrier liability for spinal surgery. The Carrier reasoned that because Dr. Scheffey did not timely appeal the Commission's April 30, 2001, letter saying the Carrier is not liable, the Carrier should not be required to pay.

The Carrier also argued that the operation exceeded Dr. Scheffey's proposed laminectomy and fusion of the lumbar spine, because he also did procedures at the S1 and S1-S2 levels.

The ALJ was not convinced by the Carrier's arguments. Commission Rule 133.206(b)(1)(E) clearly says a Carrier is liable in the absence of an appeal when one of two second opinion doctors concurs with the recommended surgery. It is undisputed that the Carrier did not appeal. The Commission's April 30, 2001, letter is essentially a nullity because it misconstrued Dr. Hay's letter. Moreover, the letter cannot abrogate the plain meaning of subsection (b)(1)(E).⁸

The Carrier's second argument, that the actual operation exceeded Dr. Scheffey's request and the second-opinion concurrence, was shown to be incorrect by the adoption preamble to the May 28, 1998, amendment to § 133.206 and the back page of the TWCC-63 form.⁹ The preamble quoted the definition of "concurrence" at §133.206(a)(13), providing that a second opinion doctor's concurrence is with the "type" of surgery, rather than the exact procedure. The preamble said second opinion doctors

are not expected to concur with exact CPT codes and the surgeon is not limited to performing surgery according to the exact CPT codes listed on the TWCC-63 form. .

⁸In principal, the Carrier's argument could also be applied to the Commission's April 4, 2001, letter, which said one second opinion doctors agreed with Dr. Scheffey. It is undisputed that the Carrier did not appeal the letter.

⁹The ALJ took administrative notice of these documents in an order dated May 5, 2003. The documents are entered into evidence as Exhibit 4 (adoption preamble) and Exhibit 5 (back of TWCC-63 form).

. . . If the second opinion doctor agrees with the type of spinal surgery recommended by the treating doctor or surgeon the carrier is deemed liable for the surgery. These decisions include, but are not limited to, approach (e. g. posterior, anterior), **levels of the spine to be operated upon**, instrumentation, bone growth stimulators etc.” (Emphasis added.)

The back of the TWCC-63 form states,

Specify the recommended surgical procedure using CPT code(s) and description(s). If more than four codes, specify the four major surgical codes on the form and attach documentation with remainder of codes. (Note: if surgery is deemed appropriate through the 2nd opinion process, the actual surgical services performed must appear on the bill and **may differ from the recommended procedures.**) (Emphasis added.)

These documents show that the bilateral laminectomy at the L3-L4, L4-L5, and L5-S1 spinal level with foraminotomy at L3, L4, L5 and S1 roots bilaterally, lateral transverse fusion at L4-L5, L5-S1, and S1-S2, and posterolateral fusion at L4-L5, L5-S1, and S1-S2 were covered by Dr. Scheffey’s proposed lumbar laminectomy and fusion and Dr. Hay’s concurrence.¹⁰

II. Findings of Fact

1. Eric H. Scheffey, M.D. requested a medical dispute resolution before the Texas Workers’ Compensation Commission Medical Review Division (MRD) when the Houston Independent School District (Carrier) denied his claim for spinal surgery, a lumbar laminectomy and fusion, performed on an injured worker (Claimant).
2. The MRD denied Dr. Scheffey’s claim in an order dated December 31, 2002.
3. Dr. Scheffey appealed the MRD decision not later than the 20th day after he received notice of the decision.
4. All parties received not less than 10 days’ notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
6. R. McIver Hay, M.D., an orthopedic surgeon, provided a second opinion on the need for surgery that agreed with Dr. Scheffey’s proposed spinal surgery.

¹⁰The mis-wording in Dr. Hay’s letter is unfortunate because it appears the Commission and perhaps the parties were confused by it. However, it is necessary for one of the parties to absorb the costs of the surgery. Applicable rule provisions and the preponderant evidence indicates the Carrier should be held liable.

7. Michael E. Seiff, M.D., provided a second opinion on the need for the surgery that was not an unqualified agreement on the need for the surgery.
8. The Carrier did not appeal after the issuance of the opinions described in Findings of Fact Nos. 6 and 7.
9. Dr. Scheffey performed spinal surgery on the Claimant on June 5, 2001, consisting of several procedures, including: bilateral laminectomy at the L3-L-4, L4-L5 and L5-S1 spinal levels with foraminotomy at L3, L4, L5 and S1 roots bilaterally; lateral transverse fusion at L4-L5, L5-S1, and S1-S2; and posterolateral facet fusion at L4-L5, L5-S1, and S1-S2.

III. Conclusions of Law

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.
2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
3. Dr. Scheffey had the burden of proof in this matter. 28 TEX. ADMIN. CODE (TAC) §148.21(h).
4. The Carrier is liable for payment of the surgery. 28 TAC §133.206(a)(13), (b)(1)(E)and (k).
5. Dr. Scheffey's request for reimbursement should be granted.

ORDER

IT IS, THEREFORE, ORDERED that Houston Independent School District pay the claim of Eric H. Scheffey, M.D. for spinal surgery performed on the Claimant on June 5, 2001.

Signed May 12th, 2003.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

JAMES W. NORMAN
Administrative Law Judge