APPEAL NO. 951781
FILED DECEMBER 13, 1995

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 September 25, 1995. The issue at the CCH was whether the Texas Workers' Compensation Commission (Commission) should approve the request of the respondent (claimant) for spinal surgery. The hearing officer determined that the Commission should approve the request, from which determination appellant (carrier) appeals. On appeal, carrier contends the hearing officer erred in determining that there was a second opinion concurring with the spinal surgery recommendation and that claimant's compensable injury did not create the need for spinal surgery. Claimant responds that sufficient evidence supports the hearing officer's determination regarding the need for spinal surgery and that extent of injury was not an issue at the CCH.

DECISION

We affirm.

The parties stipulated that claimant sustained a compensable injury on (date of injury), while working for (employer). Claimant did not testify. A May 10, 1995, letter from (Dr. J) states that claimant said she injured her back at work when she fell on some stairs.

The record reflects that the parties stipulated that (Dr. P) recommended spinal surgery and that Dr. J did not concur in the spinal surgery recommendation. (Dr. M) stated in a narrative report dated June 6, 1995:

> **Recommendations:**
>
> I do not believe that it is unreasonable to consider the L4-L5 decompression and fusion attempt, although it is suggested at least with some hesitancy considering [Dr. J's] and my own assessment of the patient's psychological reaction pattern.
>
> [omission]
>
> 1. I would tend to agree with [Dr. J] that preoperative myelogram/CT scan would be reasonable for the patient, although I do not believe that is absolutely mandatory in my own opinion.
>
> [omission]

5. By way of brief summary, I believe that [Dr. P's] plan for the patient as it relates to lumbar decompression and fusion is reasonable within the framework of the discussion in this report. She will actually make her treatment decisions with [Dr. P].

[omission]

Carrier asserts that Dr. M did not truly concur in the need for spinal surgery and that the recommendation was conditional. Section 408.026(a)(1) provides in pertinent part that, except in medical emergencies and other situations not relevant in this case, an insurance carrier is liable for medical costs related to spinal surgery only if before the surgery the employee obtains from a carrier or Commission-approved doctor "a second opinion that concurs with the treating doctor's recommendation; . . ." This statute is implemented by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) which generally provides a procedure whereby an employee recommended for spinal surgery by the treating doctor selects a second opinion doctor from a Commission-approved list, the carrier does likewise and, of the three recommendations and opinions, presumptive weight is given to the two which "had the same result, and they will be upheld unless the great weight of the medical evidence is to the contrary." Rule 133.206(k)(4). If a party is not satisfied with the Commission's order regarding spinal surgery an appeal may be taken to a CCH. Rule 133.206(k)(3). Rule 133.206(a)(13) defines "[c]oncurrence" as follows:

> A second opinion doctor's agreement with the surgeon's recommendation that spinal surgery is needed. Need is assessed by determining if there are any pathologies in the spine that require surgical intervention. Any indication by the qualified doctor that surgery to the proposed spinal area . . . is needed is considered a concurrence regardless of the type of procedure or level.

"Nonconcurrence" is defined as "[a] second opinion doctor's disagreement with the surgeon's recommendation that spinal surgery is needed." Rule 133.206(a)(14).

The hearing officer determined that Dr. P recommended spinal surgery and that Dr. M agreed that claimant is a candidate for surgery. We cannot say that Dr. M's report does not constitute a concurrence in Dr. P's surgery recommendation. Dr. M states in his report that claimant has been referred to him for consultation for low back and neck pain, and he discusses whether he agrees with Dr. J and Dr. P. The carrier views Dr. M's opinion as falling short of identifying a need for the proposed surgery. Although Dr. M does not actually state that surgery needs to be performed, he does say that the plan for surgery is reasonable and makes recommendations regarding whether there should be "preoperative" tests. A fair reading of the report does not show that it is a failure to

concur or a nonconcurrence. *Compare* Texas Workers' Compensation Commission Appeal No. 951096, decided August 22, 1995.

The hearing officer determined that of the three required recommendations and opinions, two of them recommend spinal surgery. She notes that she must give presumptive weight to the two like opinions and states that the great weight of the other medical evidence is not against the spinal surgery recommendation. She concludes that claimant is entitled to spinal surgery. The disputed issue presented a fact issue for the hearing officer. It is the hearing officer who was the sole judge of the materiality, relevance, weight and credibility of the evidence. Section 410.165(a). The hearing officer resolved the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We are satisfied that the dispositive findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier next contends that, regarding the "extent of injury issue," "claimant's need for spinal surgery is not causally or reasonably related to the injuries she sustained on (date of injury)." However, the sole issue at the CCH was "whether claimant's request for spinal surgery should be approved." Although there was some argument about liability from carrier's attorney, claimant did not testify about extent of injury. A review of the record in this case indicates that there was no benefit review conference about compensability and extent of injury and that the only issue at the CCH was whether spinal surgery should be approved. For this reason, we will not address the issue of compensability or extent of injury. Section 410.151(b).

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Stark O. Sanders Jr.
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge