APPEAL NO. 970754

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 March 28, 1997. The decision recites that the record was closed on April 1, 1997. With respect to the only issue before him, the hearing officer determined that the respondent (carrier) "is not liable for spinal surgery."

Appellant's (claimant) appeal, as was his position at the CCH, is that he wishes to be reevaluated by the second-opinion doctors, as they suggest, and that there "has been no clear decision of “concurrence” or “nonconcurrence.” Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier urges affirmance.

DECISION

Affirmed.

First, we note that the only exhibit in evidence is Hearing Officer's Exhibit No. 1, which consists of over 70-loose pages of unidentified, untabbed or unindexed documents. (Perhaps the Texas Workers' Compensation Commission (Commission) claims file.) Such a conglomeration of loose paper is less than helpful in conducting a review.

The parties stipulated that claimant suffered a compensable low back injury on _____, that the treating doctor and surgeon is Dr. ES, and that carrier's second-opinion doctor is Dr. S and that claimant's second-opinion doctor is Dr. H.

The carrier represented that claimant has had three spinal surgeries, a lumbar laminectomy, a lumbar fusion, and then surgery to remove certain instrumentation. Carrier presented, and is supported by copies of a Required Medical Report - Spinal Surgery Recommendations (TWCC-63) dated July 12, 1995, that Dr. ES recommended a fourth surgery of another laminectomy and "extension of fusion to L4." The Commission by letter dated October 25, 1995, notified the parties that "neither of the 2nd opinion doctors agreed with [Dr. ES] . . . creating a 2 to 1 decision against spinal surgery, and therefore carrier is not liable for the costs of that proposed surgery." By letter dated January 17, 1996, Dr. ES wrote both Dr. S and Dr. H stating that claimant had not responded to conservative treatment and requested an addendum for approval of "extension of [claimant's] fusion to L4." Dr. H replied by letter dated February 7, 1996, stating that he would be agreeable to reevaluating the claimant. Dr. S replied by letter dated May 11, 1996, stating he "cannot agree that an extension of the fusion would benefit this gentleman."

On another TWCC-63, dated August 15, 1996, Dr. ES diagnosed "Lateral Fusion Inst Recess Stenosis" and recommended removal of instrumentation. Dr. C, apparently carrier's second-opinion doctor, in a letter dated September 11, 1996, agreed on a "re-exploration of the L5-S1 interspace" but did not recommend other surgery for "elongation of

the instrumentation and to proceed with the surgery." Subsequently, the Commission advised Dr. ES by letter dated September 26, 1996, that the second-opinion doctors should be Dr. S and Dr. H citing Texas Workers' Compensation Commission Appeal No. 960899, decided June 24, 1996. Dr. ES replied by letter dated October 7, 1996, that he did not believe Appeal No. 960899 to be applicable because he was requesting "a completely different procedure from which [Dr. H] or [Dr. S] rendered an opinion."

Nonetheless, Dr. ES wrote Dr. S and Dr. H, by letter dated January 27, 1997, alleging a changed condition, forwarding additional x-rays, and stated that claimant "is a candidate for removal of his instrumentation with exploration of his fusion mass" and asking for "further evaluation and addendum." Dr. H replied by letter dated February 14, 1997, stating:

> At the present time, before I could recommend any surgical intervention in this gentleman, I would need to reevaluate him. Surgical decisions are not based on x-rays alone. I appreciate that this gentleman's symptomology is worsening, but I can not make any recommendations for surgical intervention without reevaluating the patient.

Dr. S replied by letter dated February 24, 1997, stating:

> it appears to me the patient has an adequate interbody fusion, if not complete posterolateral incorporation. If you think that the patient's clinical and radiographic conditions have changed, or warranting further evaluation by office, then I would be happy to see and re-evaluate this gentleman.

The Commission, by letter dated March 6, 1997, notified the parties that neither of the second-opinion doctors agreed with Dr. ES's recommendation for spinal surgery and therefore carrier was not liable for the proposed spinal surgery costs.

Claimant briefly testified at the CCH, pleading to have the instrumentation removed from his back, that the screws were loose and that he should be reevaluated with an MRI. The hearing officer suggests that this is a "medical review division" decision, cites, in bold print, an August 16, 1994, comment on the proposed rule in the Texas Register, 19 Tex. Reg. 6432, to the effect that opinions for further testing are nonconcurrences which may be reconsidered under "subsection (j)(2)(c)," Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(j)(2)(c) (Rule 133.206(j)(2)(c)). *See* Rule 133.206(l) concerning reconsideration, as adopted.

At issue in this case is whether Dr. S's and Dr. H's 1997 letters constitute nonconcurrences for surgery. Both indicate that they cannot recommend surgery without reevaluation. Rule 130.206(a)(13) defining "concurrence" states that a second-opinion doctor's "agreement" with the recommendation for surgery is needed, that "need" is assessed by determining if any pathologies in the spine "require" surgery, and that any indication by the second-opinion doctor that surgery is "needed" is considered a

concurrence. Rather clearly neither Dr. S nor Dr. H concurred in additional surgery, and both suggested a reevaluation to be necessary before they would consider additional surgery. The issue in this case was whether spinal surgery should be approved, not whether claimant should be sent back to the second-opinion doctors for reevaluation. The hearing officer in this case determined that neither Dr. H nor Dr. S concurred in the need for spinal surgery and we find that the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Gary L. Kilgore
Appeals Judge