APPEAL NO. 980065

On December 18, 1997, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the CCH was the respondent's (claimant) need for spinal surgery. The appellant (carrier) requests review and reversal of the hearing officer's decision that it may not avoid liability for spinal surgery for failure to have a second concurring opinion before surgery. The claimant requests affirmance.

DECISION

Affirmed.

Medical reports reflect that the claimant, who worked as a nurse's aide, had pain in her back and left leg when she was lifting a patient from a wheelchair on _____, and that a CT scan done on August 28, 1997, showed that the claimant has a left-sided herniated disc at L5-S1. On September 18, 1997, (Dr. L) recommended that the claimant undergo lumbar surgery consisting of a laminectomy and disectomy at L5-S1. The carrier's second opinion doctor on spinal surgery, (Dr. S), wrote on October 16, 1997, that he does not concur with surgery for the claimant, and recommended injections and an MRI scan. (Dr. C), the claimant's second opinion doctor on spinal surgery, wrote on November 21, 1997, that he concurs with the need for surgery for the claimant. The hearing officer found that the opinions of Drs. L and C that the claimant needs spinal surgery are not contrary to the great weight of the other medical evidence, and he concluded that the opinions of Drs. L and C are to be upheld and that the carrier may not avoid liability for spinal surgery for failure to have a second concurring opinion.

The carrier contends that the spinal surgery second opinion process, which is set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206), is unfair to carriers. The Texas Workers' Compensation Commission's (Commission) rulemaking process is the place for that contention. The carrier's contention does not provide a reason for reversal of the hearing officer's decision.

Dr. C stated in his report that the claimant had no previous back trouble by history. The carrier contends that Dr. C did not have medical records which showed that the claimant had complained of back pain prior to her injury and thus Dr. C's report is not a proper concurrence. The claimant explained that complaints of back pain in two medical reports from 1995 and one medical report from 1996 were due to kidney infections for which she was given medications. She further testified that prior to her injury she had not had problems with her lumbar spine. The carrier has not shown that Dr. C's report was not a proper concurrence.

Section 408.026(a) provides in relevant part as follows:

(a) Except in a medical emergency, an insurance carrier is liable for medical costs related to spinal surgery only if:

(1) before surgery, the employee obtains from a doctor approved by the insurance carrier or the commission a second opinion that concurs with the treating doctor's recommendation . . . .

Rule 133.206(b), relating to carrier liability for spinal surgery costs, provides in part as follows:

(1) The carrier is liable in any of the following situations for the reasonable and necessary costs of spinal surgery related to the compensable injury and performed by a surgeon who was on the List at the time the TWCC-63 was filed with the commission by the treating doctor or the surgeon:

(A) medical emergencies;

(B) carrier waiver of second opinion;

(C) no carrier request within 14 days of acknowledgment date, for a second opinion;

(D) concurrence by both second opinion doctors;

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

(F) final and nonappealable commission order to pay.

The carrier contends that it is liable for spinal surgery only if both second opinion doctors concur in the need for surgery and cites Rule 133.206(b)(1)(D) for that proposition. We disagree with the carrier's contention because it ignores the provisions of both Section 408.026(a)(1) and Rule 133.206(b)(1)(E). Rule 133.206(k) relates to an appeal to a CCH, and subsection (k)(2) of that rule provides that a carrier may appeal to a CCH if there is a second opinion nonconcurrence. In a letter dated November 25, 1997, the Commission notified the carrier that one of the second opinion doctors concurred with the claimant's doctor's recommendation for spinal surgery creating a two to one decision in favor of surgery, and that unless a timely appeal was filed by the carrier, the carrier is liable for reasonable and necessary costs of spinal surgery related to the compensable injury. The carrier requested a CCH on spinal surgery. Rule 133.206(k)(4) provides in part 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, and they will be upheld unless the great weight of medical evidence is to the contrary. In the instant case, the opinions of Drs. L and C had the same result, that the claimant needs spinal surgery. The hearing officer determined that the great weight of medical evidence was not contrary to the opinions of Drs. L and C and he gave presumptive weight to the opinions of Drs. L and C. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge