APPEAL NO. 990952

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 12, 1999. With regard to the only issue before him, the hearing officer determined that appellant's (claimant) request for spinal surgery was not approved.

Claimant appeals, contending that his treating doctor is a better doctor than respondent's (carrier) choice of second opinion spinal surgery doctor, that another MRI should be performed, that the hearing officer had not considered all the evidence and that the decision is "unfair." Inferentially, claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The file does not contain a response from the carrier.

DECISION

Affirmed.

This is a spinal surgery case which is governed strictly by the Texas Workers' Compensation Commission (Commission) rules and Section 408.026 of the 1989 Act. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(e)(1) (Rule 133.206(e)(1) provides that the treating doctor or surgeon shall submit a form (Recommendation for Spinal Surgery (TWCC-63)) for the recommendation for spinal surgery and advise the employee of the right to seek a second opinion. Both the employee and the carrier have the right to seek second opinions from a Commission list of doctors. Rule 133.206(k)(4) then provides:

> (4) 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. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

The parties stipulated that claimant had sustained a compensable low back injury on January 25, 1998 (all dates are 1998 unless otherwise noted). In evidence is an MRI of the lumbar spine performed on February 3rd, which shows a "small broad-based bulge of the disc at L1/2 which is of questionable significance." There was no evidence of disc herniation or significant spinal stenosis. Dr. S, claimant's treating doctor and recommending surgeon, testified that he began treating claimant on February 19th. Dr. S testified that claimant received approximately 11 months of conservative treatment with no improvement. A lumbar myelogram and CT scan performed on October 22nd, of levels L1 through L5/S1, was essentially normal. Dr. S, on a TWCC-63 dated December 29th, recommended spinal surgery for "displacement of Lumbar Disc." At the CCH, Dr. S explained the procedure he proposed which the hearing officer found to be "a L4-5 laminectomy/discectomy with instrumentation and fusion utilizing cages."

Subsequent to submission of the TWCC-63, carrier selected Dr. B as its second opinion spinal surgery doctor. In a report dated February 3, 1999, Dr. B nonconcurred in spinal surgery, stating:

> Based on the diagnostic criteria of the case, essentially a normal MRI Scan at the involved L4-L5 level, and a questionable possible abnormality, the consideration of a lumbar fusion discectomy and interbody fusion with instrumentation and the bone growth stimulator is totally absurd.

Dr. B commented that "[t]here is nothing in the medical records that would indicate that [claimant] has sustained any structural deficiency . . . ."

Claimant's choice of second opinion spinal surgery doctors was Dr. E, who also nonconcurred in spinal surgery, indicating surgery was not indicated. In a narrative report dated March 10, 1999, Dr. E noted the February 3rd MRI, the lumbar myelogram performed on October 22nd and complaints of "a 'knot' over the lower aspect of his lower lumbar area which [claimant] says swells depending on his level of activity." Dr. E concludes:

> Unfortunately I do not find that his diagnostic studies match well with his symptoms and I do not find enough abnormality with any of the lower lumbar discs to warrant surgery. I think this patient should be continued on conservative care.

Claimant testified at length at the CCH, giving his opinion on the professional competence of Dr. S versus Dr. B. However, as Rule 133.206(k)(4) states, in this proceeding, the only opinions admissible are the recommendation of the surgeon (Dr. S) and the opinions of the two second opinion doctors, Dr. B and Dr. E. The hearing officer found that the nonconcurrence recommendations of Dr. B and Dr. E were not contrary to the great weight of other medical evidence. We find that the hearing officer's decision is not against the great weight of the evidence and, accordingly, affirm the hearing officer's decision and order.

Claimant, in his appeal, argues that the decision is unfair because Dr. B is not a neurosurgeon and "works for the insurance company." Dr. B was on a list provided by the Commission and was selected from that list, just as claimant selected Dr. E. Whether Dr. B and Dr. E only considered L1 and L2 instead of L4 and L5 is certainly not evident from their reports, where they clearly commented on the L4-5 level, and Dr. E specifically referenced claimant's "knot."

The hearing officer did not say "all evidence was not presented," rather, as part of the Statement of the Evidence, the hearing officer noted that "[e]ven though all of the evidence presented was not discussed, it was considered." (Emphasis added.) Our review of the record indicates that the hearing was held as prescribed by the statute and Commission rules and, as noted above, claimant was accorded an opportunity to testify and give the hearing officer his opinion.

Accordingly, the hearing officer's decision and order are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Tommy W. Lueders
Appeals Judge