APPEAL NO. 992009

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 August 24, 1999. The issue at the CCH was whether the appellant (carrier) should be liable for the cost of the respondent's (claimant) spinal surgery. The hearing officer concluded that carrier was liable for the claimant's spinal surgery. The carrier appeals, arguing that the treating doctor did not follow the requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(e)(3) (Rule 133.206(e)(3)) that all reports and films be provided to the second opinion doctor. The carrier also argues that the great weight of the medical evidence was contrary to the concurring opinions favoring surgery. The claimant responds that the treating doctor complied with Rule 133.206(e)(3) and that the great weight of the medical evidence was not contrary to the opinions favoring surgery.

DECISION

Reversed and remanded.

The hearing officer summarizes the facts in her decision and we adopt her rendition of the evidence. Briefly, the parties stipulated that the claimant sustained a compensable injury on or about _____. The evidence showed that the claimant's treating doctor was Dr. P and his treating surgeon was Dr. D. Dr. D filed a Recommendation for Spinal Surgery (TWCC-63) dated March 30, 1999. Dr. H, the claimant's choice of second opinion doctor, filed a report dated April 26, 1999, concurring with the claimant's need for spinal surgery as recommended by Dr. D. Dr. Y, the carrier's choice for second opinion doctor, filed a report dated May 10, 1999, which said that there was no objective evidence on physical examination of nerve root changes in the back and lower extremity. Dr. Y noted that the MRI films were not presented for his review. Dr. K, the carrier's selected medical examination order doctor, in a report dated January 25, 1999, stated that he reviewed the MRI scan and noted no evidence of disc herniation. There was also in evidence medical reports from other doctors, as well as an MRI report dated December 30, 1998, which indicated a protruded disc at L2-3, a herniated disc at L3-4 and a bulged disc at L5-S1.

The hearing officer's findings of fact and conclusions of law included the following:

FINDINGS OF FACT

4. [Dr. H], Claimant's choice for a second opinion doctor, filed a report dated April 26, 1999. [Dr. H] opined, after examination and review of Claimant's medical records and films, that he concurred with Claimant's need for spinal surgery as recommended by [Dr. D].

5. [Dr. Y], Carrier's choice for a second opinion doctor, filed a report dated May 10, 1999. [Dr. Y] opined, after examination and review of Claimant's medical records and x-ray films, that there was no objective evidence on physical examination, of nerve root changes in the back and lower extremity. [Dr. Y], noted that the MRI films were not presented for his review.

6. The record did not establish that Claimant's MRI report, dated December 30, 1998 contained information contrary to the data collected on the actual MRI films.

7. The great weight of the other medical evidence is not contrary to the recommendations for spinal surgery by [Dr. D] and [Dr. H].

CONCLUSION OF LAW

3. Claimant's request for spinal surgery should be approved.

Rule 133.206 sets out the spinal surgery second opinion process. This process involves an examination by two other doctors when surgery is recommended by a surgeon on a TWCC-63 and the need for surgery is disputed. The two doctors are selected from a list of doctors provided to the parties by the Texas Workers' Compensation Commission (Commission). The claimant chooses one of the two doctors from this list and the carrier chooses the other. Rule 133.206(e)(3) provides as follows:

> The surgeon shall ensure that all medical records and films arrive at each second opinion doctor's office prior to the date of the scheduled second opinion.[1]

The carrier argues that Dr. H did not receive the films of the MRI. The claimant argues that Dr. H did receive these films and the carrier relies on conjecture rather than evidence in trying to establish that Dr. H did not receive these films. The question of whether or not the films and records were provided is clearly a question of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v.

[1]Rule 133.206(a)(4) defines surgeon as the doctor listed on the form TWCC-63 as the surgeon to perform spinal surgery.

Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we cannot say that the hearing officer erred in her Finding of Fact No. 4. However, it is not entirely clear as to whether the hearing officer actually found that Dr. H had reviewed the films of the MRI, although he was clearly aware of the MRI and makes no indication that he did not have all the materials needed to form his opinion. It is clear from the hearing officer's findings and the evidence that Dr. Y did not have an opportunity to review the films of the MRI report. Under the rule both second opinion doctors should have that opportunity. In this sense, it is clear there was not compliance with Rule 133.206(e)(3) and we remand the case for the hearing officer to insure compliance with this rule.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge