APPEAL NO. 000034

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 21, 1999, a contested case hearing (CCH) was held. At issue was whether spinal surgery for the respondent, who is the claimant, should be approved. The hearing officer approved surgery, finding two concurring opinions favorable to surgery.

The appellant (carrier) appeals, arguing that the hearing officer erred in admitting the claimant's exhibits that had not been exchanged timely, including an opinion of the second opinion doctor chosen by the claimant. The carrier argues that without these exhibits, there is no concurring opinion. The claimant seeks affirmance.

DECISION

We affirm.

At the beginning of the CCH, the carrier's attorney objected to four of the claimant's exhibits as untimely exchanged, stating that he had just received them at the end of the workday the previous day. The first of these exhibits was the second opinion of the claimant's chosen second opinion doctor; the ombudsman stated that these documents had been exchanged to the carrier, through its (City) representative, on December 10, 1999, by certified mail. She agreed that the other three documents had just been brought in the day before by the claimant and were promptly "faxed" to the carrier's attorney who appeared at the CCH.

The hearing officer admitted the second opinion as timely exchanged and found good cause for the other three documents in that they had been exchanged within 14 days after the claimant received notice of the CCH and that, as this was an expedited hearing, there was good cause for the exchange. We note that these documents were the June 1999 MRI; a September 15, 1999, EMG; and the treating doctor's records.

The hearing was essentially one of argument, with the carrier generally contending that there was no need for surgery and that the claimant's symptoms did not correlate to his subjective experiences of pain. The claimant was injured on May 2, 1999, while lifting a 50-pound bag of dog food. A June 17, 1999, MRI showed an "advanced" disc injury at L5, which impinged on the right nerve root. The reporting doctor commented that the claimant's complaints of right leg pain were consistent with this lesion.

The claimant's treating doctor, Dr. P, recommended spinal surgery, a lumbar laminectomy with related procedures. The second opinion doctor chosen by the carrier was Dr. S, who did not concur; Dr. S's report indicated that he had before him the MRI. Dr. S felt that the claimant should continue conservative measures and noted that his bulge was on the "asymptomatic" side. He noted that the claimant's obesity was a contraindication for spinal fusion. Dr. S's report was dated November 15, 1999.

The claimant's second opinion doctor was Dr. A, who agreed with the spinal surgery recommendation. His opinion was dated October 19, 1999. He reviewed the claimant's records and found that there was a failure of response to conservative treatment. He noted that the EMG showed impingement and that the MRI did also. He noted that the MRI indicated some impingement on the right side as well as left.

The Texas Workers' Compensation Commission (Commission) notified both parties on November 24, 1999, that there was a concurrence with the surgery recommendation and the carrier thereafter filed a request for a CCH. The letter was valid for one year after the date of the letter.

The carrier additionally submitted a Specific and Subsequent Medical Report (TWCC-64) from Dr. AB, which recites the results of the MRI and found muscle spasm and tenderness in the mid to lower lumbar area. He noted that the claimant was not at maximum medical improvement.

As this was a spinal surgery proceeding, there was no benefit review conference (BRC). The parties were sent a letter from the Commission, dated December 9, 1999, which informed them of the December 21, 1999, CCH. This letter stated that documentary evidence not previously exchanged should be exchanged no later than three days prior to the CCH (by December 18th).

Although the carrier recites that it had "never seen" many of the documents prior to the exchange, most of the documents were substantive medical documents in the spinal surgery process which appear to have been considered by Dr. S and Dr. A as part of their evaluations and which, through the exercise of minimal diligence, would have been either available to or received by the carrier (as opposed to the carrier's counsel) throughout the course of the second opinion process. We must therefore interpret the carrier's appeal as an assertion that it was the carrier's attorney who had "never seen" these documents.

We note that the second opinion of Dr. A was properly admitted by the hearing officer for at least two reasons. As we held in Texas Workers' Compensation Commission Appeal No. 94545, decided June 17, 1994, and in Texas Workers' Compensation Commission Appeal No. 952054, decided January 16, 1996 (Unpublished), the exchange requirement is met by exchange with parties; there is no requirement to effect a separate exchange with a party's counsel. The hearing officer was evidently satisfied that the second opinion was timely exchanged to the carrier before December 18th.

However, given that both second opinions are submitted to the Commission, they are records of the Commission and are equally available and under the control of both parties. Indeed, under 28 Tex. W. C. Comm'n, TEX. ADMIN. CODE § 133.206(j) (Rule 133.206(j)), the carrier receives a notice of receipt of the narrative report of second opinion doctors and pays for the second opinion examinations. The entire reason for holding a CCH, and the basis for the hearing officer's jurisdiction, is because one party seeks to reconsider the letter from the Commission conveying a second opinion as to surgery. It is

essential, for the CCH to have any meaning and purpose, for both second opinions to be made a part of the record. Otherwise, the hearing officer would be incapable of performing the evaluation which Rule 133.206(k)(4) requires. Thus, the second opinions can, and should, be made hearing officer exhibits even if not tendered by either party, to establish the hearing officer's jurisdiction to act and to enable the hearing officer to carry out the required evaluation set forth in Section 410.163(b). *See* Texas Workers' Compensation Commission Appeal No. 950995, decided July 28, 1995; Texas Workers' Compensation Commission Appeal No. 941698, decided February 2, 1995.

With regard to the other disputed exhibits, we note that the MRI report was used by Dr. S and Dr. AB, whose reports, submitted by the carrier as exhibits, refer to and recite the MRI results. In addition, two of Dr. P's reports that were part of the claimant's exhibits were also tendered as carrier exhibits and one of them states that Dr. A agrees with the need for surgery. If there was any error in admitting this MRI report or duplicated records of Dr. P, it would be harmless error. While the fact of an expedited proceeding alone does not necessarily constitute "good cause" for delayed exchange of documents available previously, we cannot agree that the hearing officer abused her discretion by admitting documents that would not readily appear to come under the described category of "documentary evidence not previously exchanged" in the context of a spinal surgery proceeding.

Where there is a concurring opinion on the need for surgery, the claimant does not have to prove up the reasons surgery is required; the burden of proof is on the carrier to demonstrate through a "great weight" (not merely a preponderance) of evidence that presumptive weight should not be given to the concurring opinion. Rule 133.206(k)(4). We cannot agree with the carrier's argument that Dr. S's report may be fairly read as attributing the claimant's back problems to degenerative changes brought about by obesity. We cannot agree that the hearing officer's decision giving presumptive weight to the concurring opinions is against the great weight and preponderance of the evidence.

We affirm the hearing officer's decision and order, finding it sufficiently supported by the record.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge