APPEAL NO. 001944

Following a contested case hearing held on July 20, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the appellant (carrier) is liable for the recommended spinal surgery. The carrier has appealed, asserting both that the hearing officer erred in denying the carrier's request to serve a Deposition on Written Questions on Dr. ES, the respondent's (claimant) second opinion doctor, and that the dispositive legal conclusion and the factual finding that the great weight of the medical evidence is in favor of the recommended spinal surgery are not sufficiently supported by the evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that on October 31, 1997, the claimant sustained a compensable injury; that Dr. R is the claimant's treating doctor; that Dr. ES is the claimant's choice of second opinion doctor; and that Dr. P is the carrier's choice of second opinion doctor.

The medical records indicate that while the claimant was working as a cook, she slipped on a wet floor and fell on her back. The claimant testified that the conservative methods for treating her neck pain, including physical therapy, acupuncture, ultrasound, and medications, have not been successful; that she has confidence in Dr. R who has discussed the proposed cervical spine surgery with her; and that she desires to proceed with the surgery, notwithstanding that she may not get the relief she expects.

Dr. R's February 25, 2000, report states that the claimant has had conservative treatment from several medical doctors, chiropractic treatment from two chiropractors, and three to five months of pain management from Dr. DS and that she "has failed to respond to conservative management." The carrier introduced the records of Dr. DS reflecting that the claimant commenced treatment at Dr. DS's chronic pain management clinic on July 14, 1998, and was last seen on December 3, 1999. According to the Recommendation for Spinal Surgery (TWCC-63) signed by Dr. R on March 1, 2000, Dr. R's diagnosis is cervical degenerative disc disease and cervical spondylosis and he recommends an anterior fusion with instrumentation at the C5-6 level.

In his April13, 2000, report, Dr. P states that he reviewed the claimant's voluminous medical records, except for the reported MRI which he did not have, and he set out the results of his clinical examination. Dr. P stated his impression as follows: "This patient has degenerative disease of the spine. I see no evidence of injury from any accident. There are no indications for any cervical surgery."

On May 25, 2000, Dr. ES signed a Texas Workers' Compensation Commission (Commission) form stating that the results of his examination of the claimant are that "Yes, I agree that surgery is indicated for this patient." In his narrative report of the same date, Dr. ES states that the claimant "has an essentially normal MRI of her neck for her age [56] except at C5-6 where she has the diffuse posterior herniation and the spondylitic changes." Dr. ES further states that while the discogram was positive at three levels, he would not recommend a three-level anterior cervical fusion because the results are so poor with that procedure, especially for primarily neck pain. Dr. ES said that he agrees with Dr. R's recommendation to operate only on the one level that "is obviously degenerated on the plain films and the MRI."

Section 408.026(a)(1) provides in part that an insurance carrier is liable for medical costs related to spinal surgery only if 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (Rule 133.206(k)(4)) provides that "[o]f 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." This rules goes on to provide that "[t]he only opinions admissible at the hearing are the recommendations of the surgeon and the opinions of the two second opinion doctors."

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The Appeals Panel, an appellate reviewing tribunal, will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We find the evidence sufficient to support the finding that the great weight of the medical evidence is in favor of the recommended spinal surgery.

In evidence is the carrier's June 9, 2000, Request for a Contested Case Hearing pursuant to Rule 133.206. The carrier's June 22, 2000, letter to the hearing officer, signed by a different attorney than the attorney who appeared at the hearing, encloses a "Request to Take Deposition On Written Questions And Issuance of a Deposition Subpoena [the Request]." The Request states that it is timely filed pursuant to Rule 142.13(e) and that a copy of the deposition on written questions that the carrier wishes to send to Dr. ES is attached; asks that the Commission "grant permission for the Carrier to proceed with sending this deposition on written questions"; and states that pursuant to Rule 142.12, the carrier "requests a deposition subpoena for the witness to produce evidence, including documentary evidence, at the deposition." The carrier attached to its request a copy of Dr. P's April 11, 2000, narrative report, articles entitled "Contemporary Concepts in Spine Care - Lumbar Discography" and "Controversy - Lumbar Discography," and certain questions for Dr. ES concerning how his clinical examination of the claimant compared with that of Dr. P and whether he agreed with assertions in the articles concerning whether a

fusion procedure is indicated when the adjacent discs are not normal. There is no evidence of the hearing officer's having responded to this request in writing.

At the hearing, the carrier stated that it had "filed a motion for continuance to serve deposition of written questions upon [Dr. ES] on June 22, 2000," and, "in the alternative, the Carrier had also requested that the record remain open in order to serve those same deposition of written questions upon [Dr. ES]." If a motion for a continuance and to keep the record open was in writing and "filed," it is not in evidence and it appears that the carrier was referring to the Request. The carrier asked the hearing officer to either continue the hearing and obtain Dr. ES's answers to the written deposition questions or keep the record open after the hearing concluded so that Dr. ES's answers could be obtained and the parties given an opportunity to respond to them. The claimant stated that she opposed the request. The hearing officer stated that she would "maintain my prior ruling" and denied the carrier's request. She stated she did not find good cause to continue the hearing or to keep the record open after the conclusion of the hearing, after noting that she had read the deposition questions and felt they just asked Dr. ES to review Dr. P's exam and comment on whether his exam was consistent with that of Dr. P and to review the two medical articles without a showing that those articles constitute some leading authority with mandated criteria.

In its appeal, the carrier states that the hearing officer "abused her discretion and committed reversible error by denying Carrier's request to serve Deposition on Written Questions on Claimant's second opinion doctor"; that "[i]n denying Carrier's request, the Hearing Officer determined that Carrier did not show good cause to continue the proceedings or to leave the record open until [Dr. ES] answered the questions"; that the carrier "requested a motion for continuance, or in the alternative, to leave the record open, to serve deposition questions upon [Dr. ES]"; and that the carrier met all of the procedural requirements of Rule 142.13(e). The carrier further asserts that Dr. ES's report is unclear and incomplete in view of the medical articles and Dr. P's report; that the information requested of Dr. ES cannot be obtained from reports previously exchanged; and that the requested information "is critical to Carrier's defense that [Dr. ES] gave a medically improper concurring opinion." The carrier cites the decision in Texas Workers' Compensation Commission Appeal No. 931164, decided February 3, 1994, for the proposition that a hearing officer's denial of a request for a deposition on written questions cannot be premised upon a lack of "good cause"; Texas Workers' Compensation Commission Appeal No. 92613, decided December 28, 1992, wherein the Appeals Panel was critical of an interpretation of Commission discovery and deposition rules which limits the development of the evidence; and Texas Workers' Compensation Commission Appeal No. 961560, decided September 23, 1996, which reversed and remanded to allow the carrier to obtain the deposition on written questions of a treating doctor. The carrier argues that the hearing officer failed to follow "guiding rules or principles" in denying the carrier's "request to serve deposition on written questions" and that "the ability to serve such questions is not dependent upon a hearing officer's finding of good cause" but, rather, is dependent upon a timely attempt to obtain relevant evidence not previously exchanged and not readily derived from the evidence exchanged.

It is difficult to sort through the carrier's contentions on appeal because the Request, made before the hearing, apparently sought the permission of the hearing officer to take the deposition of Dr. ES on written questions and also requested the hearing officer to issue a deposition subpoena; while at the hearing, the carrier orally requested that the hearing officer continue the hearing and/or keep the record open after the hearing so that the hearing officer could issue the subpoena and obtain Dr. ES's answers to the written deposition questions.

Rule 142.12(b)(2) provides that the Commission may issue a subpoena at the request of a party "if the hearing officer determines that the party has a good cause." Were we addressing only a request by the carrier for permission from the hearing officer to take a deposition pursuant to Rule 142.13(e), without the combined, additional request for a deposition subpoena, there would be merit to the carrier's contention that a good cause showing is not required. Rule 142.13(e) does not mention a good cause requirement and the decisions in Appeal No. 92613, *supra*, and in Appeal No. 931164, *supra*, indicate that a good cause showing need not be made simply to request the deposition of a witness. *See also* Appeal No. 961560, *supra*, where the Appeals Panel found the hearing officer's denial of a request for a deposition to be an abuse of discretion based on the merits of the request and not on a showing of good cause and where the Appeals Panel could not discern whether the hearing officer also ruled on the request for a subpoena. In contrast to these cases is the dissenting opinion in Texas Workers' Compensation Commission Appeal No. 970135, decided March 12, 1997, which states that the determination of whether or not to grant a request to take a deposition is based on a finding of good cause and cites for that proposition Texas Workers' Compensation Commission Appeal No. 94391, decided May 16, 1994. We note, however, that in Appeal No 94391, a request for a subpoena was involved.

Since the Request was both a request for permission to depose Dr. ES as well as a request for a deposition subpoena, we are satisfied that, pursuant to Rule 142.12(b)(2), a good cause showing was required. As for the request for a continuance, Rule 142.10(b) provides that the Commission may continue a hearing at the request of a party if the hearing officer determines that the party has a good cause. We find no abuse of discretion in the hearing officer's denial of the Request and denial of the continuance and/or keeping the record open under the circumstances of this case. The determination of good cause is within the sound discretion of the hearing officer and should only be set aside if that discretion was abused. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The hearing officer could consider that spinal surgery hearings get an expedited setting and that Dr. ES's concurring opinion was not likely to change after reading Dr. P's report and the two articles.

Finding no reversible error and sufficient evidence to support the challenged finding, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge