APPEAL NO. 002540

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A spinal surgery contested case hearing was convened on July 13, 2000, with the record closing on September 25, 2000, in (city 1), Texas. The hearing officer determined that the respondent (carrier) is not liable for the costs of spinal surgery. The appellant (claimant) appealed, asserting that the hearing officer erred in determining that the carrier is not liable for the costs of spinal surgery because the carrier's second choice of second opinion doctors concurred in the need for spinal surgery and that the claimant's second opinion doctor also concurred in the need for spinal surgery. The carrier responded, asserting that the hearing officer was correct in determining that the carrier's second opinion doctor was the first doctor chosen by the carrier to act as its second opinion doctor, that the carrier's second opinion doctor did not concur in the need for spinal surgery, and that the claimant's second opinion doctor did not concur in the need for the procedure recommended by the claimant's doctor.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____. On March 1, 1999, Dr. L recommended spinal surgery. Dr. L recommended a major anterior lumbar diskectomy, anterior arthrodesis, application of a prosthetic device, and BAK cages. On March 9, 1999, the Texas Workers' Compensation Commission (Commission) sent a list of spinal surgery second opinion doctors to the carrier. From that list, the carrier selected Dr. S to act as its second opinion doctor.

Dr. S examined the claimant on March 17, 1999. Dr. S did not concur in the need for spinal surgery and, in his report, stated:

> It may be worthwhile to consider an EMG of the lower extremities and to study that result before making any further determinations on surgery. If, in fact, the EMG is positive for the L5 level, then it may be worthwhile to consider a simpler procedure . . . .

Dr. S's report also noted that he did not have some of the diagnostic records (a myelogram, a discogram, a CAT scan done following the discogram, and an enhanced CAT scan) referred to in the medical records available to him. Those diagnostic records had been mistakenly sent to Dr. L's office by the carrier and, upon determining the error, sent them to Dr. S. After reviewing the records, Dr. S issued an addendum to his report, again stating that he did not concur with the need for surgery.

The claimant was advised of the nonconcurrence. The claimant then selected Dr. D to act as his second opinion doctor. The claimant was examined by Dr. D on April 22,

1999. Dr. D did not concur in the need for the stabilization procedure proposed by Dr. L and, in his report, stated:

> At this time I would not agree with the recommended procedure of anterior decompression and fusion. At most this patient may require diskectomies at L4/L5. I see no indication for fusion either posteriorly or anteriorly and I believe that his diskectomy could be adequately approached from a posterior incision and approach with much less chance of morbidity and complications.

On May 24, 1999, the claimant was examined by Dr. C. Dr. C stated that the claimant's choices were to either learn to live with the problem or to undergo surgery. Dr. C stated that there were some "investigational things" which could also be considered, such as intradiscal electrothermal treatment (IDET), but that a fusion would be the standard way to deal with the problem. Dr. C concurred with Dr. L's recommended procedure.

The claimant alleges that Dr. C is the carrier's second opinion doctor. The claimant testified that he was sent to Dr. C by the carrier, but a September 16, 1999, letter from Dr. S to the carrier indicates otherwise. In that letter, Dr. S states:

> [Dr. L] also copied me on letters that he sent to [Dr. F]. He indicates in the letters that he sent [the claimant] to [Dr. C] in [city 1] who "concurs that he has discogenic pain and needs interbody cages."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(12) (Rule 133.206(a)(12)) provides as follows:

> (12) Second opinion doctor - A commission-selected doctor, an employee-selected doctor and\or a carrier-selected doctor, provided that the injured employee and the carrier each may select only one second opinion doctor. (Emphasis added.)

Since the carrier is allowed by law to select only one second opinion doctor, and since the evidence indicates that the claimant was referred to Dr. C by Dr. L, not the carrier, the claimant's argument that Dr. S is not qualified to act as the carrier's second opinion doctor and that Dr. C's opinion is binding upon the carrier is without either legal or factual basis.

After the nonconcurrences by Dr. S and Dr. D, the claimant underwent an EMG. The results of that EMG were sent to both Dr. S and Dr. D. Neither doctor changed his opinion.

On March 29, 2000, Dr. L sent out another recommendation for spinal surgery, advocating the same procedure as he had in 1999. Communications were sent to Dr. S and Dr. D regarding the "addendum" recommendation. On May 23, 2000, Dr. S sent a letter to Dr. L stating that he did not concur with the need for the proposed surgery. Dr. D

responded on May 26, 2000, again stating that he did not concur with the proposed surgery, but would concur with a posterior decompression at L4-5.

The claimant asserts that Dr. D's statement that he would concur with a posterior decompression is tantamount to a concurrence with Dr. L's recommendation for spinal surgery because Dr. L would assess the need for the fusion after visualizing the claimant's spine. However, in response to a deposition on written questions, Dr. L made no bones about his opinion that a stabilization procedure was necessary. The claimant's argument that the potential concurrence with a decompressive procedure is a concurrence with the recommendation for spinal surgery is without merit and has no support either in fact or at law.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. In this case, the hearing officer's decision and order are well-founded in both the evidence and the law and we will not disturb her determinations.

The decision and order of the hearing officer are affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge