

## APPEAL NO. 002816

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 November 16, 2000. The only issue at the CCH was whether (claimant) needed spinal surgery. The hearing officer determined that the claimant's surgeon and a second opinion doctor concurred that the claimant needed spinal surgery. In addition, the hearing officer found that the concurring doctors' recommendation for spinal surgery was not contrary to the great weight of other medial evidence; therefore, (carrier) could not avoid liability for spinal surgery. The carrier appeals the hearing officer's finding of concurrence and his determination that the carrier is liable because his findings are not contrary to the great weight of other medical evidence. Further, the carrier appealed the hearing officer's decision to deny the carrier's request for deposition on written questions to the claimant's surgeon and second opinion doctor. The claimant has not responded.

### DECISION

The hearing officer's decision and order is affirmed.

The hearing officer did not err in determining that Dr. B and Dr. P concurred. By definition, a concurrence is "[a] second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. "Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §133.206(a)(13) (Rule 133.206(a)(13)). Since Rule 133.206 has been amended, effective July 1, 1998, this panel has construed the meaning of "concurrence" in accord with the amended rule, which defines "concurrence" as the instance of two (2) doctor's recommending the *same type of procedure*, differing from our interpretation of the former rule, where a "concurrence" could be the instance of two (2) doctor's simply agreeing that the claimant needed spinal surgery. Texas Workers' Compensation Commission Appeal No. 000978 decided June 13, 2000, Texas Workers' Compensation Commission Appeal No. 000286 decided March 27, 2000.

Here, Dr. B recommended "anterior cervical decompression and fusion" and Dr. P recommended "anterior cervical diskectomy and allograft fusion." Thus, both doctors recommended that claimant have both a stabilizing procedure and a decompressive procedure (in Dr. P's case, a diskectomy). Rule 133.206(a)(13) lists four types of surgery: "stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators." The evidence is undisputed that Dr. B and Dr. P recommended the first two (2) types of procedures for the claimant. The fact that the exact words weren't common to both recommendations is immaterial. Two doctors concurrently recommend that claimant have two of the four types of spinal surgery listed in Rule 133.206. Therefore, the hearing officer did not err in finding that the reports of Dr. B and Dr. P concurred.

The hearing officer did not err in finding that the determinations of the claimant's spinal surgeon Dr. B and second opinion doctor Dr. P were not contrary to the great weight of other medical evidence. At the hearing, the claimant introduced into evidence Dr. B's recommendation for surgery, which was to include both a decompressing and stabilization at C5-6. Also in the record was Dr. P's report, wherein he concurred with the Dr. B., specifically with respect to the need for both a decompressing and stabilization procedure at C5-6. The carrier introduced its second opinion doctor's report of Dr. A, wherein Dr. A did not concur with the other two doctors' recommendation for spinal surgery. Dr. A concluded that claimant was not a candidate for any type of back surgery.

Texas Labor Code § 410.165 reads, in pertinent part: "[t]he hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence" see also Garza v. Commercial Ins. Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It is equally proper that hearing officers may resolve the inconsistencies and conflicts in the medical evidence. Texas Employers Ins. Assoc. v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The hearing officer did not err in denying the carrier's request for deposition on written questions to Dr. B and Dr. P. If the hearing officer bases his denial on "guiding rules or principles," he does not abuse his discretion. Texas Workers' Compensation Commission Appeal No. 970135 decided March 12, 1997; see also Texas Workers' Compensation Commission Appeal No. 951067 decided August 10, 1995. The party requesting the subpoenas and depositions on written questions must show good cause. Texas Workers' Compensation Commission Appeal No. 001944 decided September 29, 2000. Texas Workers' Compensation Commission Appeal No. 94454 decided June 1, 1994. The determination of good cause is to be made by the hearing officer and should not be set aside unless his discretion is abused. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

In this case, the hearings officer based his denial of carrier's discovery request on "guiding rules and principles" because the questions contained therein were chiefly regarding collateral issues and because he could garner from the doctors' reports what their recommendations were and their reasons for so recommending. As discussed supra, the hearing officer was required to give presumptive weight to the concurring doctors' recommendation. Thus, because the hearing officer based his denial of further discovery on "guiding rules and principles," he did not err in denying the carrier's request for deposition on written questions to Dr. B and Dr. P.

For these reasons, we affirm the hearing officer's decision and order.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Kenneth A. Huchton  
Appeals Judge

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Robert W. Potts  
Appeals Judge