APPEAL NO. 011062
FILED JUNE 20, 2001

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 April 20, 2001. The hearing officer determined that the appellant (carrier) is liable for the expenses of spinal surgery related to the respondent's (claimant) compensable injury. The carrier appealed the hearing officer's determination on sufficiency grounds and requested the Appeals Panel clarify that the carrier is not responsible for the additional spinal surgery undertaken following the recommended surgery. No response was filed.

DECISION

Affirmed.

The hearing officer did not err in determining that the carrier is liable for the expenses of spinal surgery related to the claimant's compensable injury. Section 408.026(a)(1), regarding spinal surgery second opinion, provides that, except in a medical emergency, 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 carrier or the Texas Workers' Compensation 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, of 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.

It is undisputed that the claimant's treating doctor and second opinion doctor agreed on the need and type of spinal surgery to be undertaken. The carrier asserts that the concurring opinions, although given presumptive weight, are contrary to the great weight of medical evidence, thereby relieving the carrier of liability.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate-reviewing tribunal, will not disturb the 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 and we do not find it so in this case. 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 next address the carrier's request for clarification. The carrier requests that the Appeals Panel clarify that the carrier is not responsible for the additional spinal surgery undertaken following the recommended surgery. Although the carrier argues that there

were two separate surgeries done on November 9, 2000, that assertion is incorrect. There was one surgery including both anterior and posterior procedures. As to the subsequent surgery done on November 16, 2000, to remove a pedicle screw, we note that this matter was first raised at the CCH. However, when asked by the hearing officer whether the issue of liability for the subsequent surgery should be addressed, the carrier responded, "You probably shouldn't even address it, Your Honor, really." In view of the circumstances, this was not an issue at the hearing and we will not now consider this matter on appeal.

The decision and order of the hearing officer are affirmed.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge