APPEAL NO. 011483
FILED AUGUST 1, 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 June 11, 2001. The hearing officer determined that the respondent's (claimant) request for spinal surgery should be approved. The appellant (carrier) contends that this determination is against the great weight and preponderance of the evidence. The claimant urges affirmance.

DECISION

Affirmed.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) establishes a spinal surgery second opinion process to be followed if spinal surgery is recommended and the need for spinal surgery is disputed. Under this procedure, both the claimant and the carrier choose a second opinion doctor from a list of surgeons provided by the Texas Workers' Compensation Commission (Commission). A determination is made by the Commission as to whether or not the second opinion doctors concur with the recommendation for surgery. Rule 133.206(a)(13) defines "concurrence" as follows:

> Concurrence - A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e. cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to improve as a result of the surgical intervention. Types of spinal surgery include but are not limited to: stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

Rule 133.206(a)(14) defines "nonconcurrence" as follows:

> Nonconcurrence - A second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed.

Rule 133.206(k)(4) provides as follows, if a spinal surgery determination is appealed to a CCH:

> 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. The only opinions admissible at the hearing are the

recommendation of the surgeon and the opinions of the two second opinion doctors.

In the present case, the carrier argues that Dr. L, the claimant's choice of second opinion doctors, did not render a "true concurrence." The claimant's treating surgeon, Dr. D, originally recommended spinal surgery on February 28, 2001. The claimant was then examined by Dr. E, the second opinion doctor chosen by the carrier, who indicated that he did not concur with the recommendation for surgery. Dr. L examined the claimant and indicated on the Spineline Fax Response Form that he agreed with Dr. D that the recommended surgical procedure was needed and stated in his narrative report that the claimant "might benefit from the proposed spinal surgery but she had a number of questions regarding further conservative measures." It is apparent from the record that Dr. L concurs with Dr. D that the recommended surgical procedure is needed. As a result, we cannot agree with the carrier's assertion that the hearing officer erred in determining that Dr. L's report was a concurrence within the meaning of Rule 133.206(a)(13).

The hearing officer found that the Dr. E's recommendation against surgery was not contrary to the great weight of other medical evidence and that the claimant's spinal surgery should be approved. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are 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 are satisfied that the evidence sufficiently supports the hearing officer's determination that the claimant's request for spinal surgery should be approved.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge