

FILED AUGUST 31, 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 19, 2001. The hearing officer determined that the respondent's (claimant) request for spinal surgery should be approved.

The appellant (carrier) appeals, contending that the great weight of medical evidence is contrary to the opinions of the two concurring doctors based on the facts that apparently the recommending doctor changed his mind between December 27, 2000, and January 24, 2001, that there may have been an intervening event on January 17, 2001, and that the claimant's pack and a half a day cigarette habit was not given sufficient weight. The carrier also complains that its request for a subpoena for the recommending doctor's attendance was improperly denied. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable (low back) spinal injury on _____. A lumbar MRI was performed in October 2000. There is some dispute whether the MRI showed only "bulges" or a herniated disk. The claimant testified that the treating doctor recommended physical therapy. In evidence is a progress note dated December 27, 2000, where Dr. F, the claimant's treating doctor "explained to the [claimant] that neither of these are surgical lesions, and that this should be addressed with physical therapy." Nonetheless in a report dated January 24, 2001, Dr. F commented that "all conservative measures" have basically been exhausted and recommended "a spondy reduction at 4-5 and a PLIF with Ray treaded fusion cages at L4-L5."

Dr. M, the carrier's second-opinion doctor, in a report dated April 17, 2001, did not concur, indicating that there is no good surgical indication for surgery at L4-5. Dr. CM, the claimant's second-opinion doctor, in a report dated May 9, 2001, was "in agreement with [Dr. F]." All of the doctors noted that the claimant smokes between one and a half to two packs of cigarettes a day.

The carrier appeals, pointing to Dr. F's change in opinion between December 2000 and January 2001, noting a line in a physical therapy report that the claimant had "increased pain after working under the hood of a car" and the fact that the claimant was a heavy smoker. All of these factors were pointed out to the hearing officer, who, as the sole judge of the weight and credibility to be given the evidence, weighed the arguments made by the carrier.

The carrier's liability for spinal surgery costs is dependent on the concurrence of at least one of the two second-opinion doctors (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(b) (Rule 133.206(b)) and of the three recommendations (the surgeon and the two second-opinion doctors) presumptive weight will be given to the doctors who had the same result. Rule 133.206(k)(4). The hearing officer's decision that Dr. M's opinion did not overcome the presumptive weight of the two concurring doctors is not 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).

The carrier, for the first time on appeal asserts, error by the hearing officer in denying the carrier's request for a subpoena to require Dr. F's attendance at the CCH for purposes of cross-examination. We do not normally consider matters brought for the first time on appeal and we find no abuse of discretion in the hearing officer's ruling.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(carrier)** and the name and address of its registered agent for service of process is

(Carrier rep)
(address)
(city, Texas zip code).

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge