APPEAL NO. 011713
FILED SEPTEMBER 6, 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 was held on July 11, 2001. With respect to the sole issue before him, the hearing officer determined that the appellant's (claimant) request for spinal surgery should not be approved. On appeal, claimant requests that the decision of the hearing officer be reversed and a new decision rendered approving the spinal surgery and making the respondent (carrier) liable for the costs of the surgery. Carrier responded that the hearing officer did not err in determining that the spinal surgery request should not be approved and requested that the Appeals Panel affirm the hearing officer's decision and order.

DECISION

We affirm.

In deciding whether the hearing officer's decision is sufficiently supported by the evidence we will only consider the evidence admitted at the CCH. We note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the notes relating to contacts with an insurance adjuster that claimant attached to his request for review which was not admitted into evidence at the CCH. Therefore, we will not consider it.

The claimant sustained an injury to his back on _____. On November 14, 2000, the claimant's doctor, Dr. R, recommended spinal surgery. Upon carrier's request, claimant was scheduled for an examination with the doctor selected by carrier, Dr. C, to obtain a second opinion. Dr. C examined claimant on December 18, 2000, and indicated on the Spineline Fax Response Form:

> "No, I do not concur [with the recommendation of Dr. R] because:
> Additional testing is needed prior to considering surgery"[.]

On January 30, 2001, the Texas Workers' Compensation Commission (Commission) notified claimant in writing that carrier's choice of second opinion doctor had not concurred with Dr. R's recommendation and that, if claimant still wanted to pursue surgery, he "[m]ust call us by Monday, February 19, 2001 to tell us if you want to see a doctor on the list. If you do not call us by Monday, February 19, 2001, your spinal surgery

case will be closed and the insurance company will not be responsible (liable) for the costs of spinal surgery at this time." This portion of the letter is in bold print. Claimant testified that he received this letter on or about February 14 or February 16, 2001.

On February 22, 2001, the Commission sent another letter to claimant notifying him that he had not responded in accordance with the instructions of the January 30, 2001, letter and, consequently, the recommendation for surgery had been automatically withdrawn.

Commission records indicate that on February 27, 2001, eight days after the deadline, claimant requested a second opinion doctor and was scheduled for an appointment on April 2, 2001, with Dr. N. On April 5, Dr. N issued a concurrence with Dr. R's recommendation for spinal surgery. On May 3, 2001, as a result of this concurrence, the Commission issued a letter approving spinal surgery. It is not clear why, after the spinal surgery case had been closed due to claimant not requesting a second opinion doctor within the time period allowed, the case was revived.

Carrier then requested a CCH on the issue of spinal surgery and argued at the hearing that because claimant did not comply with the provisions for the spinal surgery process, his proposed surgery should not be approved. Claimant contends on appeal that his delay in notifying the Spinal Surgery Section of his election to choose a second opinion doctor resulted from the fact that the additional testing requested by Dr. C was not approved by carrier and, therefore, Dr. C's recommendation should not be considered a nonconcurrence. The claimant also argues that the spinal surgery case was closed "prematurely" because he had, in fact, chosen a second opinion doctor prior to the date on which the Commission issued a letter indicating that the case had been closed due to his failure to choose a doctor within the time period allowed.

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 carrier choose a second opinion doctor from a list of surgeons provided by the 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(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.

Dr. C noted that he did not concur with the need for spinal surgery because additional testing was needed prior to considering surgery. We do not agree with the claimant's argument that Dr. C's nonconcurrence is invalid because, if the requested tests had been performed and "came out as he expected," Dr. C would concur in the need for surgery. The hearing officer found that Dr. C did not concur and after reviewing Dr. C's report, we are satisfied that the evidence sufficiently supports this finding. 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 and we do not find them to be 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).

Claimant next contends that the hearing officer erred in determining that the spinal surgery file was closed and so there could be no concurrence. Rule 133.206(h), provides in part:

> (7) If the carrier selected second opinion exam results in a nonconcurrence and the division has not received notice of the employee's choice of second opinion doctor, the division will notify the employee, treating doctor and surgeon of the following:
>
> > (A) that the carrier selected second opinion exam resulted in a nonconcurrence;
> >
> > (B) that in order for the carrier to become liable for the costs of surgery, the employee must receive a concurrence from one of the doctors on the employee sublist; and
> >
> > (C) that failure to inform the division of the employee's selection of a second opinion doctor, within 14 days of nonconcurrence notification from the division, will result in withdrawal of the recommendation for spinal surgery.
>
> (8) If a recommendation is withdrawn, the treating doctor or surgeon may resubmit in accordance with (l)(1) of this section.

This rule was promulgated in accordance with the statutory directive set out in Section 408.026(b). The consequence of failure to notify the Commission in the time period prescribed is withdrawal of the spinal surgery request. We would note that Rule 133.206(e) actually contemplates that selection of the employee's second-opinion doctor

should be made shortly after the TWCC-63 is submitted and it is only if the Commission receives a nonconcurrence from the carrier's choice of doctor and has not been informed of the claimant's choice that the Commission undertakes the procedures set out in Rule 133.206(h)(7). The only way provided for reopening the surgical issue is set out under Rule 133.206(h)(8), and that is through resubmitting the request with a showing of a change in condition, under Rule 133.206(l). The Commission is without independent authority under the rule to simply "reopen" a case it has already closed. *See* Texas Workers' Compensation Commission Appeal No. 000349, decided March 31, 2000. Consequently, because claimant did not contact the Commission until February 19, 2001, the spinal surgery file was closed and the Spinal Surgery Section was without authority to issue a letter, based upon Dr. N's opinion, that claimant's spinal surgery had been approved. Claimant contends that he called earlier to request a second opinion doctor. However, the hearing officer heard claimant's testimony and the other evidence and made his determinations, which are not against the great weight and preponderance of the evidence. The hearing officer's determination that claimant's surgery should not be approved because he did not select a second opinion doctor within the required time period is sufficiently supported by the evidence. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We note that claimant is not, however, precluded from resubmitting the issue of spinal surgery in accordance with Rule 133.206(h)(8).

The decision and order of the hearing officer are affirmed.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge