APPEAL NO. 020038
FILED FEBRUARY 14, 2002

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 November 28, 2001. The hearing officer resolved the disputed issue by deciding that the appellant (carrier) is liable for the recommended spinal surgery. The carrier appealed, arguing that the opinion of the claimant's second opinion doctor, Dr. M, is flawed, as he did not have a complete copy of the medical records and films necessary to make his decision. The respondent (claimant) did not respond.

DECISION

Affirmed.

The hearing officer did not err in determining that the carrier is liable for the recommended spinal surgery. The rules governing the spinal surgery second opinion process require that "all medical records and films" be sent to the second opinion doctor's office prior to the examination, and Dr. M's August 27, 2001, report specifically refers to "review of medical records." At the CCH, the carrier cited Texas Workers' Compensation Commission Appeal No. 970176, decided February 21, 1997, for the proposition that concurring physicians must have the diagnostic tests to review prior to issuing their opinion. In that case, the second opinion doctor stated that he had few records and mentioned three times that he had no films, and added that he definitely needed to see the films to give a better opinion. The facts of that case are not at all similar to the evidence in the record of this case. The argument advanced by the carrier that Dr. M did not have complete records from the surgeon was rejected by the hearing officer and, based on our review of the record, we perceive no error. As to the argument that the carrier's second opinion doctor performed tests which showed that spinal surgery was unnecessary, if that were the case, that doctor or the carrier should have made such records available to the claimant's second opinion doctor prior to his examination. Failure to provide the records will not earn the carrier a second bite at the apple.

The claimant's second opinion doctor concurred with the surgeon's recommendation for spinal surgery and the carrier's second opinion doctor did not. In accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (Rule 133.206(k)(4)), the hearing officer gave presumptive weight to the two opinions which had the same result and determined that the carrier is liable for spinal surgery. 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 Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). Nothing in our review of the record demonstrates that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse it on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Terri Kay Oliver
Appeals Judge