APPEAL NO. 020656
FILED MAY 6, 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 was held on March 6, 2002. The hearing officer determined that the respondent's (claimant) request for spinal surgery should be approved. The appellant (carrier) appeals, asserting that the hearing officer erred in finding that the carrier is liable for the costs of spinal surgery, because the claimant failed to comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k) (Rule 133.206(k)) in order to appeal the first decision that the carrier was not liable for the costs of spinal surgery, and because the claimant failed to comply with Rule 133.206(l) for resubmission of the request for spinal surgery. The claimant did not respond to the carrier's appeal.

DECISION

Affirmed.

The claimant's treating doctor, Dr. D, initially recommended spinal surgery on November 30, 2000, on a Recommendation for Spinal Surgery (TWCC-63). The claimant's surgeon, Dr. M, by letter dated November 15, 2000, had recommended a "repeat decompression, instrumentation and fusion, L2 to L4." The carrier-selected second opinion doctor, Dr. W, provided his opinion on December 18, 2000, stating that he did not concur with the surgeon that the claimant needed further surgery. The employee-selected second opinion doctor, Dr. G, on January 24, 2001, signed a form letter on which he had checked that he did not concur with the recommended spinal surgery "at this time because further testing is needed before I can render an opinion." Dr. G followed up with a narrative report in which he recommended that the claimant be returned to his treating doctor for another evaluation to see if his clinical situation has changed. Dr. G added that the claimant "may require additional studies, and he will probably require surgical intervention." The Texas Workers' Compensation Commission (Commission) sent a notification letter to the claimant on February 7, 2001, advising him as follows:

> Neither of the second-opinion doctors agreed with your doctor's recommendation for the spinal surgery OR one or both of the doctors recommended more tests. Therefore, the carrier is not responsible (liable) for the costs of the spinal surgery related to the compensable injury at this time.
>
> If one of the second-opinion doctors recommended more tests, those tests may show that surgery is necessary. If you have the tests, your surgeon should resubmit the recommendation for spinal surgery as described in Rule 133.206(l).

The notification letter went on to advise the claimant of his right to appeal the decision

within ten days. The claimant did not submit an appeal.

Dr. D submitted a nearly identical TWCC-63, which is dated May 3, 2001, and has the word "ADDENDUM" written at the top of the form. Although the TWCC-63 has a number of codes listed (which were the same as on the previous TWCC-63), the letter from Dr. M, dated May 2, 2001, makes it clear that the surgeon, after review of the repeat discography, is recommending posterior instrumentation and fusion at L5-S1. The treating doctor forwarded the "ADDENDUM REQUEST FOR SECOND OPINION SPINE SURGERY" to Dr. W on May 3, 2001. Dr. W responded on May 8, 2001, that he had reviewed the discograms and postdiscogram CT, and recommended a high contrast CT scan to rule out scar tissue versus a herniated nucleus pulposus. Dr. W added that if the CT scan was positive, then he would consider the claimant a surgical candidate for a lumbar laminectomy and discectomy. Dr. W stated that he "would disagree with the proposed procedures on the TWCC 63 form."[1] There is no transmittal of the spinal surgery file to Dr. G indicated in the case file, but it is apparent that he received the file. His May 22, 2001, letter refers to the discogram and the postdiscogram CT scan, and concludes with the statement, "With that information, I would concur with your indication for lumbar surgery at the L5-S1 disc level."

As to the carrier's assertion that the claimant was required to appeal, but did not, and that the decision therefore became final, we disagree. Under the facts of this case, the claimant was not required to appeal the decision set forth in the Commission's February 7, 2001, letter. The opinions of the doctors involved were considered to be a nonconcurrence with the recommendation for surgery, but, clearly, Dr. G wanted more testing done. When that testing was done within two months, the TWCC-63 was resubmitted, in accordance with the instructions found in the Commission's letter. This evidence supports the hearing officer's determination that the resubmission process was followed. Rule 133.206(l)(1) provides for resubmission of a TWCC-63 when there is a "change of condition at any time after a nonconcurrence." Rule 133.206(a)(16) defines "change of condition" to include "new or updated diagnostic test results." There is likewise sufficient evidence from which the hearing officer could determine that there was a concurrence that the spinal surgery proposed was appropriate, and that the great weight of the medical evidence is not contrary to the recommendations for spinal surgery.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v.

[1] The "proposed codes on the TWCC 63 form" which Dr. W is referring to are the same on both of the TWCC-63 forms at issue in this case. It is apparent that the May 3, 2001, TWCC-63 was not corrected to reflect the proper codes for the procedure being recommended by Dr. M.

Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and we do not find it so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AIU INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Michael B. McShane
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Gary L. Kilgore
Appeals Judge