APPEAL NO. 020878
FILED MAY 20, 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 March 14, 2002. The hearing officer determined that the appellant's (claimant) proposed spinal surgery should not be approved. On appeal, the claimant expresses disagreement with this determination. The respondent (carrier) urges affirmance.

DECISION

Reversed and rendered.

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 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 the case be remanded for further consideration, we consider whether it came to the 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 report that the claimant attached to her request for review and we will not consider it on appeal.

Section 408.026(a)(1), relating to spinal surgeries that were recommended prior to January 1, 2002, provides that, except in a medical emergency, an insurance carrier is liable for medical costs related to spinal surgery only if, before surgery, the employee obtains from a doctor approved by the insurance carrier or the Texas Workers' Compensation Commission a second opinion that concurs with the treating doctor's recommendation. The June 30, 1998, amended version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)), which was in effect on the date that the claimant's spinal surgery was recommended, defines "concurrence" as follows:

> 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(k)(4) provides that, 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, and that the only opinions admissible at the hearing are the recommendations of the surgeon and the opinions of the two second opinion doctors.

The evidence reflects that on December 5, 2001, Dr. M, the claimant's spinal surgeon, recommended that the claimant undergo spinal surgery. Specifically, Dr. M recommended a "hemilaminectomy/discectomy at L4-L5." On January 15, 2002, Dr. V examined the claimant and indicated on the Spineline Fax Response Form (Fax Form) that, although he believed that the claimant was a candidate for spinal surgery, he did not concur with the type of procedure recommended by Dr. M. In his narrative report, Dr. V recommended a discectomy and interbody fusion, but not a laminectomy. On January 29, 2002, the claimant was examined by Dr. H, who indicated on the Fax Form that he concurred that surgery is indicated for the claimant. It is noteworthy that Dr. H did not indicate in the space provided on the Fax Form that he agreed that surgery was indicated, but that he would recommend a different procedure. In his accompanying narrative, Dr. H states:

> The patient would be a candidate for a discectomy, possibly foraminotomy. The procedure, risks and benefits and alternatives have been explained to the patient in detail.

The hearing officer determined the following:

FINDINGS OF FACT

2. [Dr. H] recommended that the Claimant not have the surgical procedure recommended by [Dr. M].

3. [Dr. V and Dr. H] recommended that Claimant not have spinal surgery and [Dr. M] recommended that Claimant have spinal surgery.

4. The great weight of the medical evidence is not contrary to the recommendation against spinal surgery by [Dr. V and Dr. H].

CONCLUSION OF LAW

3. Claimant's request for spinal surgery is not approved.

The hearing officer based the determination that the claimant's proposed spinal surgery should not be approved on the fact that Dr. H recommended that the claimant "not have the **surgical procedure**" recommended by Dr. M. However, the pivotal question is not whether Dr. H recommended the same procedure; rather, it is whether he

recommended the same **type of procedure**. Dr. M recommended hemilaminectomy/ discectomy at L4-L5. Dr. H indicated that he agreed with this recommendation, and, in fact, his narrative report reflects that his surgical recommendation would be "discectomy, possibly foraminotomy." In this case, both Dr. M and Dr. H are clearly recommending discectomy decompressive-type surgical procedures. Dr. H concurred with Dr. M that the claimant's proposed type of spinal surgery is needed and presumptive weight shall be given to the two opinions having the same result. Consequently, we reverse the hearing officer's determinations that Dr. H recommended the claimant not have spinal surgery and render a new decision that Dr. H concurred with Dr. M that the claimant's proposed type of surgery is needed; that the great weight of the medical evidence is not contrary to the recommendations of Dr. M and Dr. H for spinal surgery; and that the claimant's request for spinal surgery is approved and the carrier shall be liable for such costs.

The true corporate name of the insurance carrier is **FREMONT INDUSTRIAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Michael B. McShane
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Susan M. Kelley
Appeals Judge