APPEAL NO. 021462
FILED JULY 30, 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 May 3, 2002. The hearing officer determined that the claimant's "request for spinal surgery is approved."

The carrier appeals, arguing that the spinal surgery was not due to the compensable injury (which the carrier asserts was limited to a strain/sprain which had resolved in 1999); that the two second opinion doctors had, in fact, not concurred in the proposed surgery; that the proposed spinal surgery recommendation had not been resubmitted after having been withdrawn; and that the great weight of the other medical evidence was contrary to the concurring opinions. The carrier requests that we remand the case back to the hearing officer on the issue of extent of injury. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant "sustained a compensable spinal injury on _____." The claimant saw a number of doctors in 1998 and 1999, some of whom certified the claimant at MMI. Nonetheless the claimant changed doctors to Dr. G who, after some conservative treatment, recommended spinal surgery on a Recommendation for Spinal Surgery (TWCC-63), dated January 31, 2001. Dr. G recommended a vertebral corpectomy, a 360° fusion at L4-5, a lumbar laminectomy "and other procedures which are unreadable from the TWCC-63." The carrier at the CCH on May 3, 2002, sought to add an issue of extent of injury. We note that the carrier was, or should have been, aware that the claimant was asserting that spinal surgery was necessary as early as February 2001, and it was incumbent on the carrier at that time (or some subsequent time) to assert any extent-of-injury defense by requesting a Benefit Review Conference (BRC), rather than wait until the CCH in May 2002 to raise that defense. We reject the carrier's contention that the case should be remanded for an extent of injury issue or that extent-of-injury was actually litigated at the CCH.

As a result of the TWCC-63, the carrier selected Dr. S as its second opinion doctor. By letter dated March 27, 2001 the Commission advised the parties that the spinal surgery case had been withdrawn because the claimant had not attended the "required second-opinion exam" with the carrier elected doctor. In a report dated April 5, 2001, Dr. S stated that the "proposed procedure is a [sic] anterior and posterior lumbar fusion," discussed what he believed was a clerical error and the claimant's condition and concluded "I would be inclined to simply try an anterior lumbar interbody fusion and not subject [the claimant] to posterior instrumentation procedure." By letter dated May 10, 2001, the Texas Workers' Compensation Commission (Commission)

advised the parties that the carrier's second opinion doctor had concurred in the recommendation for spinal surgery. The carrier wrote the Commission by letter dated May 16, 2001, requesting a CCH and asserting the Dr. S's report was not a concurrence. The claimant's choice of second opinion spinal surgery doctor's was Dr. B who, in a report dated June 20, 2001, commented that while he disagreed with the 360° fusion and posterior instrumentation he agreed it was reasonable and necessary to do an anterior lumbar fusion. The Commission in a letter dated August 3, 2001, advised the parties that "[n]either of the second opinion doctors agreed with [Dr. G's] recommendation for spinal surgery." In yet a fourth letter, dated January 28, 2002, the Commission advised the parties that "[o]ne of the second opinion doctors agreed with [Dr. G's] recommendation for spinal surgery creating a two-to-one decision in favor of spinal surgery." Dr. G scheduled and performed spinal surgery in the form of an anterior lumbar fusion (with instrumentation) on April 8, 2002.

The carrier in its appeal requests, among other things, our reconsideration of Texas Workers' Compensation Commission Appeal Panel No. 010099, decided, February 28, 2001. Appeal No. 010099 cited the TEX. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) definition of concurrence as:

> A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery in 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. fusion); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

In that case, as the instant case, there was some disagreement whether the second opinion doctors had concurred in the proposed spinal surgery. In this case the hearing officer found that Dr. B and Dr. S concurred in the recommendation for spinal surgery and that the great weight of the other medical evidence is not contrary to the recommendations of Dr. B and Dr. S.

Rule 133.206(k)(4) provides that of the three recommendations and opinions, those of the surgeon and the two second opinion doctors, presumptive weight will be given to the two which have the same result and that their result will be upheld unless the great weight of the other medical evidence is to the contrary. The hearing officer determined that the other medical evidence was not contrary to the opinion of Dr. B and Dr. S, that fusion surgery was indicated, and that the request for spinal surgery should be approved, albeit after the fact. We hold that the hearing officer did not err in finding that Dr. B and Dr. S agreed on the proposed type of spinal surgery (a fusion) and the region (lumbar spine). The second opinion doctors do not have to agree on the approach (anterior, posterior, instrumentation, cages, etc) or on the number of levels within the region. *See* Texas Workers' Compensation Commission Appeal No. 002005,

decided October 17, 2000 and Texas Workers' Compensation Commission Appeal No. 010270, decided March 6, 2001. We hold that no resubmission was necessary in that the Commission's second (May 10, 2001) and third (August 3, 2001) letters were in error. As for the other evidence, including the videotape of the claimant shoveling sand, Rule 133.206(k)(4) provides that the only opinions admissible at the hearing on the issue of spinal surgery, "are the recommendation of the surgeon and the opinions of the two second opinion doctors." Our review of the record does not demonstrate that the hearing officer's decision in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the decision on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly the hearing officer's decision and order are affirmed.

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

ZENITH INSURANCE COMPANY
JAMES H. MOODY
901 MAIN STREET
DALLAS, TEXAS 75202.

_____
Thomas A. Knapp
Appeals Panel

CONCUR:

_____
Michael B. McShane
Appeals Judge

_____
Roy L. Warren
Appeals Panel