APPEAL NO. 021481
FILED JULY 18, 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 20, 2002. The hearing officer determined that the appellant's (claimant) request for spinal surgery should not be approved. The claimant appeals, asserting that newly discovered medical evidence indicates that Dr. M, the claimant's second opinion doctor, now agrees with the treating doctor's recommendation for spinal surgery. The claimant attached the "newly discovered medical evidence" to her request for review. There is no response in our file from the respondent (self-insured).

DECISION

Affirmed.

The facts are not in dispute. The claimant's treating doctor, Dr. C, recommended spinal surgery on August 10, 2001. The self-insured requested a second opinion on September 28, 2001, and the self-insured's second opinion doctor, Dr. Mc, saw the claimant on October 15, 2001. Dr. Mc did not concur with the proposed spinal surgery. His report contains the following comment:

> The patient has in the past failed to heal a two level posterolateral fusion with instrumentation. She continues to smoke. I believe that it is most unlikely that the patient would heal a posterolateral fusion with additional surgical treatment and believe that the patient's prognosis with additional surgery is for this reason, extremely poor. I, therefore, disagree with the proposed surgery.

The claimant selected Dr. M as her second opinion doctor, and saw him on December 18, 2001. Dr. M marked the blocks on his response form, which read "NO, I cannot concur at this time because: Further testing is needed before I can render an opinion." His narrative report contains the following:

> While I feel that this patient would be a reasonable candidate for attempted repair of pseudoarthrosis as well as extension of the fusion, given that her own [surgeon, Dr. C,] feels that she would be best served by seeing whether or not [Dr. B] could allow for a total cessation of smoking, I would agree that this would be strongly in her best interest and I would advise that her Worker's [sic] Comp work with her to put her in touch with Dr. B and have her work on a smoking cessation program totally. Additionally, I feel that a discogram would be ideal at the L2-3 and L3-4 levels to ascertain whether or not this pathologic L3-4 is in fact a pain generator for this particular patient . . . . I would, however, defer from a

> discographic study until we have seen how the patient can do in a total smoking cessation program. Therefore, for the present time, I would indicate that I cannot concur [due] not only to the fact that I would suggest further testing, i.e. a discogram at L2-3 and L3-4, but also that the patient should attempt to complete the smoking cessation program first.

The claimant was notified by a February 5, 2002, letter from the Texas Workers' Compensation Commission that "[n]either 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." The claimant was advised that she could resubmit the recommendation for spinal surgery "as described in [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(1) (]Rule 133.206(1)[)]" if the tests were done. She was also advised of her right to appeal. The file contains a February 14, 2002, note from the claimant "requesting an appeal of this decision." This CCH was scheduled for April 12, 2002, and continued to and was held on May 20, 2002.

The claimant testified at the CCH that she had quit smoking and that she had the discogram recommended by Dr. M. Although the report of the discogram was dated April 1, 2002, and it was admitted at the CCH, there was no indication that Dr. M had been made aware of the results. We note that the facsimile copy which was admitted as Claimant's Exhibit No. 1 at the CCH bears an imprinted date of April 9, 2002. We note that the claimant's appeal includes the May 28, 2002, letter from Dr. M in which he states that he has reviewed the discogram and has been advised that the claimant has quit smoking, and that he now concurs that surgery is indicated for the claimant. Since, with due diligence, the information about the discogram and the claimant's smoking cessation could have been communicated to Dr. M much earlier, it does not qualify as "newly discovered evidence." It is not appropriate that we consider it for the first time on appeal. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

From the evidence before him, the hearing officer decided that he had two recommendations against spinal surgery, that the great weight of the other medical evidence is not contrary to the two recommendations against spinal surgery, that the claimant's request for spinal surgery should not be approved, and that the self-insured is not liable for spinal surgery. The hearing officer's determinations are sufficiently supported by the evidence. 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. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence and determine what facts have been established. 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. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v.

Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

LJ
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Michael B. McShane
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Thomas A. Knapp
Appeals Judge