

APPEAL NO. 980028

Following a contested case hearing (CCH), on December 15, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant (carrier) is liable for spinal surgery related to the respondent's (claimant) compensable injury. The carrier has appealed on evidentiary grounds this conclusion as well as findings that (Dr. W), claimant's second opinion doctor, concurred with the need for spinal surgery and that the great weight of the other medical evidence is not contrary to the recommendations for spinal surgery from (Dr. D), claimant's surgeon, and Dr. W. Claimant responded urging the sufficiency of the evidence.

DECISION

Affirmed.

The parties stipulated that on _____ (all dates are in 1997 unless otherwise specified), claimant sustained a compensable injury; that Dr. D is claimant's proposed surgeon; that the carrier selected (Dr. B) to provide a second opinion; and that on October 31st Dr. W examined claimant. The carrier does not appeal findings that on August 28th Dr. D recommended that claimant undergo spinal surgery and agreed to perform the operation and that on October 6th Dr. B examined claimant and issued a non-concurring opinion.

Claimant testified that while at work on _____, a large overhead door "came down on the top of [his] head and mashed [him] into the ground"; that he "saw stars" and felt immediate pain in his neck; that he finished his shift; and that the next day the company nurse sent him to a physician's assistant (PA) who obtained x-rays and returned him to work at light duty. He indicated that he worked at light duty until starting a family vacation later that month; that before leaving for vacation the PA obtained an MRI and advised him to see an orthopedic physician; and that he decided to see Dr. D but could not get an appointment before August 4th so he left for the vacation in Wyoming and Utah. Claimant, who indicated that he was a professional bull rider who had made his living riding bulls at rodeos for 20 years and who continued to participate in rodeos to supplement the family income, testified that he drove his family to (city 1), where he rode two bulls in the rodeo and landed on his feet after getting bucked off the bulls. Claimant said that, when he arrived in (city 1), his neck was stiff from the long drive and he consulted with (Dr. R), a sports medicine specialist, who indicated it was all right for him to ride bulls and who gave him a neck collar. Claimant said he then drove to (city 2), where he rode a bull and got bucked off landing on his hands and knees. He said the bull stepped on his left leg resulting in an open femur fracture but that he did not injure his neck. Claimant attributed his getting bucked off to right side weakness, apparently as a consequence of his cervical

spine injury. Claimant said he cut short the vacation to return for the appointment with Dr. D. Claimant also said he has problems turning his neck to the right and has numbness in his right thumb and index finger and that he is scheduled for cervical spine surgery by Dr. D in January 1998.

Dr. D's Recommendation for Spinal Surgery (TWCC-63), dated August 28th, states the diagnosis as herniated nucleus pulposus and recommends a discectomy and fusion with instrumentation. Dr D's record of August 4th stated that an MRI report showed disc herniation at C3-4 with a 9mm canal at C4-5, narrowing of the right foramen, that his examination showed a marked decrease in sensation at the C5, C6, C7, and T1 dermatomes on the right, and that his impression was cervical disc herniations with myelopathy. Dr. D wrote on August 21st that the bull riding injury did not affect the existing neck injury. Dr. D wrote the Texas Workers' Compensation Commission (Commission) on December 10th stating his emphasis that the bull riding incident did not affect claimant's existing neck injury and that he has scheduled claimant for a discectomy with fusion.

Dr. B signed a form on October 6th and checked off statements that he cannot concur in surgery at this time because further testing is needed before he can render an opinion and because "more or a different type of non-surgical care should be tried." In his narrative report of October 6th, Dr. B stated that Dr. D described hyperreflexia with trace weak biceps on the right and sensory exam with a decrease in sensation in the C5, C6, C7 and T1 dermatomes on the right; that Dr. D's impression was cervical disc herniation and myelopathy; and that Dr. D recommended a C3-4 anterior cervical discectomy, fusion, and instrumentation with bone graft harvesting. Dr. B further reported that he did not feel claimant had a cervical myelopathy and that it would be more appropriate to continue with a more conservative course, especially since claimant's symptoms do not anatomically match a radiculopathy that would be caused at C3-4 with a herniation at C3-4 although it is on the correct right side. Dr. B felt that claimant should have a repeat MRI in view of the bull ride injury and that he should be treated with epidural steroid injections and physical therapy and that, if he still has persistent symptoms compatible with his C3-4 herniated disc, he be reviewed for potential surgery at that time. Dr. B concluded that he does not concur in the recommendation for a fusion.

On October 31st, Dr. W signed a form checking off a statement that he concurs that surgery is indicated for claimant. In his narrative report of October 31st, Dr. W set out the results of his neurological exam, noted that an MRI reveals "disc and possible bone spur at C4-5 and C4-5," and stated his impression that claimant has symptoms of radiculopathy and positive imaging studies. Dr. W concluded that he would agree with an anterior cervical discectomy and fusion given claimant's persistent symptomatology and unresponsiveness to a conservative course.

Section 408.026(a) provides, in part, 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 Commission, a second opinion that concurs with the treating doctor's recommendation. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) defines concurrence as an agreement with the surgeon's recommendation that spinal surgery is needed, that need is assessed by determining if there are any pathologies in the spine that require surgical intervention, and that any indication by the qualified doctor that surgery to the proposed spinal area is needed is considered a concurrence, regardless of the type of procedure or level. Rule 133.206(k) 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.

The carrier's offer of a peer review report by (Dr. P) was objected to for failure to timely exchange the report and the objection was sustained. We note that Rule 133.206(k) also provides that the only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

The carrier baldly asserts that claimant's bull riding is not consistent with someone who requires a cervical fusion. The carrier further asserts that claimant went from July 8th to August 4th without treatment, that Dr. D did not state the spinal level or levels of the proposed surgery, and that had Dr.W been given a more accurate history he would not have concurred with the proposed surgery. However, we regard these points on appeal as not amounting to the great weight of the medical evidence and we are satisfied that the two challenged factual findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge