APPEAL NO. 990474

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 8, 1999, a contested case hearing was held. He (hearing officer) determined that appellant (carrier) is liable for spinal surgery in this case. Carrier appeals, contending that: (1) this issue is one for the Medical Review Division of the Texas Workers' Compensation Commission (Commission); and (2) the hearing officer erred in determining that carrier is liable for spinal surgery. Claimant responds that the hearing officer's determinations are correct.

DECISION

We affirm.

Carrier appeals the hearing officer's determination that it is liable for spinal surgery. Carrier argues that the Texas Workers' Compensation Commission's (Commission) Medical Review Division, not the Commission's Hearings Division, has jurisdiction over this issue. We have previously rejected this argument. *See* Texas Workers' Compensation Commission Appeal No. 950517, decided May 17, 1995. The Commission's Hearings Division and hearing officer had jurisdiction to determine the carrier's liability for the claimant's recommended spinal surgery. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k) (Rule 133.206(k)). Carrier also appears to assert that the Hearings Division does not have jurisdiction until the Medical Review Division determines whether claimant is entitled to continuing medical treatment. However, it is undisputed that claimant sustained a compensable injury. Therefore, he is entitled to lifetime medical treatment. Section 408.021(a); Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993; see also Section 413.031; Rule 133.305.

Carrier asserts that claimant did not have a trauma to his spine when he was injured and that he should not have surgery because doctors initially could not determine what was causing his pain. The parties stipulated that claimant sustained a compensable spinal injury. Two doctors had like opinions regarding the need for spinal surgery in this case. Section 408.026(a)(1) provides in pertinent part that, except in medical emergencies and other situations not relevant in this case, an insurance carrier is liable for medical costs related to spinal surgery only if before the surgery the employee obtains from a carrier or Commission-approved doctor "a second opinion that concurs with the treating doctor's recommendation; . . ." This statute is implemented by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) which generally provides a procedure whereby an employee recommended for spinal surgery by the treating doctor selects a second opinion doctor from a Commission- approved list, the carrier does likewise and, of the three recommendations and opinions, presumptive weight is given to the two which "had the same result, and they will be upheld unless the great weight of the medical evidence is to the contrary." Rule 133.206(k)(4).

Dr. D submitted a Recommendation for Spinal Surgery (TWCC-63) on November 10, 1998, recommending that claimant undergo spinal surgery. Claimant's second-opinion doctor, Dr. L, agreed that claimant should have spinal surgery. In evidence are videotapes showing claimant performing such work as digging and lifting branches and logs. Carrier contends that spinal surgery should be denied because claimant is able to perform heavy work. In a May 7, 1998, medical record, Dr. D indicated that he was told what was depicted in the videotapes and discussed them, stating that: (1) claimant has a high pain tolerance and is able to be more active than most people despite his pain; (2) claimant gave a history of back pain whether or not he is active; (3) Dr. D has not told claimant to remain inactive; (4) claimant is apparently capable of heavy work; (5) the doctor who did claimant's discogram had noted claimant's high pain tolerance; (6) claimant was willing to work for months after his injury and did not seem like he was trying to trick anyone; and (7) claimant is injured and needs treatment, but is able to be active. Dr. L stated that he would not review the videotape. Dr. M stated that he viewed the videotape, that claimant had misrepresented his back problem in an earlier examination, and that he sees no need for further medical treatment. Dr. S indicated that he viewed the videotapes and stated that the patient's current condition is not causally related to the compensable injury. Dr. DE, carrier's second opinion doctor, indicated that he viewed the videotapes and indicated that if claimant truly has radicular pain, "an EMG of the lower extremities would clear this up. If the EMG is negative, no surgery would be recommended." Dr. DE stated that he did not concur in the surgery recommended because "further testing is needed." The record does not contain an EMG test report.

The hearing officer determined that Dr. D recommended spinal surgery and that claimant's second opinion doctor, Dr. L, concurred in Dr. D's spinal surgery recommendation. The hearing officer also determined that the "great weight of the other medical evidence is not contrary to the recommendation for spinal surgery."

Here, the two like opinions were that there should be spinal surgery. At the CCH, the disputed issue presented a fact question for the hearing officer. He was the sole judge of the materiality, relevance, weight, and credibility of the evidence in this case. Section 410.165(a). He resolved any inconsistencies in the evidence and determined that carrier is liable for spinal surgery. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We conclude that the hearing officer's determinations 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).

Carrier next asserts that the hearing officer erred in determining that carrier is liable for spinal surgery, noting that the two doctors favoring spinal surgery had refused to view videotapes depicting claimant's activities. Carrier cited Texas Workers' Compensation Commission Appeal No. 972550, decided January 26, 1998, which concerned whether the concurring doctors should be afforded an opportunity to view a surveillance videotape. However, the doctors in this case were afforded an opportunity to view the videotape. Dr. L and Dr. D might consider that their examinations and the MRI and other diagnostic reports, rather than videotapes, are more relevant to the issue of whether spinal surgery is needed. Further, we would note in this case that the videotapes were admitted at the CCH.

Although carrier contends that the hearing officer may not have considered them, we find nothing in the record to indicate that the hearing officer did not consider all the evidence in this case. Carrier cites Texas Workers' Compensation Commission Appeal No. 971072, decided July 24, 1997, in support of its contention that a videotape may be considered by the hearing officer in spinal surgery cases. Again, there is nothing to indicate that the hearing officer failed to consider the videotapes in this case. Carrier cited Texas Workers' Compensation Commission Appeal No. 982666, decided December 30, 1998, in support of its contention that the videotapes were sufficient evidence to overcome any presumption in favor of spinal surgery. However, the fact finder in this case considered the videotapes and the proposed surgeon's explanation of claimant's activities depicted on the videotapes and made his determinations based on the evidence. We have already concluded that his determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Carrier cited Texas Workers' Compensation Commission Appeal No. 970801, decided June 17, 1997, however, that case merely concerns the admission of evidence. The videotapes were admitted in this case.

Carrier contends that it should not be liable for spinal surgery because Dr. L purportedly stated that he did not think spinal surgery would improve claimant's pain. Carrier cited Texas Workers' Compensation Commission Appeal No. 971352, decided August 29, 1997, in support of its contentions. However, that case is distinguishable because the "concurring" doctor stated that he did not believe surgery would offer *any* benefit to the employee in that case. In this case, Dr. L did not say surgery would offer no benefit, he merely said that he did not think it would help claimant's *back* pain. Claimant testified that he was told that the surgery might benefit his leg pain rather than his back pain.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge