

APPEAL NO. 990598

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 2, 1999, a hearing was held. He approved respondent's (claimant) request for spinal surgery. Appellant (carrier) asserts that there is inadequate objective evidence to support surgery; in addition, the concurring opinion of Dr. E did not concur in the type of surgery proposed. The appeals file does not contain a reply from claimant.

DECISION

We affirm.

Claimant worked for (employer) as a nurse's assistant; she said she hurt her back when a patient kicked out at her causing her to fall to the floor upon her buttocks. The parties stipulated that claimant sustained a compensable low back injury on \_\_\_\_\_.

Claimant was treated by Dr. Mc, D.C. chiropractically. On November 21, 1998, Dr. Mc referred claimant to Dr. G, a neurosurgeon. Dr. G first saw claimant on December 1, 1998; he reviewed the MRI and x-rays which he noted showed degenerative sclerosis at L4-5 with disc bulging and neuroforaminal narrowing. He said that he discussed epidural injections but claimant was not receptive to that idea. He stated that surgery to include decompression at L4-5 with stabilization was offered.

On some unknown date (the Recommendation for Spinal Surgery form does not provide a blank for the date of the recommendation), Dr. G recommended lumbar laminectomy, lumbar fusion, cages, and instrumentation. Dr. B was chosen by carrier as a second opinion doctor, and Dr. E was chosen by claimant. Dr. B nonconcurred; Dr. E concurred.

While carrier says that Dr. E did not concur in the surgery proposed, Dr. E checked a statement on a cover sheet which says, "Yes, I concur that surgery is indicated for this patient." In so doing, Dr. E left blank a statement that he could have checked, but did not, which said, "Yes, surgery is indicated, but I recommend a different procedure." Dr. E's narrative referred to the MRI; he said it showed "significant deterioration and degeneration at the L4-5 disc segment with marked narrowing of the disc space . . . change in the adjacent end plates, and herniation of the disc . . . this all combines to produce spondylosis with spinal stenosis at L4-5." He agreed that surgery is indicated. In regard to the type of surgery, he said there were two options and that, "she might opt for simple discectomy and decompression" but he then added, "I think an instrumented fusion is certainly also a reasonable option." The way in which he expressed the above allows a reasonable inference that he meant the options to be either discectomy and decompression alone or discectomy and decompression together with an "instrumented fusion." The latter is basically what Dr. G recommended. This narrative, together with the signed cover sheet in which Dr. E checked the "surgery is indicated" statement without recommending a different

procedure, sufficiently supports a determination that Dr. E concurred in the recommendation.

Dr. B stated in his review that claimant did not do well with Waddell signs. He also states, "[claimant's] current clinical performance is one of the most exaggerated demonstrations of symptom magnification that I have ever seen." While carrier also states that there is inadequate objective evidence to warrant surgery, Dr. B basically says that the objective evidence is sufficient; he stated, "I would agree with Dr. G that the radiographic pictures and MRI picture would be consistent with the operative procedure if we were simply treating x-rays and MRI scans. One must however take into consideration the individual and the clinical findings consistent with reasonable operative outcome." Dr. B had also stated in his narrative that the result of surgery will be "extremely poor . . . and that she will continue to complain of persistent back pain." As stated, he nonconcurred.

Neither the 1989 Act nor the applicable rules of the Texas Workers' Compensation Commission require a certain number of objective studies to support the need for spinal surgery. Tex. W.C. Comm'n, 28 TEX ADMIN. CODE § 133.206(i)(2)(Rule 133.206(i)(2)) provides for second opinion doctors to review "films" as opposed to reports of films, but it does not provide a minimum number of different studies that must be provided for review. Similarly, Rule 133.206(a)(13) provides for a concurring opinion to consider whether there are "any pathologies in the area of the spine for which surgery is proposed," but it too does not quantify or set a minimum amount of studies that must be provided to show the "pathologies." In this case, an MRI and x-rays were provided the second opinion doctors and Dr. E discussed the pathologies he saw on examining the film. The studies provided were not inadequate to result in an approval of spinal surgery.

The evidence sufficiently supports the findings of fact that Dr. G recommended surgery and that Dr. E concurred in the type of surgery proposed. With Rule 133.206(k)(4) providing that presumptive weight will be accorded the two opinions that agree (from the recommending doctor and the two second opinion doctors only), the approval of claimant's request for spinal surgery is sufficiently supported by the evidence and is consistent with applicable rules.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Judy L. Stephens  
Appeals Judge