APPEAL NO. 990811

Following a contested case hearing held on March 19, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant's (claimant) request for spinal surgery should not be approved. Claimant has appealed, urging that the hearing officer erred in relying on the reports of the two second opinion doctors who disagreed with the proposed cervical spine surgery. She contends that the results of five tests showing herniated cervical discs constitute the great weight of the medical evidence and that the proposed cervical spine surgery should be approved. The respondent (carrier) asserts that the two second opinion doctors were aware of the herniations but felt they were not significant and did not warrant the proposed cervical spine surgery.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable spinal injury on _____, while working for (employer), and that Dr. TP recommended that claimant have spinal surgery while Dr. JP and Dr. HM recommended that claimant not have spinal surgery. The hearing officer found that Dr. JP is the carrier's second opinion doctor and that Dr. HM is claimant's second opinion doctor.

Claimant testified that when she saw Dr. HM on or about January 10, 1999, he said to her: "My neck is in worse shape than yours and I wouldn't have that surgery." He also told her that the chances of the surgery being successful were only 50-50. Claimant stated that Dr. HM's exam lasted only about five to 10 minutes and was "not thorough." Claimant further testified that when she saw Dr. JP on or about January 18, 1999, he at first thought she was to be seen for back surgery and that after he looked at the x-rays, he commented that "a lot of people have herniated discs." She also stated that Dr. JP's exam lasted only about five to 10 minutes and was "not thorough." Claimant further testified that Dr. MM, apparently her intended surgeon, said he would recommend surgery. She also said his exam lasted 15 to 20 minutes and "was thorough."

Claimant indicated that her quality of life since her injury has been much diminished by pain and discomfort. She also conceded that she did not know just how much time an examination of her neck should take.

The May 13, 1998, report of Dr. D, an orthopedic surgeon who examined claimant upon referral by Dr. TP, stated the diagnosis as cervical spine strain, cervical radiculopathy, and dorsal spine strain, and his seven treatment recommendations did not include surgery.

The May 21, 1998, report of Dr. L, a radiologist, regarding a cervical spine MRI, stated the impression as a 2 mm herniated disc centrally at C5-6 with compression on the

thecal sac and subtle indenting on the spinal cord, and a 2.5 mm herniated disc at C6-7 with mild indenting of the thecal sac and subtle touching on the spinal cord.

The May 21, 1998, report of Dr. RB indicated that claimant's nerve conduction studies, performed to rule out evidence consistent with cervical radiculopathy and entrapment neuropathy of the upper extremities, were essentially normal.

Dr. S, who reviewed the cervical spine x-rays and May 21, 1998, cervical spine MRI for the carrier, reported on July 3, 1998, that there was no evidence of "significant disc bulging and protrusion/herniation" involving the intervertebral disc spaces.

The July 7, 1998, report of Dr. KB, an orthopedic surgeon, stated that an MRI on May 21, 1998, revealed herniated discs at C5-6 and C6-7, that claimant's symptoms persisted despite physical therapy and other conservative modalities, that a CT myelogram has been ordered, and that claimant "will require cervical discectomy with fusion."

Dr. D reported on July 23, 1998, that he had Dr. MM and Dr. KB review the MRI films; and it is the consensus of the three of them, all orthopedic surgeons, that the MRI indicated herniated nucleus pulposus (HNP) at C5-6 and C6-7; and that they, and also Dr. L, disagree with Dr. S's opinion and question what he means by no "significant" disc changes.

The August 6, 1998, report of Dr. LI, who examined claimant for the carrier, stated that "[t]here is no significant pathology present" in claimant's MRI, that "at the most, there is slight minimal degeneration of the C5-6 and C6-7 disc[s]," that "there is no torn annulus and there is no disc herniation of significance" in claimant's neck, and that by that he means "there is certainly no sign of a surgical problem or evidence of specific injury to the cervical spine attributable to this injury." He also stated that not only is there no sign of a surgical problem but that future chiropractic care is not a medical necessity.

Dr. L's findings in the September 30, 1998, report of a cervical myelogram included small abnormal ventral indentations upon the thecal sac at C4-5, C5-6, and C6-7, suggesting a focal bulged or protruded disc. The findings in the September 30, 1998, report of a post myelogram CT scan report included a 2 mm bulged disc with mild impingement upon the thecal sac at C4-5, a 2 mm herniated disc with mild compression on the thecal sac and spinal cord, and a 2.5 mm herniated disc with moderate impingement upon the thecal sac and spinal cord. Dr. L also reported on September 30, 1998, that claimant's x-rays revealed no acute compression fracture, listhesis or bony destruction, and that claimant had mild spondylosis from C4 to C7 and a slightly decreased lordotic curve of the mid-low portion of the cervical spine.

Dr. MM's Recommendation for Spinal Surgery (TWCC-63), signed on October 14, 1998, states that his proposed surgical procedures include C4-7 discectomy, arthrodesis interbody C4-7, C4-7 anterior instrumentation, and bone graft. In an October 14, 1998, letter to Dr. D thanking him for the referral, Dr. MM stated that claimant was hurt when a

plastic pipe fell on her when she was bent forward, that she has progressed to having severe pain which keeps her from sleeping or doing any significant activity, and that his impression is post-traumatic internal disc derangement of the cervical spine.

Dr. L's December 3, 1998, discogram report, which reflected that claimant was 45 years of age, stated the impression as abnormal discograms at C4-5, C5-6, and C6-7 with leaked contrast media into the epidural space through torn annulus posteriorly and with concordant neck pain. Dr. L's December 3, 1998, report of a post discogram CT scan reflected a 2 mm herniated disc with impingement at C4-5 and 2.5 mm herniated discs with impingement at C5-6 and C6-7.

Dr. TP, who provided claimant with chiropractic treatment, reported on December 16, 1998, that a cervical discogram revealed two levels of herniation and that claimant was recommended by Dr. MM for cervical surgery. Dr. TP reported on December 23, 1998, that claimant continued to complain of pain in the cervical region radiating down both arms and of headaches, and that on December 9, 1998, she was evaluated by Dr. D, who recommended cervical spine surgery.

The January 15, 1999, report of Dr. E, who conducted a psychological evaluation of claimant, included major depressive disorder in the diagnosis.

Dr. JP's January 19, 1999, report, noting that claimant's "entire mobility is very unusual," states his opinion that claimant "presents with longstanding spondylosis of the neck without any significant HNP's, root compression, or spinal cord compression"; that she also "presents with multiple inconsistencies during the evaluation and evidence of significant psychosocial issues/magnification issues"; and that he does not agree with the recommended surgery.

Dr. HM's January 19, 1999, report, noting that claimant's gait was normal when he urged her a little bit, stated that the myelogram CT is the most significant study he reviewed and that "there does not appear to be any significant nerve root compression to account for" her diffuse weakness and pain radiating into the arms and legs without evidence of myelopathy. Dr. HM further stated that due to the disparity of the findings on his exam and on the myelogram, "my suspicion is that surgical intervention in this woman will result in a very poor outcome in terms of her symptoms and, therefore, I do not agree with surgery."

Dr. TP wrote on February 3, 1999, that Dr. HM's report shows he did not perform a thorough exam; that he would like Dr. HM to review the reports of Dr. MM and Dr. D, who are both experienced surgeons who only perform medically necessary surgery, and that claimant needs discectomy and fusion surgery with instrumentation.

Section 408.026(a)(1) provides 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 Texas Workers' Compensation Commission (Commission) a second opinion that concurs with the treating

doctor's recommendation. *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(b) (Rule 133.206(b)). Rule 133.206(k)(4) 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. This rule 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 Appeals Panel has drawn the distinction between the "opinions" and the "medical evidence" mentioned in Rule 133.206(k)(4). *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 961009, decided July 12, 1996.

The hearing officer found that both Dr. JP and Dr. HM had the benefit of an examination and review of medical records and films and that both reviewed claimant's test results; that both Dr. JP and Dr. HM stated that claimant's herniations were not significant and did not significantly cause nerve root compression; and that the great weight of the medical evidence is not contrary to the recommendations of Dr. JP and Dr. HM against spinal surgery. Based on these factual findings, the hearing officer reached the legal conclusion that claimant's request for spinal surgery should not be approved. Claimant specifically appeals the finding concerning the great weight of the medical evidence, insisting that the diagnostic tests established that the several cervical disc herniations were not insignificant and that they constituted the great weight of the medical evidence that spinal surgery should be approved.

We are satisfied that the challenged finding and conclusion are not so against the great weight 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:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge