

APPEAL NO. 990873

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 March 31, 1999. The sole issue at the CCH was whether the respondent's (claimant) request for spinal surgery should be approved. The hearing officer determined the claimant's request for spinal surgery is approved. The appellant (carrier) appeals, urging the great weight of the medical evidence is contrary to the recommendation for spinal surgery due to the lack of evidence of any pathology in the spine requiring surgical intervention and due to the weak "concurrence" by the carrier's second-opinion doctor. The claimant responds, urging that the hearing officer's decision is correct and should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable spinal injury on _____. Dr. S submitted a Recommendation for Spinal Surgery (TWCC-63) on May 18, 1998, recommending that claimant undergo spinal surgery, a lumbar laminectomy and fusion with possible instrumentation. Claimant's second-opinion doctor, Dr. R, and carrier's second-opinion doctor, Dr. F, did not concur with the need for spinal surgery. Both Drs. R and F felt that further testing was needed before they could render an opinion and Dr. R felt that more, or a different type of, non-surgical care should be tried.

The claimant had a lumbar discogram and CT scan performed in July 1998. On October 12, 1998, Dr. S resubmitted a TWCC-63 and wrote a letter to both Drs. R and F in which he indicated that the claimant had undergone further conservative treatment, steroid blocks and facet blocks, and Dr. S recommended a laminectomy and fusion with instrumentation at L5 and S1. Dr. F filed an addendum report on January 27, 1999, which states in pertinent part that "[i]t appears by the testing that was done that this [claimant] does have a facet arthropathy at L5-S1 and may be a candidate for an L5-S1 fusion and decompression." Dr. R filed an addendum report on October 20, 1998, which states that if the diskograms are positive at L5-S1, then he would agree with a surgical intervention including fusion with instrumentation, but he would need to see a confirmatory diskogram prior to the proposed procedure. On March 1, 1999, the Texas Workers' Compensation Commission (Commission) issued a letter indicating that the carrier was liable for the costs of spinal surgery and this was disputed by the carrier.

Section 408.026(a)(1) provides in pertinent part that 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; . . ." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) 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).

The carrier asserts that the concurrence of Dr. F is insufficient to hold it liable for spinal surgery when viewed in concert with the opinions of Dr. R and Dr. SU. Dr. SU did not examine the claimant, but reviewed the diagnostic test results and concluded that the diskogram did not represent any pathology and there is nothing "traumatic" about the findings, which are consistent with chronic degenerative disc disease.

The hearing officer determined that Drs. S and F recommended spinal surgery and that Dr. R recommended that the claimant not have spinal surgery during the addendum process. The hearing officer also determined that the "great weight of the other medical evidence is not contrary to the recommendation for spinal surgery by Dr. S." The disputed issue presented a fact question for the hearing officer. The hearing officer was the sole judge of the materiality, relevance, weight, and credibility of the evidence in this case. Section 410.165(a). She resolved any inconsistencies in the evidence and determined that the carrier is liable for spinal surgery. 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).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge