

APPEAL NO. 991071

A contested case hearing was held on April 28, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with hearing officer to consider the following disputed issues: (1) did the appellant (carrier) waive the right to contest the compensability of the respondent's (claimant) recurrent disc herniation at L4-5; and (2) is the compensable injury a producing cause of claimant's recurrent disc herniation at L4-5. The hearing officer concluded that the carrier did not waive the right to contest the compensability of claimant's recurrent disc herniation at L4-5 and that claimant's compensable injury (of _____) is a producing cause of his recurrent disc herniation at L4-5. The carrier has appealed the latter conclusion, as well as three related factual findings, asserting the insufficiency of the evidence. The file does not contain a response from claimant. The hearing officer's determination of the carrier waiver issue has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The parties stipulated that on _____, claimant sustained a compensable injury. Not appealed are findings that claimant underwent spinal surgery at L4-5 and L5-S1 in July 1996; that he was able to return to work for (employer) but was limited by his injury; that after returning to work, claimant was placed in a sedentary-duty job by the employer and was provided a golf cart to use when traveling around the employer's plant; that in the latter part of 1998, he experienced increased pain in his low back with radiation of pain into the lower extremities; and that his increased symptoms were the result of a left-sided herniation of the L4-5 disc.

Claimant testified that on _____, while employed by the employer as a truck driver, his neck and low back were injured when he was "jerked real bad" while operating an overhead crane lifting a heavy concrete block; that he had three operations on his neck; that he underwent lumbar spine surgery by Dr. D in July 1995; that in March 1996, he returned to work and was given light duty by the employer consisting of dispatch work in the office and checking on loads and orders in the yard using a golf cart to get around; and that he worked 12 to 16 hours per day, mostly sitting. He said that, following the low back surgery, he was assigned a 29% impairment rating (IR); that he continued to have low back pain which radiated into the left leg; that he received injections from Dr. S; that Dr. D had told him he would be back; and that in November 1998, Dr. D performed a second operation on his low back, having told him it was the same injury and he would use the old scar.

Claimant further testified that he had not had any new trauma to his back at home or at work after the _____ injury. He also said that at a benefit review conference, Mr. S, a co-owner of the employer, stated that claimant had not had a new injury on the job. The carrier's representative stated that she did not know who the employer's workers'

compensation insurance carrier was in 1998 and claimant's assistant stated that the employer had a different carrier in 1998.

Dr. D wrote on January 13, 1995, that he reviewed claimant's lumbar spine MRI of January 11, 1995, and that it shows a bulging disc at both "L5 and L5-S1." Dr. D wrote on March 29, 1995, that he reviewed the myelogram of March 28, 1995, and that claimant has a ruptured disc at L4-5 on the right side which he suspects is responsible for the back and leg pain. Writing on October 7, 1995, to justify his request for a lumbar MRI scan, Dr. D stated that claimant had bilateral lumbar laminectomies with a discectomy and decompression of both nerve roots on July 27, 1995; that he has had a very severe exacerbation of pain, rated at 10 on a scale of one to 10; and that causes for this pain could include a recurrent disc herniation.

Dr. B, to whom claimant was referred by Dr. D for an IR after reaching statutory maximum medical improvement, reported on October 14, 1995, that he assigned claimant an IR of 29% for his cervical and lumbar spine injuries. Dr. B further reported that, following surgical procedures on claimant's cervical spine in June and October 1994 and April 1995, claimant underwent a discectomy, foraminotomy, and laminectomy at L4-5 by Dr. D on July 27, 1995; that claimant had recurrence of low back pain after his lumbar surgery which radiates into his lower extremities; that his pain is rated 10 on a scale of one to 10; that Dr. D has ordered various imaging tests; and that, depending on the results of the low back workup in progress, claimant may require additional surgery.

Dr. D reported on November 27, 1995, that an MRI and CT scan were done on October 18, 1995; that the studies show a small central bulge at L5-S1 and the possibility of a small recurrent focal bulge on the right at L4-5; and that a prior MRI scan in January 1995 showed broad-based herniated nucleus pulposus (HNP) at L4-5 and desiccation in the discs at L4-5 and L5-S1. Dr. D's impression was status postoperative lumbar laminectomy at L4-5 bilateral for central disc herniation with residual recurrent mechanical back and bilateral leg pain which is possibly due to the internal disc disruption at L4-5. Dr. D stated that he doubted claimant had a significant recurrent disc herniation and that, if he has one, it is extremely small on the MRI and myelogram.

Dr. D wrote the carrier on January 17, 1996, stating that while he hopes that additional surgery can be avoided, the possibility does exist since claimant has significant multi-level disc problems in his neck and low back and runs the risk of becoming symptomatic at other levels. Dr. D reported on September 9, 1996, that at claimant's last low back workup in October 1995, he was found to have a disc bulge at L5-S1 and postoperative changes at L4-5. His impression included probable internal disc disruption at L4-5 and L5-S1.

The carrier's October 8, 1996, letter to Dr. D authorizing a lumbar discogram states that the carrier's preauthorization review findings include the diagnosis of recurrent disc herniation. The October 15, 1996, lumbar discogram report states that the L4-5 disc had a degenerative pattern with a posterior bulge and created left low back pain, not like the usual

pain pattern. The October 15, 1996, report of the CT scan after discography states that the L4-5 disc shows diffuse degenerative change with central collection and an epidural leak, central and right. Dr. D wrote claimant on October 21, 1996, advising that he had reviewed the discogram report and that the L4-5 and L5-S1 discs are abnormal but do not appear to be the major source of claimant's pain.

In evidence is the carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated "10/23/98" stating that the carrier disputes any disability and medical treatment related to claimant's current medical condition, and that, based on the medical evidence, claimant's current medical condition and need for spinal surgery are not related to the compensable injury of "_____."

Dr. H November 13, 1998, report to the carrier states that claimant recently had an MRI which showed a recurrent disc herniation at L4-5 on the left; that his diagnosis is "[HNP] L4/5 on the left, at the site of the old surgery"; and that "[t]his is recurrent disc surgery, . . ." The carrier wrote claimant on November 18, 1998, stating that the carrier's second opinion doctor agreed with his doctor's recommendation for spinal surgery and that the carrier is liable for the reasonable and necessary costs thereof.

Dr. D wrote the carrier on January 13, 1999, stating that he disagrees with the carrier's position that claimant's current condition is not related to his _____, injury; that although claimant had a two-year lapse in medical treatment, his symptoms have not changed; that it is his medical opinion that claimant's current, pre-surgical symptoms are directly related to the _____, injury; that, after submitting the Recommendation for Spinal Surgery (TWCC-63) and receiving the liability letter from the Texas Workers' Compensation Commission, he proceeded with the surgery; and that he questions the good faith of the carrier.

The carrier appeals findings that claimant's compensable injury of _____, included an injury to the L4-5 and L5-S1 discs; that claimant did not sustain an aggravation injury to his low back after returning to work for the employer; and that claimant's compensable injury of _____, to the L4-5 disc was a producing cause of the subsequent left-sided herniation of that disc. The carrier urges that claimant's only evidence of causation is a "simple diagnosis" of a left-sided herniation at L4-5 in September 1998 (five years after the original injury) a history of working 12 to 16 hours per day for two years, and various doctors' notations of "recurrent" herniation; that there is no explanation as to how a right-sided L4-5 disc herniation in 1993 can recur as a left-sided herniation in 1998; and that claimant's evidence of causation is impermissibly speculative under Texas case law and insufficient to support the hearing officer's determination.

Whether claimant's compensable injury of _____, was a producing cause of his recurrent disc herniation at L4-5 presented the hearing officer with a question of fact to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508

S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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). In Texas Workers' Compensation Commission Appeal No. 971839, decided October 23, 1997, the Appeals Panel observed that, while there is no statutory definition of "producing cause" nor any uniformly accepted and exclusive language defining the term, it has been generally accepted to mean "a cause 'without which' another event would not have occurred or a cause which 'but for' its existence another event would not have occurred." We also stated that it is well-settled that there may be more than one producing cause of an event.

In our view, the hearing officer could infer from all the evidence that claimant did not sustain a new injury at work through the aggravation of his _____, injury by repetitive trauma, as the carrier asserted, but that his injury of _____, was, indeed, a producing cause of his recurrent L4-5 disc herniation notwithstanding its left side location. Contrary to the carrier's contentions, claimant was not required to prove precisely just how, physiologically, his degenerated, desiccated L4-5 disc developed the left side herniation addressed by Dr. D's November 11, 1998, surgery. The Texas Supreme Court has stated that it "has never required the medical expert to explain or even understand the precise biochemistry or mechanism by which the initial trauma affects the health or organs of the injured party. . . ." Western Casualty and Surety Company v. Gonzales, 518 S.W.2d 524, 526-527 (Tex. 1975). In our view, claimant's medical evidence is sufficient proof to meet our standard of review and is more than just "a simple diagnosis" without explanation, or junk science.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge