APPEAL NO. 001332

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 May 3, 2000. The hearing officer determined that the respondent (claimant) had disability beginning on March 6, 2000, and continuing through the date of the CCH.

The appellant (carrier) appealed, arguing that the second spinal surgery that caused the claimant to be out of work a second time was not the result of the compensable injury, according to a decision reached by another hearing officer on the "extent" of the claimant's injury. The carrier argues that it was not necessary for the hearing officer to opine that the claimant's first spinal surgery was done in an urgent circumstance, and also argues that the first surgery went beyond the level determined to be part of the compensable injury. The carrier states that the facts establish that the second surgery was not "reasonably required" to treat the compensable injury. The carrier says that it did not stipulate to all the facts as the decision states. The carrier asserts that the fact of a concurring second opinion does not preclude the carrier from "later questioning whether any part of the surgery performed was reasonable and necessary medical treatment for the compensable injury." The carrier admits that if the second surgery was needed to treat the compensable injury, then the claimant has disability under the 1989 Act. The claimant recites evidence in favor of the decision.

DECISION

We affirm.

Both the claimant and his spinal surgeon, Dr. M, testified at the CCH. The claimant sustained a cervical injury on _____, and had emergency surgery on April 2, 1999. Dr. M testified that the need for this was urgent. The claimant had an anterior cervical decompression spanning three cervical levels, C3-4, C4-5, and C5-6. Dr. M said that three nerve roots were being compressed. Dr. M stated that even if it were medically possible to pinpoint the claimant's compensable injury to only a single herniated disc at C4-5, it was necessary to fuse adjoining levels to fully stabilize the herniated level and decompress all nerve roots in the area. The first surgery was done from access through the front of the neck.

Dr. M stated that when the claimant continued to have problems after surgery with upper extremity numbness, Dr. M ascertained that there was a continued compression on the C6 nerve root, and also that some of the stabilizing screws at other vertebral bodies were moving out.

On March 6, 2000, Dr. M operated a second time, this time entering the neck from the back. He said that his recommendation for surgery received a concurring second opinion. The documents in the file show that the concurring doctor was the carrier's choice whose narrative report is not in evidence.

The March 2000 operative report is clear that the C4-5 disc was an involved level in the second surgery. There was no evidence that the carrier brought any matter before the medical review division or otherwise disputed (before or concurrently with the second opinion process) the reasonableness of spinal surgery to treat the compensable injury. Dr. M testified that he was board certified both as a neurologist and as a spinal surgeon.

The claimant said that after his first surgery, he was off work until January 10, 2000. He said he returned to work but was assigned a sedentary desk job. Although he was paid at the same rate, he said he worked only 40 hours a week as opposed to overtime that he had worked prior to his injury. The claimant left work again on the date of his second surgery and had not returned to work by the time of the CCH, although he was improving.

The carrier has presented opinions of two doctors that were not based upon examination of the claimant. (Dr. G, a radiologist, opined that the April 5, 1999, surgery was directed at the compensable injury only as to the procedures done for level C4-5. However, he stated that "the technical aspects of surgery including the levels operated on and fused are best left to the judgment of the neurosurgeon as these aspects are not my area of expertise." Dr. P, an orthopedic surgeon, was advised that the compensable injury was "only" the herniation of C4-5, and asked whether the second surgery was reasonable and necessary to treat it. He stated that the surgery stemmed solely from the claimant's preexisting multi-level degenerative disc disease. Dr. P stated that the first surgery had been enough to treat the herniated disc at C4-5.

First, we agree that all the facts were not stipulated except those for venue and coverage. A clerical numbering error was evidently made. We have reviewed all but the first three findings for sufficiency of the evidence. The hearing officer's decision is fully supported by the record in this case. The decision that the carrier cites as *res judicata* that the claimant's injury involved only the C4-5 disc has been reversed and remanded by the Appeals Panel. Texas Workers' Compensation Commission Appeal No. 000561, decided May 4, 2000. It was noted in that decision that Dr. M had been unable to testify, and that the claimant was unrepresented. The issue on remand is waiver by the carrier of any dispute to compensability of the cervical levels other than C4-5.

Presupposing that an injury to a spinal region can be localized to a single disc level, Dr. M's testimony, believed by the hearing officer, plainly indicates that reasonable surgical treatment for that disc may also involve a fusion of adjoining levels. It was also evident that the claimant's C4-5 herniation impacted on the nerve roots adjoining that disc, also pointing to a need for broader regional treatment. Although Dr. M said he performed the second surgery to alleviate symptoms at the C6 nerve root, he also described the need to stabilize the entire fusion he had performed before and to alleviate moving screws. The operative report describes this fusion.

A claimant is entitled to medical care "reasonably required by the nature of the injury as and when needed." Section 408.021. The hearing officer found that it was necessary to surgically treat adjoining areas not necessarily part of the C4-5 injury in order to

effectively treat the compensable injury. Spinal surgery for which a carrier is liable must be "related to" the compensable injury. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §133.206(b) (Rule 133.206(b)). A carrier that seeks to argue that incapacity relates solely to preexisting conditions and not to treatment for a compensable injury has the burden to prove this. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

Rule 133.206(b)(3) states that a carrier may challenge whether medical care related to the spinal surgery is medically necessary, but states that when this is done in dispute resolution proceedings, there must be some showing of compliance with applicable rules and revaluations regarding utilization review. Although the carrier might not have been able to ask for a CCH on spinal surgery (Rule 133.206(k)(2)), we see no indication that the medical dispute resolution process as provided in Sections 408.027 or 413.031 would have been foreclosed to it. The spinal surgery process set out in Section 408.026 is, in effect, a specialized form of preauthorization. *See also* Rule 134.600(b). In response to the carrier's position that it may continue to raise the reasonableness of the second operation in a hearing on disability or other matters, we would note that Section 413.017(b) provides that medical services provided subject to prospective or concurrent or retrospective review as required by the medical policies of the commission and which are authorized by the insurance carrier are presumed to be reasonable. The hearing officer's findings as to the connection of the second surgery to the C4-5 compensable injury that had been determined in the earlier CCH are supported by Dr. M's testimony and the operative report.

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011 (16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Although there was some reference to the fact that the claimant may have earned less than his preinjury average weekly wage prior to the date of his surgery, this was not clearly developed and the claimant has not appealed the hearing officer's determination that disability began March 6, 2000, and continued to the date of the CCH. The hearing officer's decision on the period of disability is sufficiently supported by the record.

We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge