

APPEAL NO. 002688

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 16, 2000, a contested case hearing was held. With respect to the only issue before him, the hearing officer determined that the respondent's (claimant) compensable (low back) injury is a producing cause of his recurrent disc herniation at L4-5.

The appellant (carrier) appealed, contending that the hearing officer's decision is "totally unsupported by any credible evidence"; that the hearing officer "interjected his [own] belief into the record"; and that the medical evidence indicates that "the actual cause of Claimant's current problems . . . was the previous disc herniation in 1991 at the L4-5 level" and is not related to the claimant's compensable 1997 injury. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified, and it is relatively undisputed, that he had a work-related low back injury in 1990 (not the injury at issue here), had spinal surgery at the L3-4 level in January 1991, and a second spinal surgery at the L4-5 level in June or July 1991. The claimant testified that he returned to work for the employer in 1993 and worked full time at his regular duties until _____. The parties stipulated that the claimant sustained "a compensable lower back injury on _____." (What that compensable injury was is not further defined.) A lumbar myelogram performed on July 27, 1997, showed "post operative changes L4-5." The claimant began treating with Dr. D, who performed a laminectomy and bilateral foraminotomies at the L3-4 level on September 17, 1997. The claimant testified that he has had continued pain and problems since the 1997 surgery and has been unable to return to work. The claimant had physical therapy in February and March 1998. The claimant testified that he did not see a doctor nor take medication between March 1998 and March 2000, when "the pain got so bad" that he returned to see Dr. D. Exactly when that was is not clear.

In a report dated May 2, 2000, a physician's assistant wrote that the claimant was last seen by Dr. D on April 11, 2000, when an MRI was ordered. The report goes on to state:

The interpretation [of the MRI] was post-operative change at L4-5 with moderate recurrent disc herniation posteriorly, left paracentral with surrounding enhancing scar formation with encroachment of the left neural foramen and displacement of the cecal [sic] sac with mild diffuse bulge at L3-4 concentric to the right laterally.

After discussion with [Dr. D] . . . , it was elected to present to the patient L4-5, L5-S1 diskectomy/laminectomy, pedicle screw with fusion.

The claimant agreed to the proposed surgery and the second opinion spinal surgical process was begun. Dr. G, the carrier's second-opinion doctor, agreed to the surgery and, in a report dated June 19, 2000, commented:

MRI scan of the lumbar spine with and without contrast done on 4/25/00 . . . shows extensive postop changes noted at L3-4 and L4-5. [Claimant] has a large disc herniation at L4-5 off to the right with some degenerative changes noted at the L4-5 disc level.

Dr. H, the carrier's required medical examination doctor, examined the claimant and, in a report dated July 11, 2000, recited the claimant's history; commented on the April 25, 2000, MRI which "showed a moderate recurrent disc herniation at L4-5 with left paracentral with surrounding and enhancing scar formation . . ."; and, in response to specific questions, stated:

The examinee is status post L3-4 lumbar decompression with remote fusion L4-5, L5-S1. MRI of April 25, 2000, reveals a recurrent L4-5 disc herniation encroaching the left neuroforamen, and scar formation. Although the same levels are involved, the current left sided complaints do not correlate with the prior complaints of right sided symptoms that he had pre and post op in 1997. However, this recurrent L4-5 herniation is the same level and same side (left) that he had, and was surgically treated for in 1990-1991.

If we correctly understand the carrier's position, it is that the admittedly necessary surgery at L4-5 is not due to the stipulated "compensable lower back injury on _____," but is "a recurrence of the 1991 injury."

The question appears to be whether the recurrent disc herniation at L4-5 related back to the compensable _____ injury or the 1991 injury. The medical evidence, particularly the May 2, 2000, report, and perhaps Dr. G's report noting "extensive postop changes noted at L3-4 and L4-5," can be interpreted differently. The hearing officer chose to interpret the reports as relating to the stipulated, undefined low back injury of _____ with the attendant September 1997 surgery at the L3-4 level. While a different fact finder may have reached a different conclusion on the same facts, Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.), we are unwilling to say that the hearing officer's decision is 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). We disagree with the carrier that the hearing officer's decision is "a gross miscarriage of justice" or that "there is absolutely no evidence whatsoever to support the hearing officer's decision."

As to the carrier's complaint that the hearing officer "acted improperly by interjecting his belief into the record," we can only comment that it appears the hearing officer was thinking out loud and was doing no more than other hearing officers might do mentally in private. We do not find that this constituted reversible error in this case.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge