

APPEAL NO. 000383

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 January 26, 2000. The hearing officer determined that the respondent's (claimant) compensable injury of _____, extended to his right hip and that the appellant (carrier) failed to timely dispute the compensability of the right hip based on newly discovered evidence. The carrier appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____. He contended that he was prescribed Prednisone, a steroid which he took orally over a two- to three-month period, for the low back injury and that the Prednisone caused avascular necrosis (AVN) of the right hip. The claimant was not sure which doctor prescribed the Prednisone. He also testified that he paid for the prescriptions himself because he did not want to "hassle" with the carrier to obtain payment. The adjuster testified that her review of the claimant's file disclosed numerous medications approved for payment, but no indication that approval for Prednisone was ever requested. Other treatment included three epidural steroid injections. The claimant also said he drank two glasses of red wine per day as prescribed by a doctor for his heart condition, but otherwise denied he was an alcoholic.

On May 13, 1999, Dr. B performed a right hip replacement which was approved by the carrier. There was no dispute that the claimant suffered from AVN. On May 18, 1999, Dr. B wrote that Dr. E had prescribed the oral steroid Prednisone over a three-month period in 1997; that the claimant had no other risk factors for AVN; and that the AVN "directly resulted" from the use of Prednisone. This letter was date stamped as received by the carrier on May 6, 1999. On December 17, 1999, Dr. Y, D.C., wrote that the claimant developed AVN as "a direct result of the prescription [of] oral steroids."

Dr. T, an orthopedic surgeon, performed a records review of this claim at the request of the carrier and testified at the CCH. He described the possible causes of AVN as a fracture or pressure on the hip, chronic oral steroid use, and alcohol abuse. In his opinion, the three injections did not cause the AVN and he found no prescription in Dr. E's records for Prednisone. He, nonetheless, conceded that although it is difficult to determine

what dosages at what frequency are sufficient to cause AVN, he believes that two to three months of daily use would be enough.¹

The hearing officer considered this evidence and made the following finding of fact and conclusions of law on the extent of injury issue:

FINDING OF FACT

4. Claimant did sustain physical harm or damage to the structure of his right hip, including [AVN], in the course and scope of his employment as a result of the compensable injury of _____.

CONCLUSIONS OF LAW

4. The compensable injury of _____ did extend to the Claimant's right hip.
5. The Claimant sustained an injury to his right hip.

Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." We have also held that an injury or disease caused by medical treatment of a compensable injury is also part of the compensable injury. Texas Workers' Compensation Commission Appeal No. 92540, decided November 19, 1992. The claimant had the burden of proving causation in this case. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether the medical treatment of the claimant's low back injury caused the AVN was a question of fact for the hearing officer to decide. Because causation in this case is not a matter within common knowledge or experience, the claimant was required to prove causation by expert evidence to a reasonable degree of medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

In its appeal, the carrier argues that the evidence was insufficient to establish that the claimant was prescribed Prednisone for the compensable low back injury and that Dr. T attributed the AVN to chronic alcohol consumption. We agree that this case presents somewhat of an evidentiary challenge. The hearing officer found the claimant credible in his assertions that he was prescribed Prednisone by some doctor (he could not remember which one) and took it orally daily for two to three months. While the carrier did not have a burden of proof in this case, we note that there was no evidence developed on where the

¹We note that in his report of August 22, 1999, Dr. T apparently concluded that the Prednisone was actually prescribed for a condition that predated the _____, compensable injury and, for this reason, the AVN was not compensable. This was apparently the same rationale originally used by the carrier to deny liability for the AVN.

claimant obtained the Prednisone or attempts to verify the prescription either through any of the various doctors' offices or through a pharmacy. The adjuster conceded that there are cases where claimants decline to go through the red tape of carrier approval, and pay for medications out of their own pocket. Under these circumstances, we are unwilling to conclude that the implied findings of the hearing officer that Prednisone was prescribed for the claimant's low back condition and that the claimant orally took it for two to three months were not supported by sufficient evidence. See Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). As to proof of causation, Dr. T, at best, stated the possible causes of AVN and it was up to the hearing officer to determine whether Dr. T also testified that he did not think it probable that the Prednisone caused the AVN. We cannot necessarily agree with the position of the carrier that Dr. T actually stated the cause was not the Prednisone. Dr. B's opinion, on the other hand, was based on the claimant's representation that he took the Prednisone, that there were no other risk factors involved and that the use of the Prednisone was the cause of the AVN. We are satisfied that this was sufficient evidence to a reasonable degree of medical probability to support a finding of causation.

There remains the question of whether the carrier timely disputed the compensability of the AVN. Section 409.021(c) provides, generally, that a carrier must dispute the compensability of an injury by the 60th day after being notified of the injury. If a carrier fails to timely dispute, it waives the right to do so absent newly discovered evidence that could not have been discovered earlier. Section 409.021(d). We have held that this requirement to dispute applies to additional injuries not previously claimed. Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993; *but see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)), effective March 13, 2000. The time period for dispute is triggered by the receipt of written notice of the injury. Texas Workers' Compensation Commission Appeal No. 982566, decided December 16, 1998, and Texas Workers' Compensation Commission Appeal No. 952232, decided February 8, 1996. And a dispute based on newly discovered evidence does not necessarily create a 60-day window to dispute. See Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000.

The parties agreed that the carrier filed its dispute of the compensability of the AVN on October 1, 1999. The carrier contended that Dr. T's peer review of August 22, 1999, which the carrier says it received on August 24, 1999, constituted the newly discovered evidence that could not reasonably have been discovered earlier. Until this time, it argues, it had no reason to question Dr. B's assertion that the AVN was caused by the Prednisone use. Only when Dr. T challenged the claimant's assertion that he was prescribed Prednisone for his low back injury did the carrier believe it had grounds for disputing the compensability of the AVN.

The hearing officer found that the carrier had sufficient facts from which to investigate the claim based on its receipt of Dr. B's report on May 6, 1999. In reaching this conclusion, the hearing officer relied on our decision in Texas Workers' Compensation

Commission Appeal No. 961797, decided October 24, 1996, and cases cited therein for the proposition that a peer review report is generally not newly discovered evidence, but only newly created evidence. She further concluded that the carrier was responsible for undertaking a timely investigation upon receipt of Dr. B's letter rather than doing nothing until it received Dr. T's report. Whether the carrier had any reason at the time it received Dr. B's report to dispute the compensability of the AVN was largely beside the point. The time period for disputing began on the date this letter was received, not on the date the carrier felt it had sufficient evidence to dispute the compensability of the AVN. We find the evidence sufficient to support the determination that the carrier's contest of the compensability of the AVN was not timely. Under these circumstances, the AVN became compensable as a matter of law. Texas Workers' Compensation Commission Appeal No. 990724, decided May 24, 1999.

There remains the argument of the carrier that the claimant did not prove he had AVN and that, under the holding of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), the failure to timely dispute does not create an injury where there was none. The flaw in this argument is the assertion that the claimant did not establish that he had AVN. This position does not appear to have been seriously advanced at the CCH. In any case, there was more than ample evidence that the claimant had right hip AVN for which the carrier, however unadvisedly, approved surgery and for which surgery was undertaken. We have held that Williamson applies only in those cases where there is no underlying injury or disease. See Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999, and Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999, and cases cited therein. Clearly, in this case, there was an underlying hip injury and Williamson provides no relief to the carrier for its failure to timely dispute the compensability of the injury.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Dorian E. Ramirez
Appeals Judge

CONCUR IN THE RESULT:

While I reluctantly concur in the result, largely because the credibility of witnesses is basically a matter for a hearing officer to assess, I find the evidentiary posture of this case in connecting avascular necrosis (AVN) to the compensable injury something akin to a house of cards. To boot strap the testimony, without any corroboration in any document or medical report, that at some time a strong prescription drug was prescribed by some doctor for some reason and taken over some indefinite period of time, which testimony is then taken as a given in arriving at an expert opinion of reasonable medical probability of causation and the eventual "implied" finding that the drug was prescribed and that an AVN injury was thus compensable, is quite a stretch in my way of thinking. Only because of my adherence to the principle that although an appellate level review might arrive at different inferences from all the evidence presented and that such is not a sound basis for reversing findings of fact by a fact finder, particularly where credibility is a key factor, do I reluctantly concur. I also write to disassociate myself from the broad implication that a peer review report is merely "newly created" evidence and inferentially entitled to no weight on this issue. It may well be the first evidence coming to the attention of the carrier that what was thought to be and treated as a compensable injury was not, in fact, a compensable injury. That the carrier accepted and paid for treatment thinking there was causation until a subsequent report indicated otherwise should not alone be used as a basis for applying waiver.

Both determinations are, in my view, on somewhat tenuous grounds, at best.

Stark O. Sanders, Jr.
Chief Appeals Judge