

APPEAL NO. 010618

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 22, 2001, the record closed on January 29, 2001. The hearing officer determined that the respondent's (claimant) injury does include and extend to include an injury for bilateral avascular necrosis of the hips. She further determined that the claimant had disability from December 23, 1999, through the date of the CCH. The appellant (carrier) has appealed the decision and order of the hearing officer on sufficiency of the evidence grounds, also alleging that the carrier is relieved of liability for any injury to the left hip because of the doctrine of last injurious exposure. The claimant filed a response to the appeal, urging affirmance.

DECISION

Affirmed.

The claimant initially suffered an injury to the right groin when he misjudged the distance to the ground while stepping off a ladder. There was medical evidence presented from which the hearing officer could determine that the subsequently diagnosed microfracture of the right hip was part of the original injury and enhanced, accelerated, and aggravated the previously asymptomatic avascular necrosis of the right hip. There was also medical evidence from which the hearing officer could determine that the lack of treatment of the right hip resulted in additional weight bearing on the left hip, which has accelerated the avascular necrosis of the left hip, making that a natural and direct result of the original compensable injury.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

As to the carrier's invocation of the doctrine of last injurious exposure, we note that there was no such issue raised at the benefit review conference or added as an issue at the CCH. Section 410.151(b). As such, it was not a proper issue for determination at the CCH. We agree that the carrier did argue this concept to the hearing officer in the context that the carrier would not be liable for any injury to the left hip because the claimant no longer worked for the first employer after October 31, 1999, and the left hip injury was in the nature of a repetitive trauma injury which occurred while the claimant worked for another employer. The carrier's reliance on this concept is erroneous. The injury to the left hip was the natural and direct result of the original specific incident injury, not an occupational disease which might call for application of the last injurious exposure doctrine.

The hearing officer's determination of disability and the dates thereof is supported by evidence in the record, and is affirmed.

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

Michael B. McShane
Appeals Judge

CONCURRING OPINION:

I fully concur with Judge McShane's majority opinion. I merely write separately to answer what I consider to be erroneous concepts in Judge Kelley's dissenting opinion.

With all respect to Judge Kelley, for whom I have the highest admiration and the greatest affection, I simply and strongly disagree with her views in this case. The dissenting opinion would have us set new legal standards concerning medical evidence. Under this new standard, "conclusory" medical evidence should be legally insufficient to support the decision of a hearing officer. Such a standard would have us invade not only the fact-finding function of the hearing officer, but the medical judgments of the medical community.

Medical evidence is by its nature the statement of expert opinions. This is what expert witnesses do--they state opinions (conclusions) to be judged by the finder of fact. Sometimes these opinions are stated in some detail; sometimes they are expressed as conclusions based upon the expert's special knowledge and training. They especially tend to be more in the nature of conclusions in a system like the Texas Workers' Compensation Commission's dispute resolution system where they are generally presented in written form and are not subject to cross-examination. Nor do the parties have a great deal of control over how much or how little detail these expert opinions have. Clearly, such written medical records are admissible at contested case hearings and are evidence that may be considered by a hearing officer. If the hearing officer finds the medical opinion

unpersuasive, the hearing officer is not required to rely on the opinion. On the other hand, the hearing officer may rely on the opinion of an expert. Determining whether or not to rely on such evidence is one of the major functions of the fact finder--in this system, the hearing officer.

Setting up some new standard of evidentiary review by deciding that the hearing officer may not rely upon "conclusory" medical evidence is rife with mischief. Who is to determine what is "conclusory" medical evidence and what is "nonconclusory" medical evidence? The answer, of course, is the particular reviewing panel of the Appeals Panel, which will end up reweighing the medical evidence without any real legal standard upon which to rely. This will, in my view, only lead to the Appeals Panel substituting its judgment for the hearing officer's fact finding and the doctor's medical opinion. The way to avoid this problem is simply to stick to the proper legal standard of sufficiency review, rather than trying to invent new standards of review and new classes of expert evidence. See Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997.

In the present case, Dr. P expressed the opinion that the claimant's injury aggravated his avascular necrosis stating as follows:

The operant doctrine here, which is still valid by my understanding with discussions with attorneys in the state of Texas, is called "proximate cause"!

Basically at the time that the patient was injured on the right side he had no knowledge that there was anything wrong with either of his hips. As part of the evaluation when the patient did not recuperate adequately for what should have rapidly resolved, i.e., a minor groin injury. Additional studies indicated that the patient had a damaged hip. What happened when he fell was that the previously asymptomatic right hip was subjected to a degree of force sufficient to cause fracture and collapse of the devitalized subchondral bone resulting in the pain that the patient developed. That pain was initially, but in retrospect, erroneously attributed to a groin pull.

The MRI and orthopedic evaluation has led to a more adequate assessment and understanding of the patient's situation, i.e., an injury that occurred at work was superimposed on a symptomatic idiopathic avascular necrosis.

We have also now a more ominous situation in which due to the increasing pain in the right hip, even with crutches, the patient is putting more weight than we would like him to put on the opposite left hip just to get around. When the insurance company told him that they were not willing to recognize this injury and he was apparently told that he could not go out on temporary income benefit support he stayed at work, which has subjected the opposite left hip which was not part of the original injury, but unfortunately showed evidence of avascular necrosis to excessive stress and strain over and above what he would have been subjected to had he not been at work.

With the extra stress to the left hip, because the right hip hurts and the fact that he has felt obliged to stay at work because apparently his compensable injury is not being accepted by the insurance carrier it may very well have set up a chain of events in which the left hip was overstressed/overloaded as [a] direct result of damage to the right hip and should this occur the left hip will then become part of the treatment paradigm also as workers' comp. related!

In order to get this problem resolved on the right hip and to hopefully protect the left hip we need to get on with treating this patient.

No one has claimed nor will anyone claim that the avascular necrosis was caused by the fall. What is being claimed however is that the avascular necrosis superimposed an injury on an asymptomatic process that was ongoing at the time that the patient sustained an injury and caused the ongoing process to be materially damaged to the point where it became symptom causing.

We are also saying that extra stress and strain put on the left hip, which is not part of the original injury, may conceivably cause this hip to be overloaded, cause the subcondral bone on the left hip to fracture with collapse of the articular surface, creating a situation in which the left hip will not only require surgery but will have failed as a direct result of the workers' compensation injury to the right hip and the events surrounding same!

Also, Dr. M, the claimant's treating doctor, stated, in a sworn affidavit, as follows:

This disease can progress slowly over time and eventually manifest itself to the patient when some sort of stress or injury occurs to the affected area. In [claimant's] case, that event was stepping off the ladder and jamming his right hip. Although [claimant] also had avascular necrosis of the left hip at the time of his injury, he did not initially exhibit any symptoms on the left side.

As a result of the injury to the right hip, [claimant] was forced to place the majority of his weight bearing on the left hip. Due to a delay in treatment of the right hip, and prolonged weight bearing on the left which added stress to that area, the left hip has become involved and requires treatment. The left hip involvement is a direct result of the injury to the right hip.

It is my opinion that the initial injury to the right hip has aggravated the underlying avascular necrosis and has accelerated the progression of the disease, not only on the right side but bilaterally (both hips). It is also important to note that this injury may also affect other weight bearing joints such as the knees. When the hips are no longer able to bear the weight of the body, the knees are forced to bear more weight than normally and they can become involved in the process. The possibility of the knees being

involved is directly related to the amount of time they are forced to overcompensate for the weight bearing. In [claimant's] case, this process has been ongoing for over a year and could have been minimized by early treatment of the right hip.

The hearing officer relied upon these expert opinions in finding the avascular necrosis compensable. I see no reason to second guess either the doctors or the hearing officer.

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I dissent. As the hearing officer acknowledges, there is no doctor's opinion contending that the avascular necrosis did not exist prior to the _____, groin pull injury. The aggravation of avascular necrosis, most especially on a side of the body not involved in the work-related groin pull and possible microfracture, is certainly beyond common experience. Therefore, it was essential that there be medical evidence submitted which establishes the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. See Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; and Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993.

I have carefully reviewed the medical evidence in this case and, aside from some conclusory pronouncements from Dr. P that there was an "aggravation" (with no explanation as to how there was), and some speculative statements about how the avascular necrosis "may" have developed from prolonged weight bearing, there is essentially no medical evidence rising to the level of reasonable medical probability linking the development of avascular necrosis to the _____ injury. Dr. P attributes the development of left-sided avascular necrosis to the claimant's daily work activities for another employer in addition to the "lack of treatment" for the right hip. The long quotations in the concurring opinion only underscore, rather than refute, the speculative nature of the opinions and assumptions underlying them.

We have expressly held that deferring medical treatment, and thereby failing to halt the natural progression of a disease, does not constitute an "aggravation" of that disease. Texas Workers' Compensation Commission Appeal No. 93416, decided July 18, 1993.

Although the concurring opinion postulates that I am setting up a "different" evidentiary standard, far from it--we have not accepted simple allegation as evidence and

where an expert medical opinion is required, as here, simple repetition of the basic allegation ("an aggravation") absent any explanation of the "what" or "how" simply does not rise to the level of expert medical evidence establishing the causal connection as a matter of reasonable medical probability. Parties have a great deal of control over what information may be solicited from treating doctors, contrary to what the concurring opinion suggests.

Far from supporting the hearing officer's decision and attribution of this ordinary disease of life to the minor _____, incident, the great weight and preponderance of the medical evidence nearly compels the finding that the condition developed as it would have irrespective of the groin pull injury and microfracture. I would reverse and render that the great weight and preponderance of the evidence was against the hearing officer's decision that there was a work-related "aggravation," certainly as to the left hip avascular necrosis, and to the right as well.

Susan M. Kelley
Appeals Judge