APPEAL NO. 011801
FILED SEPTEMBER 18, 2001

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 July 13, 2001. The hearing officer determined that the respondent's (claimant) compensable injury extends to and includes avascular necrosis of the right hip. The appellant (carrier) appealed on sufficiency of the evidence grounds. The claimant did not submit a response to the carrier's appeal.

DECISION

Affirmed.

An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). Whether an employee has "a disease or infection naturally resulting from the damage or harm," or whether an injury extends to a particular member of his body is a factual matter for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Where the matter of the causation of the claimed injury is beyond common knowledge or experience, expert evidence to a reasonable degree of medical probability is required. 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.). The claimant sustained a compensable injury on _____, when he fell approximately 10 feet from a ladder onto a concrete floor. The claimant lost consciousness for some period, and related that when he came to he had intense pain in his head, but had no sensation from his buttocks to his feet. Medical records indicate there was "significant contusion and ecchymosis over the left upper hip and thigh area." By November 11, 1999, the claimant was reporting pain in the external rotators in the right buttocks and into the right adductors. The hearing officer detailed the conflicting medical evidence and opinions which were presented at the CCH. The evidence sufficiently supports the hearing officer's factual determination that the compensable injury extends to and includes avascular necrosis of the right hip as a natural result of the compensable injury.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The Appeals Panel will not substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 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.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN INTERSTATE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

STEVE ROPER
1616 SOUTH CHESTNUT STREET
LUFKIN, TEXAS 75901.

Michael B. McShane
Appeals Judge

CONCURRING OPINION:

I concur based on our standard of review. Expert evidence is certainly required for this injury. While I share the dissenting judge's lack of enthusiasm for the explanatory quality of the two doctors' letters in support of the claim, I cannot agree that the great weight and preponderance of the evidence is against the hearing officer's decision to believe the opinions contained therein. The relaxation of rules of evidence in our proceedings and the allowance of letters and reports written by a doctor in lieu of testimony will often leave the record lighter than would be the case in a question and answer forum. I think that the hearing officer considered the fact that the claimant was unconscious and therefore could not rule out that he may well have hit his right buttock or hip when he fell.

This being said, I would suggest to hearing officers that evidence that rises to reasonable medical probability will be that which allows the hearing officer to

understand and answer not just the bottom-line conclusion of causation, but how the injury led to development of the condition or disease under review.

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The medical evidence reflects that the claimant fell eight feet, as the emergency room (ER) records reflect, not 15 to 18 feet as stated by Dr. S in his May 7, 2001, report. Dr. S's opinion, while referring to a standard of "reasonable medical certainty," states merely that "there is a relationship" between the trauma from the claimant's fall and his subsequent development of avascular necrosis (AVN) with no attempt whatsoever to explain such "relationship." Dr. S also notes that the claimant, on January 1, 2001, gave a history of approximately three months of right inguinal pain, that is, since October 2000. Dr. D, in his March 7, 2001, report, after noting the claimant's history and Dr. S's opinion, simply concludes that he "believe[s] this is all related to the original injury in September of 1999." Dr. D, like Dr. S, does not attempt to explain the basis for this belief. Most importantly, both the ER records and Dr. D's records reflect that immediately following the injury the claimant had left hip contusion and ecchymosis and complained of left leg pain and numbness but that there was no mention of any bruising whatsoever or other evidence of blunt force trauma to the right hip area. While Dr. D did record a complaint of pain in the right hip area in October and in November 1999, the records contain no further evidence of right hip symptoms before October 2000. Dr. B, in his May 22, 2001, report states that "it is not conceivable to [him] that a trauma to the right hip could occur which disrupted the vascular supply to the femoral head but did not cause enough bony injury for the patient to register any complaints of right hip pain" and that "[t]he time delay between his work injury and presentation for right hip pain is not consistent with a traumatic cause for [AVN] and suggests a nontraumatic etiology."

It is not disputed that expert medical evidence is required to prove that the claimant's right hip AVN was caused by his fall from the ladder at work. It is well settled that a medical expert is not required 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. Gonzalez, 518 S.W.2d 524, 527 (Tex.1975). It is equally well settled that to constitute evidence of causation, an expert opinion must rest on reasonable medical probability and that reasonable probability is determined by the substance and context of the opinion and does not turn on semantics or on the use of a particular term or phrase. Insurance Company of North America v. Myers, 411 S.W.2d 710, 713 (Tex. 1966). Further, the requirement for such opinion to be grounded on reasonable medical probability applies whether the opinion is expressed in testimony or medical records since the need to avoid opinions based on speculation and

conjecture is identical in both situations. Hooper v. Torres, 790 S.W.2d 757, 760 (Tex. App.-El Paso 1990, writ denied). In Burroughs Wellcome Company v. Crye, 907 S.W.2d 497, 499 (Tex.1995), the court, citing Schaefer v. Texas Employers' Insurance Ass'n, 612 S.W.2d 199, 202-205 (Tex. 1980), stated that "[w]hen an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment."

The hearing officer states in her decision that the claimant "has shown, within a reasonable degree of medical probability that his [AVN] naturally resulted from the trauma he sustained during the fall he sustained during the course and scope of his employment." In my opinion, this determination is against the great weight of the evidence because it is not sufficiently supported by probative expert medical opinion. It defies common sense to determine that the claimant's right hip AVN was induced by the trauma he sustained in his fall when the medical records so clearly reflect the impact damage on the left hip and leg and reflect not even so much as a bruise in the right hip area. The failure of either Dr. S or Dr. L to provide some explanation as to how the claimant could have sustained sufficient trauma to the right hip as to result in the development of AVN in the right femoral head and yet bear no surface evidence of trauma in that area renders their opinions inadequate to counter the opinion of Dr. B.

I would reverse and render a new decision to reflect that the claimant failed to meet his burden of proving that his AVN was caused by his fall at work.

Philip F. O'Neill
Appeals Judge