

APPEAL NO. 090238
FILED APRIL 27, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 20, 2009. With regard to the only issue before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, includes a recurrent disc herniation at L5-S1.

The appellant (carrier) appealed, contending that a prior disc herniation at the same level only resulted in a degree of lowered resistance and that there was a lack of evidence of reasonable medical probability establishing causation. The appeal file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable injury to his lumbar spine at the L5-S1 level on _____. An MRI performed on September 7, 2004, had an impression of a large paracentral disc protrusion in L5-S1. Spinal surgery in the form of a right L5-S1 discectomy was performed on March 11, 2005, by Dr. B the claimant's treating doctor. The hearing officer in the Background Information, commented that the last follow-up progress note from Dr. B prior to the current alleged injury in (alleged date of injury), was dated May 19, 2005. That note stated that the claimant was to return to work a maximum of six hours a day with a 15-pound lifting restriction. The claimant testified that he was much improved after the spinal surgery having only occasional stiffness on rainy days and that he attended college and worked some light duty salesman jobs. A Report of Medical Evaluation (DWC-69) by a doctor selected by the treating doctor acting in place of the treating doctor certified the claimant at clinical maximum medical improvement on September 22, 2005, with a 5% impairment rating based on Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment.

The claimant testified that some time in (alleged date of injury), as he was kneeling and bending forward putting a plate in the dishwasher at home, he felt pain in his back and had difficulty getting up. The claimant returned to Dr. B, who in a report dated July 7, 2008, noted that the claimant "[h]ad 90% improvement" in his back "until three weeks ago." Dr. B diagnosed lumbar radicular syndrome and a palpable recurrent disc herniation and ordered an MRI. An MRI performed on November 3, 2008, notes a large (13 mm) disc herniation at L5-S1. In a report dated November 24, 2008, Dr. B commented:

He returns after having his MRI performed, which is remarkable for recurrent disk herniation on the right side at the L5-S1 level. This is the

level, where he had his previous surgery performed This surgery definitely predisposed him to further disk issues of which could include degeneration or reherniation. In my opinion, this should be covered as part of his original worker's compensation insurance.

A peer review report dated November 26, 2008, stated that the 2008 dishwasher incident "is a new event and is unassociated with the previous event occurring years earlier on _____." The peer review report indicates that the 2008 event may be due to the claimant's weight and "genetic tendencies for disc degeneration."

The hearing officer cited the two MRIs and Dr. D's November 24, 2008, report in finding that the recurrent herniated disc in (alleged date of injury), was a naturally flowing result of the compensable injury of _____.

Section 401.011(26) defines injury to mean, in part, "damage or harm to the physical structure of the body and a disease or infection **naturally resulting** from the damage or harm. [Emphasis added.]" Appeals Panel Decision (APD) 000594, decided May 8, 2000, cited Maryland Casualty Company v. Rogers, 86 S.W.2d 867, 871 (Tex. Civ. App.-Austin 1935, writ ref'd) as follows:

By the word "naturally," as used in the statute, it is not meant that the disease which is shown to have attacked the victim of the accident is such disease as usually and ordinarily follows the accident; but it is only meant that the injury or damage caused by the accident is shown to be such that it is natural for the disease to follow therefrom, considering the human anatomy and the structural portions of the body in their relations to each other. However, the fact that an injury may affect a person's resistance will not mean that a subsequent injury outside the work place is compensable, where the subsequent disease or infection is not one which flowed naturally from the compensable injury.

In determining whether the subsequent injury is one that naturally flowed from the compensable injury, it is important to consider whether there was a distinct, nonwork-related activity involved in the subsequent injury, whether a distinct different body part was injured, the length of time between the injuries, whether there was only a degree of weakening or lowered resistance, and whether there was medical evidence to establish causation. APD 000594, *supra*. In the instant case, the only factor supporting the claimant's position is that the follow-on injury was to the same body part as the original 2004 injury. The follow-on injury, in the present case, was almost three years after the claimant's surgery for the original 2004 injury.

APD 022225, decided October 4, 2002, is a case with similar facts where a compensable 2000 disc protrusion injury at L4-5 was held not to include a nonwork sneeze induced 2001 L4-5 herniated disc injury about one year after the original injury. The Appeals Panel in APD 022225 cited APD 021169, decided June 27, 2002, a case involving a follow-on injury to the left leg in which the Appeals Panel discussed several

cases involving follow-on injuries to the same body part and to other body parts, and concluded that a follow-on injury that resulted from instability, weakness, or lowered resistance from the compensable injury does not constitute making the follow-on injury compensable.

In the instant case, both Dr. B and the hearing officer base their opinions on the fact that the claimant's 2005 spinal surgery "definitely predisposed [the claimant] to further disk issues" meaning that the 2008 herniation resulted from the claimant's predisposition for lowered resistance based on the 2004 injury and 2005 spinal surgery. Dr. B does not discuss causation beyond his opinion that the 2005 surgery predisposed the claimant "to further disk issues." The hearing officer's finding that the recurrent herniated disc in (alleged date of injury), was a naturally flowing result of the _____, compensable injury and the conclusion of law that the compensable injury of _____, includes a recurrent disc herniation at L5-S1 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's determination that the compensable injury of _____, includes a recurrent disc herniation at L5-S1 and render a new decision that the compensable injury of _____, does not include a recurrent disc herniation at L5-S1.

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

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge