

APPEAL NO. 100895
FILED AUGUST 23, 2010

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 June 8, 2010. With regard to the sole issue before him, the hearing officer determined that the compensable injury of _____, included a left L5-S1 disc herniation with S1 radiculopathy.

The appellant (carrier) appealed, contending that there was insufficient medical evidence to explain how the respondent (claimant) sustained a herniated lumbar disc at the L5-S1 level during shoulder surgery. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified how he injured his right arm and shoulder loosening fittings with a wrench at work on the date of injury. The claimant eventually had right shoulder surgery in the form of an arthroscopic subacromial decompression and rotator cuff repair on August 21, 2009, performed by (Dr. J). The operative narrative of the August 21, 2009, surgery states that the claimant was "positioned in the sitting position, in the beach chair, a pillow under his knees, heels padded, and sequential compression devices on his legs." The claimant testified that when he awoke from the surgery he had numbness and tingling in his left leg. Dr. J, in a report dated August 27, 2009, noted that the claimant had spent a night in the hospital, the location of the numbness, and the claimant did not have back pain or buttock pain. Dr. J, in a report dated October 29, 2009, noted left lower extremity radiculopathy. An MRI performed on November 23, 2009, showed a 5 mm disc protrusion and posterior annular tear at the L5-S1 level and disc bulges at several other levels. The claimant alleges that the L5-S1 disc protrusion/herniation occurred or was aggravated during the August 21, 2009, surgery for the compensable right shoulder injury.

(Dr. B) was appointed as the designated doctor to determine, among other matters, the extent of the compensable injury. In a report dated December 18, 2009, regarding the back, Dr. B wrote that the back and left leg possible radiculopathy "certainly should be considered part of the compensable injury." Dr. B does not give any explanation regarding his conclusion. (Dr. C) performed a peer review and concluded that there was insufficient medical evidence of causation to support Dr. B's conclusion. Dr. C's peer review report and Dr. J's operative report were sent to Dr. B in a letter of clarification. Dr. B responded by letter dated May 4, 2010, stating that he agrees with Dr. C "in that in most cases, positioning during surgery would not cause an aggravation to a lumbar condition; however, that does not completely rule out the plausibility or probability that the positioning during surgery could have aggravated his lumbar condition."

The Texas courts have long established the general rule that “expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience” of the fact finder. Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. Appeal Panel Decision 022301, decided October 23, 2002. See also City of Laredo v. Garza 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing Guevara. In this case, how shoulder surgery can cause a herniated lumbar disc or an aggravation of a pre-existing lumbar condition requires expert medical evidence to a reasonable degree of medical probability. Dr. B’s comment that while positioning during surgery would not cause an aggravation of a lumbar condition in most cases but does not completely rule out the plausibility or probability of that happening does not meet the required standard of proof of causation within a reasonable medical probability required by Guevara and Laredo.

In reviewing a “great weight” challenge, we must examine the entire record to determine if: (1) there is only “slight” evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). In this case, we hold the hearing officer’s decision to be 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 left L5-S1 disc herniation with S1 radiculopathy, and we render a new decision that the compensable injury of _____, does not include a left L5-S1 disc herniation with S1 radiculopathy.

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

**CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Veronica L. Ruberto
Appeals Judge