

APPEAL NO. 101679
FILED DECEMBER 30, 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 (CCH) was held on October 7, 2010.

The issues at the CCH were:

1. Is the [appellant (self-insured)] liable for the payment of accrued benefits pursuant to [28 TEX. ADMIN. CODE § 124.3 (Rule 124.3)] resulting from its failure to dispute or initiate the payment of benefits within [15] days of the date it received written notice of the injury?
2. Does the compensable injury of _____, extend to include an injury to the left knee consisting of post-traumatic osteoarthritis and loose bodies?

The hearing officer determined that the "compensable injury of _____ . . . include[s] an injury [to the left knee] consisting of post-traumatic osteoarthritis and loose bodies" and that the self-insured is liable for the payment of accrued benefits pursuant to Rule 124.3 resulting from its failure to dispute or initiate the payment of benefits within 15 days of the date it received written notice of the injury.

The self-insured appealed, contending that the hearing officer misapplied Rule 124.3 and that the evidence does not support the hearing officer's extent-of-injury determination. The respondent (claimant) responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant testified that as she was walking down some stairs at her workplace, she heard a "pop" and felt immediate pain in her left knee. The claimant reported her injury and was referred to an orthopedic clinic for treatment. Medical records indicate that the claimant had prior reconstructive left knee surgery in 1985.

RULE 124.3

The hearing officer made an unappealed finding that the self-insured received (first) written notice of the claimant's injury on February 3, 2010. The self-insured's attorney represented that the self-insured began payment of benefits. In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated March 15, 2010, filed with the Texas Department of Insurance, Division of Workers' Compensation (Division)

on March 16, 2010, the self-insured accepted a “left knee strain only” and disputed entitlement to benefits for “post-traumatic arthritis resulting from previous non-work related surgery and extensive pre-existing arthritic and degenerative changes.”

The claimant had left knee surgery on March 22, 2010. The pre- and post-operative diagnoses were “[l]eft knee osteoarthritis with numerous loose bodies.” The procedure was an arthroscopic removal of loose bodies from the anterior intracondylar region. In a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) dated March 22, 2010, and filed with the Division on March 24, 2010, the self-insured stated that they are denying the claim for workers’ compensation benefits “in its entirety.”

As previously noted, the parties stipulated that on _____, the claimant sustained a compensable injury. The hearing officer, in the Background Information of her decision wrote:

With regard to the carrier liability issue, the [self-insured] received first written notice of the injury on February 3, 2010. [The self-insured] had until February 18, 2010, to file a [PLN-1]. Because the [self-insured] did not do so until March 24, 2010, according to Rule 124.3(a)(2)(B) the [self-insured] is liable for medical services provided to the claimant prior to the March 24, 2010, date.

Rule 124.3(a) provides in pertinent part that upon receipt of first written notice of injury the carrier “shall conduct an investigation relating to the compensability of the injury, the carrier’s liability for the injury, and the accrual of benefits.” If the carrier believes that it is not liable for payments the carrier is to file the notice of denial of the claim in the form and manner required by Rule 124.2 of this title. Rule 124.3(2) provides that when the carrier files a notice of denial after the 15th day but on or before the 60th day after receipt of written notice of the injury; (B) the insurance carrier is liable for and “shall pay” for all medical services, in accordance with the Act and rules, provided prior to the filing of the notice of denial. Rule 124.3(e) further provides in part, that this section does not apply to disputes of extent of injury.

In its PLN-11 dated March 15, 2010, filed with the Division on March 16, 2010, the self-insured disputed post-traumatic arthritis and degenerative changes but “accepts [a] left knee sprain only.” In another PLN-11, dated March 23, 2010, filed with the Division on March 24, 2010, the self-insured disputed “pre-existing arthritis with multiple loose bodies” and again “accepts left knee sprain only.” A PLN-1 dated March 22, 2010, also filed with the Division on March 24, 2010, denies “this claim in its entirety,” stating that there was no causal connection between the alleged injury and the employment. The self-insured’s stipulation at the CCH that on January 10, 2010, the claimant sustained a compensable injury negated the self-insured’s PLN-1 in which the self-insured denied the claim in its entirety.

We reverse the hearing officer's determination that the self-insured is liable for the payment of accrued benefits pursuant to Rule 124.3 resulting from its failure to dispute or initiate the payment of benefits within 15 days of the date it received written notice of the injury because the self-insured had accepted a left knee sprain and had stipulated to a compensable injury at the CCH. We render a new decision that the self-insured is liable for the payment of accrued benefits in accordance with this decision.

EXTENT OF INJURY

The hearing officer in her Background Information stated that:

[(Dr. S), the claimant's treating doctor] provided a letter to the Division, indicating that claimant's incident at work exacerbated or aggravated her preexisting left knee osteoarthritis and foreign bodies. [(Dr. L)], [self-insured's] peer review doctor, disagreed with [Dr. S]. The preponderance of the evidence is that the compensable injury extends to include post-traumatic osteoarthritis and loose bodies.

Actually, Dr. S was responding to a letter dated June 3, 2010, from the claimant's ombudsman in which Dr. S was asked for an opinion whether the traumatic occurrence in question (walking when she felt a pop) caused the diagnosed conditions. Dr. S replied:

While it is impossible to be exact, my opinion is that the patient's knee symptoms are most likely related to her chronic knee problem and they were exacerbated by the more recent injury in January 2010. Certainly twenty-five years out from reconstructive type surgery that she had on the left knee, it would be quite common to have fairly severe or advanced degenerative arthritis including possible loose bodies.

Conversely, in another letter dated July 16, 2010, responding to questions from the carrier's adjuster, Dr. S was asked to indicate specific objective medical evidence of further damage or harm to the physical structure of the claimant's body as a result of the incident of _____. Dr. S answered "[n]one available." In another portion of the letter, Dr. S is asked "[i]f there is no specific physical change, is the evidence you are relying on pain symptomology" to which Dr. S replied "Yes." The last comments were initialed "7/20/10."

Also, in evidence is a peer review report dated March 19, 2010, from Dr. L. Dr. L opined that there was no evidence that any damage to the claimant's knee occurred as a result of walking down the steps and feeling a pop. Dr. L stated that the claimant "clearly had pre-existing arthritis with multiple loose bodies, and simply noticed crepitation in her knee while walking down the stairs" and that there is "no evidence that walking down the stairs caused any worsening of [the claimant's] pre-existing arthritis."

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert medical evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. Appeals Panel Decision (APD) 022301, decided October 23, 2002. See also Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). To be probative, expert testimony must be based on reasonable medical probability. City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) In this case, the claimant proceeds on a theory that her pre-existing chronic degenerative knee conditions (also arthritis and loose bodies) were aggravated by walking down the stairs and a near fall. How a near fall can cause post-traumatic osteoarthritis and loose bodies requires expert medical evidence.

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 and that the term includes an occupational disease. See Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet.), in which the court held that the aggravation of a pre-existing condition is a compensable injury for purposes of the 1989 Act. See also APD 062010, decided December 4, 2006, in which the Appeals Panel held that to prove an aggravation of a pre-existing condition, there must be some enhancement, acceleration, or worsening of the underlying condition from the injury and not just a mere recurrence of symptoms inherent in the etiology of the pre-existing condition.

Although Dr. S’s reply to a letter states that the claimant’s symptoms “are most likely related to her chronic knee problem” and “were exacerbated by the more recent injury” in a subsequent response letter Dr. S stated there was no medical evidence of further damage or harm to the physical structure of the claimant’s body. We hold that Dr. S’s contradictory responses to letters do not prove to a reasonable medical probability by expert evidence that the pop in the knee and immediate pain caused an aggravation of the claimant’s post-traumatic osteoarthritis and loose bodies. Also in evidence is Dr. L’s peer review report which medically explains the cause of the pop and pain as crepitation and no worsening of the pre-existing left knee arthritis.

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). The hearing officer’s determination that the claimant’s compensable injury of _____, includes post-traumatic osteoarthritis and loose bodies 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 claimant’s compensable injury of _____, includes post-traumatic osteoarthritis and loose bodies and render a new decision that the claimant’s compensable injury of

_____, does not include an injury consisting of post-traumatic osteoarthritis and loose bodies.

SUMMARY

We reverse the hearing officer's determination that the compensable injury of _____, includes an injury consisting of post-traumatic osteoarthritis and loose bodies and render a new decision that the compensable injury of _____, does not include post-traumatic osteoarthritis and loose bodies.

We reverse the hearing officer's determination that the self-insured is liable for payment of accrued benefits pursuant to Rule 124.3 resulting from its failure to dispute or initiate the payment of benefits within 15 days of the date it received written notice of the injury. We render a new decision that the self-insured is liable for the payment of accrued benefits in accordance with this decision.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**EXECUTIVE DIRECTOR
(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge