

APPEAL NO. 110108
FILED MARCH 31, 2011

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 December 28, 2010. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____ (stipulated); (2) the "claimed" (compensable) injury of _____, includes an injury to the left femur diagnosed as a fracture and nonunion of the fracture; (3) the appellant (self-insured) has not waived the right to contest compensability of the femur fracture in the claimant's left leg because the self-insured timely contested the compensable injury under Sections 409.021 and 409.022; and (4) the claimant had disability beginning March 8, 2010, and continuing through the date of the CCH.

The self-insured appealed the extent-of-injury issue asserting there was insufficient expert medical evidence of causation and the disability issue. The claimant responded, urging affirmance.

The hearing officer's determinations on the compensable injury and carrier waiver issues were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____.

The claimant was a clerk in a justice of the peace court. The claimant testified that on _____, she was performing her normal duties when she began to have left leg pain. The claimant testified that the pain grew worse as the day wore on and that late in the afternoon, as she was walking she felt a "pop" in her left leg and as she continued to walk her left leg gave out and she fell to the floor. The claimant was immediately taken to a hospital emergency room where the claimant was diagnosed with a pathologic fracture of the left mid distal femur with minimal trauma. The medical history indicated that the claimant described a "lymphoma with some tumor involving the left lower thigh or leg that responded to radiation" some years before. The medical reports indicate "minimal trauma." The claimant had surgery the next day, (day after date of injury). The hospital discharge diagnosis, dated February 9, 2009, was a "[p]athologic fracture of the left femur, likely due to radiation, prior history of radiation, osteoradionecrosis." A consultant report, dated February 6, 2009, had a lengthy discussion of the claimant's medical history and concluded with an impression: "[p]athologic fracture, likely secondary to osteoradionecrosis of the left midfemur secondary to a long course of radiation therapy, with resultant devitalized bone at the site of [the] fracture."

The claimant was paid eight weeks of temporary income benefits and the claimant returned to work. The hearing officer in his Background Information, noted the claimant's fracture did not heal, discussed the claimant's radiation treatment of 20 years prior to the date of injury and noted that, due to the nonhealing, another surgery (or amputation) with the use of cement to augment the deficient bone would be necessary.

EXTENT OF INJURY

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 walking at work was a producing cause of the fractured femur. See APD 101679, decided December 30, 2010. (Dr. M), one of the claimant's treating doctor's, in a note dated February 25, 2010, stated:

[The claimant] is a patient of ours who has a nonhealing femoral fracture status post radiation for a liposarcoma which was initially irradiated in the 1990's. She has radiation induced osteitis at the present time. The initial cause, at least according to the patient history, was a fall in [month] of [year] at [city] She does have a pre-existent condition which possibly has weakened her bone, but it has definitely caused it not to heal secondary to the radiation, she received in the 1990's. It is more than likely that the trauma contributed to the fracture.

Dr. M related the trauma to a (prior date of injury), work related fall (not the _____, event at issue in this case). The claimant agreed that she had sustained a fall in (prior date of injury), but for whatever reason that claim was not pursued. A peer review report dated June 17, 2010, concluded that the claimant's "nonhealing femur fracture is related to the radiation induced osteitis of bone."

The best evidence of causation is in the medical history of a report dated February 6, 2009, by (Dr. S), a consultant, who stated:

As noted, [the claimant] is up and down constantly at work and weight-bearing and walking, and this became increasingly difficult for her, but she continued to work for the normal workday. In late afternoon, she decided that the pain was severe enough that she would have to go home She wanted to prepare the coffee pot for the next day and apparently was able to carry the coffee pot to the bathroom, get water and set it up. When trying to walk back to her desk, she was having severe pain, briefly leaned on the wall, and then when she took the next step, she heard a popping

sound from the left leg, had sudden severe exquisite pain, and fell to the floor.

Dr. S, however, does not give an opinion on causation but rather recites the factual events of the day as told to him by the claimant. We further note that the claimant's testimony, and medical records, all recite the "pop" the claimant felt was prior to her fall to the floor. Dr. S had an impression of: "[p]athologic fracture, likely secondary to osteoradionecrosis of the left midfemur secondary to a long course of radiation therapy, with resultant devitalized bone at the site of [the] fracture." Dr. S does not provide an explanation how walking was a producing cause of the femur fracture.

The hearing officer, in his Background Information states that "simply walking" can result in a compensable injury and that the employer takes the claimant as it finds him or her. We do not disagree with that statement. The hearing officer goes on to state: "[t]he claimant's walking put weight and stress on her left leg and was a significant producing cause of the femur fracture, and without which the injury would not have occurred." No doctor's report expresses that opinion.

In Guevara, *supra*, the Texas Supreme Court reiterated the longstanding general rule that "expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors." Guevara went on further to state that "[c]ompetent proof of the relationship between the event sued upon and the injuries or conditions complained of has always been required." In this case, we hold that evidence that walking can produce sufficient stress on a radiation devitalized bone to cause a femur fracture and nonunion of the fracture is outside the common knowledge and experience of the fact finder and requires expert medical evidence within a reasonable medical probability. APD 101604, decided December 14, 2010.

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).

We hold that none of the medical evidence constitutes expert medical evidence within reasonable medical probability sufficient to establish that walking could produce stress on a radiation devitalized bone to cause a femur fracture and nonunion of the fracture. Accordingly, we reverse the hearing officer's determination that the claimed injury of _____, extends to an injury to the left femur diagnosed as a fracture and nonunion of the fracture and render a new decision that the claimed injury of _____, does not include an injury to the left femur diagnosed as a fracture and nonunion of the fracture.

DISABILITY

The hearing officer determined that the claimant had disability beginning March 8, 2010, and continuing through the date of the CCH. The period of disability in this case was occasioned by the second surgery and treatment required for the left femur fracture and nonunion of the fracture. Because we have reversed the hearing officer's determination on compensability of the left femur fracture and nonunion of the fracture we also reverse the hearing officer's determination that the claimant had disability beginning March 8, 2010, and continuing through the date of the CCH and render a new decision that the claimant did not have disability beginning March 8, 2010, and continuing through the date of the CCH.

SUMMARY

We reverse the hearing officer's determinations that the claimed injury of _____, includes an injury to the left femur diagnosed as a fracture and nonunion of the fracture. We render a new decision that the claimed injury of _____, does not include an injury to the left femur diagnosed as a fracture and nonunion of the fracture.

We also reverse the hearing officer's determination that the claimant had disability beginning March 8, 2010, and continuing through the date of the CCH and render a new decision that the claimant did not have disability beginning March 8, 2010, and continuing through the date of the CCH.

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

**COUNTY CLERK
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge