

APPEAL NO. 120253  
FILED APRIL 16, 2012

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 January 23, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue by deciding that the compensable injury of [date of injury], did not include a lumbar spine L4-5 disc mildly narrowed and a diffuse 2 mm disc protrusion producing mild ventral dural deformity, worse in extension than in flexion, leaving about 8 mm residual midsagittal dural diameter, with bilateral mild flaval prominence present with dorsolateral impression on the dural sac (claimed myelogram/CT scan findings). The appellant (claimant) appealed the hearing officer's extent-of-injury determination. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that she was riding in a golf cart when her supervisor, who was driving, took a turn too sharply and hit a pole. The claimant testified she fell out of the cart, hurting her neck and back. On April 27, 2004, the claimant had fusion surgery at the L5-S1 level. The evidence reflects that the claimant was diagnosed with the claimed myelogram/CT scan findings. The claimant contends that the claimed myelogram/CT scan findings are part of the compensable injury due to adjacent disc disorder as a result of the spinal fusion. The carrier contends that the diagnosis of adjacent disc disorder does not apply.

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. 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.) citing *Insurance Company of North America v. Meyers*, 411 S.W.2d 710, 713 (Tex. 1966).

In analyzing the applicable law and facts of the case, the hearing officer stated in his Background Information section of his decision:

[Dr. S] wrote in a letter of causation dated April 22, 2011, that "the literature states 40 to 50% of fusion patients develop problems more rapidly at adjacent discs due

to the fusion. [The claimant] is one of these patients.” He wrote on January [6], 2011, that [c]laimant’s severe back pain and leg pain are due to adjacent disc and joint disease and relates that to her fusion related to her workers’ compensation injury.

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Also, Dr. S does not note in his records or causation letters a comparison of [c]laimant’s pre-surgery [L4-5] disc condition or her post-surgery [L4-5] condition closer to her surgery and her [L4-5] condition now such as what degenerative changes occurred that cause him to diagnose adjacent disc disorder. He does not address how her co-morbidities may be a part of [c]laimant’s pain complaints or that she had continuing and chronic low back pain from the date of the fusion through the present and how that pain may be different near the surgery versus how it is now to support a finding of adjacent disc disorder versus failed back surgery syndrome . . . . [Transcon. Ins. Co. v. Crump, 330 S.W.3d 211 (Tex. 2010)] requires a doctor to discuss and eliminate other diagnoses listed in a differential diagnoses. Dr. [S] did not do that in this case. Claimant did not provide expert medical evidence to establish, within a reasonable degree of medical probability, a causal nexus between the claimed extent of injury and the mechanism of injury, and that the mechanism of injury is a producing cause of the claimed extent of injury.

The Supreme Court in its Crump decision considered in part the issue of whether expert medical causation testimony from a treating physician relying on a differential diagnosis is reliable and therefore legally sufficient evidence to support the jury’s verdict. The Supreme Court held that “the treating physician’s opinion was based on a reliable foundation and therefore, legally sufficient evidence supports the jury’s verdict.” The Supreme Court recognized that differential diagnosis is “a clinical process whereby a doctor determines which of several potential diseases or injuries is causing the patient’s symptoms by ruling out possible causes—by comparing the patient’s symptoms to symptoms associated with known diseases, conducting physical examinations, collecting data on the patient’s history and illness, and analyzing that data—until a final diagnosis for proper treatment is reached.”

We note that an analysis of other possible causes of an injury or illness is a factor to consider when determining causation. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) and E. I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). However, the Supreme Court in Crump noted that “a medical causation expert need not ‘disprov[e] or discredit[] every possible cause other than the one espoused by him.’” The Supreme Court does not hold that the only method to establish expert medical causation evidence is by differential diagnosis.

In this case, the hearing officer misinterpreted and misapplied the law under the Crump decision because he has interpreted that case as requiring a differential diagnosis from a doctor to establish causation and this requires a remand.

The hearing officer must utilize the proper legal standard in analyzing and weighing the evidence in this case. Therefore, we reverse the hearing officer's determination that the compensable injury of [date of injury], did not include the claimed myelogram/CT scan findings and remand the extent-of-injury issue to the hearing officer for further action consistent with this decision. The hearing officer is to determine the extent-of-injury issue based on the evidence already admitted at the CCH.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

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

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Cynthia A. Brown  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge