

APPEAL NO. 121581
FILED OCTOBER 8, 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 commenced on May 11, 2012,¹ and concluded on July 6, 2012, in [City], Texas with [hearing officer] presiding as hearing officer. The hearing officer determined that: (1) the respondent (claimant) did not have disability from March 24 through May 23, 2011; (2) the employer did not make a bona fide offer of employment (BFOE) to the claimant entitling the appellant (self-insured) to adjust post-injury weekly earnings; (3) the compensable injury of [date of injury], extends to right knee degenerative joint disease in the form of degenerative changes of the patellofemoral compartment and patellofemoral arthritis but does not include right knee degenerative joint disease in the form of articular cartilage loss with spurs in the medial and lateral compartments; (4) the claimant reached maximum medical improvement (MMI) on July 14, 2011; and (5) the claimant's impairment rating (IR) is four percent.

The self-insured appealed, contending that: (1) the hearing officer's decision and order does not reflect the CCH issue; (2) the hearing officer's decision regarding the extent of injury is based "on a typographical error" by the designated doctor; and (3) the claimant failed to meet her burden of proof regarding the extent-of-injury issue. The claimant responded, urging affirmance.

The hearing officer's determinations that: (1) the claimant did not have disability from March 24 through May 23, 2011; (2) the employer did not make a BFOE; (3) the claimant reached MMI on July 14, 2011; and (4) the claimant's IR is four percent have not been appealed and have become final pursuant to Section 410.169.

This case was initially set for hearing on May 11, 2012, and the self-insured failed to appear. After being notified of its failure to appear, the self-insured contacted the Texas Department of Insurance, Division of Workers' Compensation (Division) and requested an opportunity to appear and present evidence. The case was rescheduled and heard on July 6, 2012. The hearing officer held a show cause hearing and, in the Background Information, stated that he found that the self-insured did not have good cause for its failure to appear at the May 11, 2012, CCH.²

DECISION

Reversed and remanded.

¹ The hearing officer's decision states that the matter was initially called for a hearing on March 5, 2012, but the records indicate the date was May 11, 2012.

² The hearing officer did not make a finding of fact on no good cause.

It is undisputed that the claimant was a corrections officer with the [employer] and sustained a compensable injury on [date of injury]. The claimant testified that she twisted her right knee while performing training involving a “two-man takedown” procedure on [date of injury]. The self-insured has accepted a right knee strain/sprain. The claimant saw [Dr. K] on January 28, 2011. In a report dated February 8, 2011, Dr. K diagnosed “[r]ight knee sprain possible internal derangement.” An MRI performed on February 11, 2011, had the impression of “three-compartment arthritic change with considerable degenerative change in the patellofemoral compartment.” The claimant subsequently began treating with [Dr. A]. In a report dated March 14, 2011, Dr. A references the February 11, 2011, MRI, diagnoses degenerative joint disease of the right knee, and lumbar radiculopathy, and comments that the claimant’s “surgery from many years ago appears to be intact.” In a report dated June 14, 2011, Dr. A notes a fall to the claimant’s knee “1 week ago” and again has an impression of degenerative joint disease of the knee and right knee pain. Dr. A commented that the claimant originally injured her knee in [date of injury], while doing a training exercise for work and that she was found to have some patellofemoral arthritis stemming from the patellar realignment procedure when she was younger.

At the CCH the parties stipulated that [Dr. P] was appointed by the Division as a designated doctor to give an opinion on MMI, IR, extent of injury and disability.³ Dr. P, in a report dated August 21, 2011, noted that the claimant “rolled on her right knee” during the training exercise which “included twisting of her right knee” and that “mechanisms of injury support the [causal] relationship between the compensable site of the injury and the event.” Regarding the extent of injury, Dr. P states:

Based upon the history and nature of the injury and the patient’s complaints as they relate to the alleged site, it is my opinion that [the claimant’s] extent of the injury includes the right knee area.

Also in evidence is what appears to be the second page of a letter of clarification [LOC] where Dr. P is asked:

Please offer your opinion as to whether the injury includes lumbar radiculitis, arthritic and degenerative changes of the patellofemoral compartment, the articular cartilage loss with spurs in the medial and lateral compartments.

Dr. P responded in a letter dated October 12, 2011, stating in part:

³ In his decision and order, the hearing officer states that Dr. P was the designated doctor regarding the extent of claimant’s compensable injury and disability.

I stated that the patient is at MMI or her knee sprain/strain and dislocation of her patella (compensable injuries). The lumbar radiculitis, arthritic and degenerative changes of the patellofemoral compartment are compensable to this injury. The patient has had several injuries to her knees in the past. There [were] no notes, MRI or needle EMG performed for her lower back and is not compensable to this injury. The description of her injury does not relate to her lower back. The articular cartilage loss with spurs in the medial and lateral compartments are also not compensable to this injury because of her history with her knee injuries.

The self-insured contends that the quoted paragraph contains a typographical error and the comment should read that the degenerative changes of the patellofemoral compartment are “not” compensable to this injury.

THE ISSUE

The disputed issue reported out of the benefit review conference, and agreed to by the parties, was:

Does the compensable injury of [[date of injury]], extend to . . . the diagnoses of right knee degenerative joint disease and/or patellofemoral arthritis?

The hearing officer in Conclusion of Law No. 5 determined:

The compensable injury of [date of injury], extends to . . . right knee degenerative joint disease in the form of degenerative changes of the patellofemoral compartment and patellofemoral arthritis but does not include right knee degenerative joint disease in the form of articular cartilage loss with spurs in the medial and lateral compartments.

This issue was not reformed or amended by the parties.

The hearing officer’s determination does not conform to the disputed issue before him by referring to the patellofemoral compartment and making a determination on a condition of “articular cartilage loss with spurs in the medial and lateral compartments.” We reverse the hearing officer’s determination that the compensable injury of [date of injury], extends to degenerative joint disease in the form of degenerative changes of the patellofemoral compartment and patellofemoral arthritis but does not extend to right knee degenerative joint disease in the form of articular cartilage loss with spurs in the medial and lateral compartments and remand the case to the hearing officer to make a

determination of the extent-of-injury issue that conforms to the disputed issue before him.

CAUSATION

The Appeals Panel has previously held that proof of causation must be established to reasonable medical probability by expert evidence where the subject is so complex 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 a reasonable medical probability. *City of Laredo v. Garza*, 239 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing *Insurance Company of North America v. Myers*, 411 S.W.2d 710, 713 (Tex. 1966). In this particular case, causation of how a twisted or rolled knee would cause or aggravate right knee degenerative joint disease and/or patellofemoral arthritis is beyond common knowledge and proof of causation must be established to a reasonable medical probability by expert evidence.

The hearing officer, in his Background Information, indicates that he agrees with the concept that proof of causation for the claimed conditions must be established by expert medical evidence. However, the hearing officer then comments that the designated doctor's report has presumptive weight which establishes "prima facie evidence of the causal relationship, or lack thereof" between the compensable injury and the conditions at issue. The designated doctor, Dr. P, in the response to the LOC, simply cites the knee sprain/strain and dislocation of the patella as the compensable injuries. The opinion given by Dr. P does not establish causation, particularly as it is conclusory. The hearing officer erred in stating that Dr. P's opinion established prima facie evidence of causation between the compensable injury and the conditions at issue.

The hearing officer makes a finding that "[n]o other expert medical opinions were offered regarding the relationship between [the] [c]laimant's incident of [date of injury], and the diagnoses of right knee degenerative joint disease and patellofemoral arthritis." Upon review of the evidence, we disagree that no other expert medical opinions regarding causation were offered. Dr. A, in his report of March 14, 2011, discusses the claimant's past history of seven surgeries on her right knee over many years and discusses the claimant's x-rays showing decreased joint space in the patellofemoral compartment. Dr. A, in a chart note of August 29, 2011, discusses that the claimant "was found to have some patellofemoral arthritis stemming from a patellar re-alignment procedure when she was younger and it has been felt that her arthritis has been aggravated by the twisting injury that she sustained in January." It is inaccurate to say that there are no other expert medical opinions regarding the relationship between the

claimant's compensable injury and the diagnosis of right knee degenerative joint disease and patellofemoral arthritis.

We reverse the hearing officer's determination that the compensable injury extends to right knee degenerative joint disease in the form of degenerative changes of the patellofemoral compartment and patellofemoral arthritis but does not include right knee degenerative joint disease in the form of articular cartilage loss with spurs in the medial and lateral compartments. We remand the case for the hearing officer to use the correct standard of whether the claimant met her burden of proof on causation.

In the decision on remand, the hearing officer is to make a finding of fact whether the self-insured had good cause for its failure to appear at the CCH scheduled for May 11, 2012.

The parties are to be allowed to comment on the evidence in the record but no additional evidence is to be admitted by the parties.

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 Division, 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 **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**JONATHAN D. BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.**

For service by mail the address is:

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STATE OFFICE OF RISK MANAGEMENT
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Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge