

APPEAL NO. 122022
FILED NOVEMBER 26, 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 August 30, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent's (claimant) compensable injury of [date of injury], extends to a herniated nucleus pulposus (HNP) at L4-5 and at L5-S1 and lumbar radiculopathy; (2) the claimant has not reached maximum medical improvement (MMI); and (3) the claimant does not have an impairment rating (IR). The appellant (carrier) appeals the hearing officer's determinations on extent of injury, MMI, and IR. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the Texas Department of Insurance, Division of Workers' Compensation-selected designated doctor, [Dr. P], certified that the claimant reached MMI on July 14, 2011, and assigned a five percent IR; and (3) the treating referral doctor, [Dr. S], certified that the claimant was not at MMI on October 25, 2011. The claimant testified that he felt a pop in his back when he bent over to push on a wrench to tie a knot on a pipe approximately six inches above ground. In evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated May 10, 2011, which states that the carrier accepts a lumbosacral spine sprain/strain only.

L5-S1 HNP AND LUMBAR RADICULOPATHY

The hearing officer's determination that the compensable injury of [date of injury], extends to a HNP at L5-S1 and lumbar radiculopathy is supported by sufficient evidence and is affirmed.

L4-5 HNP

In the Background Information section of her decision, the hearing officer indicated that her determination that the compensable injury of [date of injury], extends to L4-5 HNP is based on the medical opinion of [Dr. B].

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 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 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).

Dr. B, in a letter dated January 16, 2012, and entitled "Causation of the Compensable Injury," stated:

[The claimant's] reported mechanism of injury is consistent with his initial and ongoing complaints as well as the objective diagnostic testing that have since been performed i.e. MRI and EMG/NCV.

The [claimant's] lumbar MRI revealed annular disc protrusions and posterior annular tears at both the L4 and L5 levels and his lower extremity EMG/NCV revealed bilateral S1 radiculopathy, left side worse.

It is my professional opinion that [the claimant's] current complaints and diagnostic radiological findings are the direct result of him bending and pushing while at work on [[date of injury]].

The evidence reflects that Dr. B did not diagnose a L4-5 HNP or causally relate a L4-5 HNP to the claimant's work injury in this letter dated January 16, 2012, or in any of his medical reports in evidence.

In evidence is an MRI of the lumbar spine dated November 17, 2010, which impression lists "[u]nremarkable MRI of the lumbar spine." The findings include that the disc spaces are normally maintained with no evidence of significant disc bulge or disc protrusion at any of the levels. It also finds that there is no evidence of foraminal stenosis or central canal stenosis. There is also an undated addendum to this report which states:

An outside MRI from [March 11, 2011], is reviewed. That exam described mild bulges at L4-5 and L5-S1.

Review of the prior MRI of [November 17, 2010], is made at the request of the [claimant]. Minimal bulges at L4-5 and L5-S1 are seen.

There is no impression of a L4-5 HNP in this addendum.

Also in evidence is an MRI of the lumbar spine dated March 1, 2011. The listed impressions of that MRI include a "1-mm diffuse annular disc bulges and posterior annular tears at the L4-5 and L5-S1 levels without significant focal disc protrusion, central/lateral recess stenosis, or neural foraminal narrowing seen." There is no impression of a L4-5 HNP. There is an addendum to that MRI report, which is dated March 30, 2011. It states that:

[Dr. Y] provided me with a nerve conduction study and needle EMG study, which suggested the possibility of an S1 nerve root radiculopathy, in particular on the left.

The study was re-reviewed. There is a 1-2-mm diffuse annular disc bulge with a posterior annular tear at the L5-S1 level, asymmetrically more prominent toward the left. It just does abut the left S1 nerve root.

The addendum does not refer to any changes to the March 1, 2011, previous impressions regarding the L4-5 level or include an impression of a L4-5 HNP.

A review of the medical records in evidence by the other medical providers, Dr. P, Dr. Y surgeon, [Dr. Br] consultant, [Dr. H] EMG doctor, [Dr. W] radiologist, Dr. S the referral doctor, and [Dr. T] peer review doctor, indicate either nothing remarkable at the L4-5 level or a diagnosed L4-5 disc protrusion or bulge or annular tear. No medical provider diagnosed a L4-5 HNP nor opined that L4-5 HNP was causally related to the work injury of [date of injury]. [Dr. VH] also testified at the CCH that there was no L4-5 HNP and that there is a medical difference between a herniation and a disc bulge or protrusion.

Accordingly, the hearing officer's determination that the compensable injury of [date of injury], extends to a HNP at L4-5 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to a HNP at L4-5 and render a new decision that the compensable injury of [date of injury], does not extend to a HNP at L4-5.

MMI/IR

There are two certifications of MMI/IR in evidence. The designated doctor, Dr. P, rated only a lumbar sprain/strain. Because we have affirmed the hearing officer's determination that the compensable injury extends to a HNP at L5-S1 and lumbar radiculopathy, Dr. P did not rate the entire compensable injury and thus, his certification of MMI/IR cannot be adopted.

The other certification of MMI/IR is by Dr. S, a doctor selected by the treating doctor to act in place of the treating doctor, who examined the claimant on October 25, 2011, and certified that the claimant was not yet at MMI and assigned no IR. The narrative attached to his Report of Medical Evaluation (DWC-69) indicates that the claimant is not at MMI due to a HNP at L5-S1 and lumbar radiculopathy and possible surgical intervention. The hearing officer's determination that the claimant has not yet reached MMI and does not have an IR is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's decision that the compensable injury of [date of injury], extends to a HNP at L5-S1 and lumbar radiculopathy.

We reverse the hearing officer's decision that the compensable injury of [date of injury], extends to a HNP at L4-5 and render a new decision that the compensable injury of [date of injury], does not extend to a HNP at L4-5.

We affirm the hearing officer's decision that the claimant has not yet reached MMI and has no IR.

The true corporate name of the insurance carrier is **UNITED STATES FIDELITY & GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge

