APPEAL NO. 122353
FILED JANUARY 22, 2013

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 24, 2012, in [City], Texas, with [hearing officer]. presiding as hearing officer. The issues before the hearing officer were: (1) does the compensable injury of [date of injury], extend to aggravation of the underlying stenosis at L4-5 and aggravation of underlying spondylolisthesis at L5-S1; (2) has the respondent (claimant) reached maximum medical improvement (MMI); and (3) what is the impairment rating (IR).

The hearing officer determined that: (1) the compensable injury of [date of injury], extends to aggravation of underlying stenosis at L4-5 and aggravation of underlying spondylolisthesis at L5-S1; (2) the claimant has not reached MMI; and (3) because the claimant has not reached MMI, an IR cannot be assigned at this time.

The hearing officer's determinations that the claimant has not reached MMI and because the claimant has not reached MMI an IR cannot be assigned, have not been appealed and therefore have become final pursuant to Section 410.169.

The appellant (self-insured) appealed the extent-of-injury determination, contending that determination is not supported by the evidence and that the claimant failed to prove causation. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The claimant testified that she was a counselor for the self-insured working with high school students and that on [date of injury], she was attacked from behind by an 18-year-old student, and slammed into a desk and wall. The parties stipulated that the claimant sustained a compensable injury on [date of injury]. That stipulation is omitted in the hearing officer's findings of fact. The self-insured accepted a low back strain. The parties stipulated that the Texas Department of Insurance, Division of Workers' Compensation appointed [Dr. B] as the designated doctor on the issues of extent of injury, MMI and IR.

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 that in 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).

Section 408.0041(a)(3) provides that at the request of the insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about the extent of the employee's compensable injury. Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary.

The claimant was initially seen at [OMI] on November 30, 2011, where she was diagnosed with low back pain. An MRI performed on December 9, 2011, mentions mild central spinal stenosis at L3-4 and anterior subluxation spondylolisthesis at L4-5. The "[i]mpression" was "[L3-4] and [L4-5] levels have chronic degenerative changes with varying degrees of neural exit canal impingement bilaterally."

The hearing officer in the Background Information commented that the designated doctor, Dr. B, "determined that the injury includes aggravation of stenosis at L4-5 and spondylolisthesis at L5-S1." Dr. B who was appointed for extent of injury, MMI and IR, examined the claimant on May 22, 2012, and certified the claimant at MMI on April 26, 2012, with a 10% IR. Regarding the extent of injury, Dr. B wrote "[t]he extent of injury is spondylolisthesis, central canal stenosis and foraminal stenosis." No spinal levels are mentioned. In discussing his IR, Dr. B concluded that the claimant "has a herniated nucleus pulposus, spondylolisthesis, and decreased sensation over the nerve root distribution of [L4-5] on the right." However, we note that the issue before the hearing officer was "aggravation of underlying spondylolisthesis at **L5-S1**." (Emphasis added.) The hearing officer's comment in the Background Information section of his decision that Dr. B "determined that the injury includes aggravation of stenosis at L4-5 and spondylolisthesis at L5-S1" is factually incorrect and is not supported by the preponderance of the evidence.

Also in evidence is a report from [Dr. K], a self-insured selected required medical evaluation doctor. Dr. K examined the claimant on July 11, 2012, and certified that the claimant was not at MMI. In commenting on the claimant's treatment, Dr. K discusses "degenerative listhesis at L4-5, in the presence of an intact disc space at L5-S1." We note again the issue reported from the benefit review conference was "aggravation of underlying spondylolisthesis at L5-S1." Further, there was no evidence or testimony that listhesis is the same or synonymous with spondylolisthesis although the parties treated the terms as being synonymous. Regarding his diagnosis, Dr. K wrote:

> Injuries to multiple areas of the body while working, [date of injury], but primarily lumbar spine strain, aggravating pre-existing degenerative disc disease lumbar spine, and specifically degenerative listhesis L4-5 with continuing low back pain and minor radicular pain right lower extremity, probably L5 distribution. . . .

Dr. K does not mention stenosis in his report.

Also in evidence is a "[t]o whom it may concern" letter dated July 26, 2012, from [Dr. W] at OMI. Dr. W comments:

> Subsequent lumbar MRI has shown a lumbar disc displacement, nerve root impingement, and spondylolisthesis. Absent some strong evidence to the contrary, these injuries are the direct result of his work injury.

Dr. W does not mention stenosis and does not specify levels of spondylolisthesis of the lumbar spine.

[Dr. N], a self-insured peer review doctor, testified at the CCH that there was no aggravation, meaning no worsening, acceleration or enhancement of the claimant's pre-existing degenerative conditions, by the compensable injury.

There was no expert medical evidence within a reasonable medical probability discussing how being thrown against a wall and/or desk would aggravate underlying stenosis at L4-5 or underlying spondylolisthesis at L5-S1. In fact what mention was made of spondylolisthesis or stenosis was either general without specifying a spinal level or in the case of spondylolisthesis referred to spondylolisthesis at the L4-5 level. Accordingly, we reverse the hearing officer's determination that the compensable injury of [date of injury], extends to aggravation of underlying stenosis at L4-5 and aggravation of underlying spondylolisthesis at L5-S1 as being so against the great weight and preponderance of the evidence has to be clearly wrong and manifestly unjust. We render a new decision that the compensable injury of [date of injury], does not extend to aggravation of underlying stenosis at L4-5 and aggravation of underlying spondylolisthesis at L5-S1.

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

[SUPERINTENDENT]
[ADDRESS]
[CITY, TEXAS ZIP].

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge