APPEAL NO. 101178
FILED OCTOBER 28, 2010

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 July 12, 2010. The hearing officer resolved the disputed issue by deciding that the compensable injury of _____, extends to an L5-S1 herniated nucleus pulposus (HNP) with radiculopathy, cervical disc protrusions at C3-4, C4-5, C5-6, and C6-7, multiple level cervical HNP with instability at C5-6 and C6-7, primarily at C6-7 radiculopathy and spondylolisthesis at L5-S1.

The appellant (carrier) appealed, disputing the hearing officer's determination of the extent-of-injury issue. The carrier acknowledges in its request for review that "[a]t the beginning of the [CCH], the carrier accepted as compensable [an] L5-S1 HNP with radiculopathy, but maintained its dispute for spondylolisthesis at L5-S1." The appeal file does not contain a response from the respondent (claimant).

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. Although not reflected in the hearing officer's decision and order a review of the record reflects that the parties also stipulated that the compensable injury of _____, extends to an L5-S1 HNP with radiculopathy.

The hearing officer's determination that the compensable injury of _____, extends to an L5-S1 HNP with radiculopathy and spondylolisthesis at L5-S1 is supported by sufficient evidence and is affirmed.

The claimant testified that he was a truck driver for the employer and that on _____, he was involved in a motor vehicle accident (MVA) while driving the truck in the course and scope of his employment. The claimant testified that about 8 to 10 hours after the accident he began experiencing "massive headaches" and soreness developed in his back, left knee, and left shoulder. The medical records in evidence reflect that the claimant had surgery on both his left knee and left shoulder on October 31, 1997, and May 13, 1998, respectively. In a medical record dated September 11, 1997, entitled "Pain Management Consultation" (Dr. M), noted that several hours after the accident the claimant had significant neck pain that developed into headaches. Dr. M further noted that "[a]t the present time, the [claimant's] neck pain and headaches have resolved." The claimant testified that he had no treatment of his neck other than the medications from the emergency room (ER). In evidence is an MRI of the claimant's cervical spine, performed on May 11, 2009. The impression of the MRI includes cervical disc protrusions at C3-4, C4-5, C5-6, and C6-7. (Dr. E), an orthopedic

surgeon, diagnosed the claimant with multiple level cervical HNP with instability at C5-6 and C6-7, primarily at C6-7 radiculopathy.

The hearing officer noted in the Background Information portion of his decision and order that (Dr. S), the designated doctor, (Dr. W), who performed an independent medical examination (IME), and Dr. E, an orthopedic surgeon who examined the claimant, expressed opinions that associated the conditions under consideration with the compensable injury. We note that Dr. W stated in correspondence dated December 14, 2007, that "the medical documentation and history does support a causal relationship between the work accident of _____, and the injuries and current symptoms." The diagnoses given in that correspondence were to the left shoulder, left knee, and the lumbar spine. We note no diagnosis for the cervical spine was included in Dr. W's correspondence. Dr. W noted that the claimant had complaints of discomfort in his left knee and low back and said his left shoulder is secondarily uncomfortable and that the claimant indicated that he did not have additional injuries. Dr. W did not comment on any specific cervical condition in relation to the claimant.

Dr. E notes in a medical record dated May 19, 2009, that the claimant presented with neck pain and bilateral arm pain and had failed conservative treatment over the last 11 ½ years but as previously noted the claimant testified that he had no treatment to his neck other than medications from the ER.

Dr. S, the designated doctor in a November 12, 2009, addendum to his earlier narrative stated that the claimant's cervical MRI findings resulted directly or indirectly from the compensable injury. Dr. S based his opinion on his review of the records in which he noted that the claimant complained of neck pain on six specific occasions, in addition to the cervical MRI performed in 2009. Dr. S noted complaints of neck pain in the initial medical record, and in records dated September 30, 1998; December 20, 1999; August 7, 2007; December 14, 2007; and May 11, 2009. The September 30, 1998, medical record referenced by Dr. S notes that the claimant had neck pain and spasms 8 to 10 hours after the accident but did not note any current complaints nor did the doctor who authored that record diagnose any cervical condition or recommend treatment of any kind or any diagnostic testing of the claimant's cervical spine.

(Dr. H), who authored the December 20, 1999, report noted that his examination was an IME and that the claimant sustained an injury to his neck when giving the history of the present illness but did not diagnose the claimant with a cervical injury and did not document that the claimant had a complaint about cervical pain as of the date of the report. The medical record of December 14, 2007, was from Dr. W and noted in the history of present condition that the claimant sustained an injury to his low back, neck, left shoulder, and left knee in a MVA but does not document present complaints that the claimant had of pain to his neck.

There is an attenuation issue in this case. Although the claimant testified that he complained about his neck after the MVA, he testified that he had no actual treatment for his neck other than medications from the ER. The claimant acknowledged that there

was a significant gap in time between medical treatment and the diagnosis of the cervical conditions at issue in this CCH.

In Guevara v. Ferrer, 247 S.W.3d 662, 665 (Tex. 2007), 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." *See, e.g.,* Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982) (explaining that because "the diagnosis of skull fractures is not within the experience of the ordinary layman," expert testimony was needed); Kaster v. Woodson, 123 S.W.2d 981, 983 (Tex. Civ. App.—Austin 1938, writ ref'd) ("What is an infection and from whence did it come are matters determinable only by medical experts.") However, the court acknowledged "an exception to the general rule whereby causation findings linking events and physical conditions could, under certain circumstances, be sufficiently supported by non-expert evidence." Guevara, 247 S.W.3d at 666. The court explained that lay testimony is "adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition." Thus, generally, "lay testimony establishing a sequence of events [that] provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation."

The court in Guevara, *supra*, further stated:

> . . . evidence of an event followed closely by manifestation of or treatment for conditions [that] did not appear before the event raises suspicion that the event at issue caused the conditions. But suspicion has not been and is not legally sufficient to support a finding of legal causation. When evidence is so weak as to do no more than create a surmise or suspicion of the matter to be proved, the evidence is 'no more than a scintilla and, in legal effect, is no evidence.' [citation omitted] Nevertheless, *when combined with other causation evidence*, evidence that conditions exhibited themselves or were diagnosed shortly after an event may be probative in determining causation. [citation omitted] (emphasis added)

See also *City of Laredo v. Garza*, 293 S.W.3d 625 (Tex. App.—San Antonio 2009, no pet.)

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 date of the claimant's compensable injury is _____, and the cervical MRI in evidence was performed in 2009. Dr. S based his opinion on the claimant's persistent complaints of neck pain and subsequent MRI findings to opine that the

cervical conditions at issue resulted directly or indirectly from the injury of _____. However, some of the records Dr. S relies on to show a complaint of neck pain were merely recitations of the history of the incident and did not document present complaints. Further, Dr. S did not opine about the effect of the approximately 10 years without medical treatment for the cervical spine on the causal relationship of the disputed cervical conditions to the compensable injury.

Accordingly, the hearing officer's determination that the compensable injury of _____, extends to cervical disc protrusions at C3-4, C4-5, C5-6 and C6-7; and multiple level cervical HNP with instability at C5-6 and C6-7, primarily at C6-7 radiculopathy 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 _____, extends to cervical disc protrusions at C3-4, C4-5, C5-6, and C6-7; and multiple level cervical HNP with instability at C5-6 and C6-7, primarily at C6-7 radiculopathy and render a new determination that the compensable injury of _____, does not extend to cervical disc protrusions at C3-4, C4-5, C5-6, and C6-7; and multiple level cervical HNP with instability at C5-6 and C6-7, primarily at C6-7 radiculopathy.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of _____, extends to an L5-S1 HNP with radiculopathy and spondylolisthesis at L5-S1.

We reverse the hearing officer's determination that the compensable injury of _____, extends to cervical disc protrusions at C3-4, C4-5, C5-6, and C6-7; and multiple level cervical HNP with instability at C5-6 and C6-7, primarily at C6-7 radiculopathy and render a new determination that the compensable injury of _____, does not extend to cervical disc protrusions at C3-4, C4-5, C5-6, and C6-7; and multiple level cervical HNP with instability at C5-6 and C6-7, primarily at C6-7 radiculopathy.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge