APPEAL NO. 132318
FILED JANUARY 9, 2014

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 September 3, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue before him by deciding that the compensable injury of [date of injury], extends to lumbar radiculopathy, lumbar IVD, and bulging discs at L4-5 and L5-S1.

The appellant/cross-respondent (self-insured) appealed the hearing officer's determination, contending that there was insufficient evidence to establish causation between the claimed extent-of-injury conditions and the compensable injury. The respondent/cross-appellant (claimant) responded, urging affirmance of the hearing officer's determination; however, the claimant's response contains an untimely cross-appeal regarding an evidentiary ruling made by the hearing officer at the CCH. The claimant contends in his cross-appeal that the hearing officer erred in not allowing the admission of one of his exhibits. The appeal file does not contain a response from the self-insured to the claimant's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant, a firefighter, testified that he sustained an injury to his back while doing inverted leg presses.

UNTIMELY CROSS-APPEAL

Although the claimant's response was timely as a response, it was untimely as a cross-appeal. The deemed date of receipt of the hearing officer's decision was September 18, 2013, and a timely appeal must have been filed by Wednesday, October 9, 2013. The claimant's response/cross-appeal was sent by facsimile transmission to the Texas Department of Insurance, Division of Workers' Compensation (Division) on October 10, 2013, and was received by the Division on that date. Accordingly, insofar as the claimant's response is considered a cross-appeal, the cross-appeal not having been filed or mailed by October 9, 2013, is untimely as a cross-appeal. *See* 28 TEX. ADMIN. CODE § 143.3(d), 102.5(d), 102.3(a)(3) and 102.3(b) (Rules 143.3(d), 102.5(d), 102.3(a)(3), and 102.3(b)). The claimant's response was timely and was considered.

BULGING DISCS AT L4-5 AND L5-S1 AND LUMBAR RADICULOPATHY

The hearing officer's determination that the compensable injury of [date of injury], extends to bulging discs at L4-5 and L5-S1 and lumbar radiculopathy is supported by sufficient evidence and is affirmed.

LUMBAR IVD

The hearing officer also determined that the compensable injury of [date of injury], extends to lumbar IVD.

The Texas courts have long established the general rule that "expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience" of the fact finder. Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). 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* City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing Guevara. The hearing officer correctly notes in the Background Information section of the decision that the claimed conditions are outside the scope of common knowledge and experience and therefore require expert medical evidence.

The first medical record in evidence containing a diagnosis of lumbar IVD is from [Dr. R], the designated doctor appointed by the Division to determine maximum medical improvement, impairment rating, and extent of injury. Dr. R's report is dated January 26, 2013, and in that report Dr. R states that the claimant's compensable diagnoses should include lumbar IVD disorder without myelopathy. Dr. R further states that "[b]ased [upon] examinations, radiographic studies and other objective and subjective symptomatology, I have determined with reasonable medical certainty, that [the claimant] did in fact receive the above stated lumbar spinal [injury] as a result of the above noted accident . . ." and that "[b]ased upon the history and nature of the injury and [the claimant's] lumbar spine complaints his extent of the injury should include . . . [l]umbar IVD. . . ."

The only other medical record in evidence referencing lumbar IVD is from [Dr. S], the post-designated doctor required medical examination doctor, dated April 9, 2013. Dr. S was asked to "discuss how the injury did not cause IVD disorder" and in his report Dr. S responded that:

> The injury was reported while exercising. The radiologist interpreting the films noted degenerative changes at L4-5 and L5-S1. After reviewing the films, it was clear the L4-5 region demonstrated significantly more degenerative disc disease, as well as foraminal stenosis. This was reviewed by the radiologist via telephone. [Dr. H] noted that there was no clear indication of acute changes on the T2 images, therefore, demonstrating that within reasonable medical probability, the IVD disorder itself was not a result of the work injury.

The hearing officer quoted both Dr. R's and Dr. S's reports in his decision, and also discussed a report dated October 25, 2012, from [Dr. M], a referral doctor. In that report Dr. M assessed lumbar radiculopathy and protrusions at L4-5 and L5-S1, and that the "disc protrusion . . . are consistent with more recent injury." In a hand-written note at the bottom of the report Dr. M states that "[t]his [[date of injury]] injury was a substantial factor in causing the disc protrusions described above. Without the work-related injury [[date of injury]] [the claimant] wouldn't have the disc injury [and] would still be working [and] not seeking treatment." Nowhere in this report, or in any of his other reports in evidence, does Dr. M specifically assess or diagnose lumbar IVD or discuss that condition.

The hearing officer noted that he found Dr. M's and Dr. R's opinions to be based upon an accurate understanding of the mechanism of injury and reasonable medical probability and were more persuasive on the extent of the claimant's injury. However, as mentioned above the only two medical reports in evidence that discuss the specific diagnosis of lumbar IVD are from Dr. S, dated April 9, 2013, and Dr. R, dated January 26, 2013. Dr. S opined that the lumbar IVD was not a result of the compensable injury. Although Dr. R opined that the compensable injury extended to lumbar IVD, Dr. R did not provide any explanation of causation between the compensable injury and lumbar IVD. Accordingly, we reverse the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar IVD, and we render a new decision that the compensable injury of [date of injury], does not extend to lumbar IVD.

The true corporate name of the insurance carrier is **[self-insured]** and the name and address of its registered agent for service of process is

[MAYOR]
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge