APPEAL NO. 120311-s
FILED APRIL 9, 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 January 24, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the sole disputed issue by deciding that the compensable injury of [date of injury], did not include the stress fracture of the left second metatarsal. The appellant (claimant) appealed the hearing officer's extent-of-injury determination. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that [Dr. H] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address maximum medical improvement and impairment rating but not to address the extent of the compensable injury. It is undisputed that the claimant fell off a stage and fractured her left ankle, resulting in two surgeries, one to implant screws and hardware into the left ankle and one later to remove some of the screws. The evidence reflects that the claimant was diagnosed with a stress fracture of the left second metatarsal on April 28, 2011. The claimant contends that the compensable injury of [date of injury], extends to a stress fracture of the left second metatarsal as opined by her treating surgeon, [Dr. D]. The self-insured contends that this is a follow-on injury and not related to the compensable injury.

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. *See* 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 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).

In analyzing the applicable law and facts of the case, the hearing officer stated in his Background Information section of his decision:

While he does not use magic words, [Dr. D] does believe the stress fracture is a direct result of "initiation of weight bearing after a prolonged period of time

nonweightbering (*sic*) and was the direct result of the injury of [date of injury]." Missing from [Dr. D's] opinion, and required by the [Transcon. Ins. Co. v. Crump, 330 S.W.3d 211 (Tex. 2010)] decision, is his analysis ruling out other causes of the stress fracture, i.e. [the] [c]laimant's osteoporoses and her diabetes. Claimant did not meet her burden of proof.

The Supreme Court in its Crump decision considered in part the issue of whether expert medical causation testimony from a treating physician relying on a differential diagnosis is reliable and therefore legally sufficient evidence to support the jury's verdict. The Supreme Court held that "the treating physician's opinion was based on a reliable foundation and, therefore, legally sufficient evidence supports the jury's verdict." The Supreme Court recognized that differential diagnosis is "a clinical process whereby a doctor determines which of several potential diseases or injuries is causing the patient's symptoms by ruling out possible causes—by comparing the patient's symptoms to symptoms associated with known diseases, conducting physical examinations, collecting data on the patient's history and illness, and analyzing that data—until a final diagnosis for proper treatment is reached."

We note that an analysis of other possible causes of an injury or illness is a factor to consider when determining causation. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) and E. I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). However, the Supreme Court in Crump noted that "a medical causation expert need not 'disprov[e] or discredit[] every possible cause other than the one espoused by him.'" The Supreme Court does not hold that the only method to establish expert medical causation evidence is by differential diagnosis.

In this case, the hearing officer misinterpreted and misapplied the law under the Crump decision because he has interpreted that case as requiring a differential diagnosis from a doctor to establish causation and this requires a remand.

Accordingly, we reverse the hearing officer's determination that the compensable injury of [date of injury], did not include the stress fracture of the left second metatarsal and remand the extent-of-injury issue to the hearing officer for further action consistent with this decision.

The hearing officer must utilize the proper legal standard in analyzing and weighing the evidence in this case, which includes the medical opinion of Dr. D, the claimant's treating surgeon, who causally related the claimed stress fracture of the left second metatarsal to the work injury of [date of injury], as well as the claimant's bone scan.

The hearing officer is to determine the extent-of-injury issue based on the evidence already admitted at the CCH.

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 **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

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

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge