COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

EAST TEXAS EDUCATIONAL INSURANCE ASSOCIATION,	§	No. 08-19-00220-CV
Appellant,	§	Appeal from the
v.	§	210th District Court
MARIA D. RAMIREZ,	§	of El Paso County, Texas
Appellee.	§	(TC# 2018DCV1567)

O P I N I O N

Appellant, East Texas Educational Insurance Association, appeals from a trial court judgment reversing the decision of the Texas Department of Insurance, Division of Workers' Compensation. After a jury trial, the jury found that Maria Ramirez, Appellee, was entitled to Lifetime Income Benefits ("LIBs") with an accrual date of June 12, 2013. In four issues on appeal, Appellant challenges the legal and factual sufficiency of the evidence to support the jury's findings and the trial court's judgment. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

On June 5, 2008, Appellee slipped and fell while stripping wax off a floor at the school where she worked as a custodian for Fabens Independent School District. She sustained a left hip

fracture and dislocation in the fall. Surgery to repair the fracture was successful, but Appellee developed a number of complications which resulted in additional surgeries to her left hip and leg.

Plaintiff's Medical Records

Following the initial fall, Appellee was transported by ambulance to a local hospital where she was diagnosed with a subcapital fracture of the left femur. A past medical history of diabetes was noted, along with elevated glucose readings indicating hyperglycemia. Appellee received an initial evaluation from Dr. Everett Campbell, who performed an endoprosthesis replacement of the proximal femur in Appellee's left hip the same day. A week later, medical records note Appellee was recovering "nicely" from her surgery and was stable, although experiencing pain in the hip. She was discharged to a rehabilitation hospital on June 12, 2008. At the rehabilitation hospital, she received a treatment plan with a goal of addressing gait, mobility, and pain. At that time, she was unable to walk or transfer without at least moderate assistance.

Five days later, an infectious disease physician saw Appellee due to her experiencing low-grade fevers. The doctor discovered a "stage 1 decubitus" (bedsore) without evidence of infection.

Appellee was discharged from the rehab hospital on June 25, 2008. At the time of discharge, she was able to walk seventy-five feet two times in a row with a walker. She still required assistance for transferring and getting in and out of bed. Her surgical incisions appeared to be healing well, and she was deemed to be medically stable and able to participate in outpatient rehab and discharged home. Appellee started outpatient physical therapy two days after discharge and attended ten physical therapy appointments from July 2, 2008, through July 22, 2008.

On July 23, 2008, Appellee received treatment at Alivio Health Center for pain in her left hip at an 8/10 level that was exacerbated by standing and walking. She also complained of pain

and numbness radiating to her left leg and toes. An examination revealed sciatic disc compression; however, no neurologic abnormalities were identified.

On July 29, 2008, Dr. Campbell provided a follow-up evaluation after Appellee presented in the emergency room with a left hip infection. Appellee reported the symptoms began the previous week when she noticed fever and increased pain in her left hip. Dr. Campbell discovered infected fluid in Appellee's hip; x-rays of her hip showed the prosthesis was in place. Appellee's treatment plan was to remove the prosthesis and any damaged tissue and continue with antibiotic treatment for the infection. X-rays from July 31, 2008, following the second surgery show proper alignment and position of the prosthetic in Appellee's left hip.[1]

On September 6, 2008, Appellee received a follow-up evaluation and complained of mild pain in her hip; her extremities showed no swelling or tenderness, and her sutures were healing. Her treatment plan included continued range-of-motion and progressive resistive activities with therapy. Progress notes from September 24, 2008, through October 3, 2008, indicate continued pain complaints and a sacral ulcer. Her left hip pain was well-controlled with medication. Progress notes in that time indicate her left hip was healing well and she continued treatment for the sacral ulcer. By October 19, 2008, Appellee showed a healed wound on her left hip and complained of mild pain in the hip, and continuing pain in the sacrum.

On October 20, 2008, Appellee presented at Triumph Hospital with a new complaint of right ankle pain and difficulty walking. Examination showed the right ankle had posterior edema of the Achilles and discomfort on palpation. Appellee had full active range of motion in her right

[1] An operative report for the surgery to remove and debride Appellee's left hip is not included in the record on appeal.

ankle with mild discomfort, and increasing discomfort with flexion. Her diagnoses included possible sprain/strain to the right Achilles tendon and residual debility.

On October 21, 2008, Appellee denied having any current pain. Examination of her right leg showed mild edema and discomfort in the right Achilles tendon. Medical records between October 24 and October 31, 2008, indicate Appellee was not experiencing significant pain and examination of her extremities showed no swelling or tenderness. She continued to receive treatment for the sacral ulcer wound. On October 31, 2008, Appellee underwent surgery to repair the sacral ulcer.

Records through early November of 2008 show Appellee continued to attend physical therapy appointments and receive treatment for the sacral ulcer. Her condition was stable and reports indicate she was doing well.

On November 15, 2008, Appellee complained of spasms in her legs and right arm and hand with "unclear etiology." She began receiving home health care in mid-November of 2008.

By December 3, 2008, Appellee reported doing well with her ulcer. She experienced some pain on rotation of her left hip; x-rays of the left hip showed a good position of the cement spacer and minor limb shortening. However, it was recommended that her treatment include "a revision arthroplasty and likely proximal femoral replacement."

A December 18, 2008, evaluation by Dr. Michael Mrochek, a physiatrist, indicated Appellee's lower extremities were very atrophic, had weakness in both ankles with dorsiflexion (flexing the foot upward) and significant low back pain with a strait leg raise test. The treatment recommendation included a study of her lower extremities to look for the possibility of radiculopathy. Dr. Mrochek noted her complete inability to work.

On January 5, 2009, Appellee reported difficulty walking. Dr. Mrochek noted severe atrophy in both legs and weakness in the right leg. Dr. Mrochek conducted nerve tests of Appellee's spine and noted impressions of "lumbosacral neuritis and polyneuropathy due to diabetes."

On January 9, 2009, Appellee received a follow-up evaluation complaining of an infection of her left hip. Her physician planned hip replacement surgery to occur in the future. Appellee was discharged from physical therapy on January 14, 2009.

On January 22, 2009, Appellee underwent an MRI of her lumbar spine which showed "multilevel lumbar spondylotic changes" and multiple protrusions. An MRI of Appellee's sacrum the same day showed subcutaneous fat edema and inflammation overlying the sacrococcygeal region.

On February 4, 2009, Appellee reported difficulty getting up and moving around due to pain in her coccygeal area. She reported pain going down her legs. Examination revealed lower extremity atrophy. Her physician recommended a bone scan and delayed her upcoming hip replacement to first rule out any additional source of infection. A bone scan on February 23, 2009, ruled out evidence of an active infection in the region around the left hip prosthesis. Her physician recommended proximal femoral replacement and total hip arthroplasty at that time.

On May 5, 2009, Appellee underwent a "radical resection of proximal left femur and conversion of previous hip surgery to left hip arthroplasty." She was post-operatively diagnosed with left hip infection. She was transferred to a rehabilitation center on May 13, 2009, with orders for weightbearing as tolerated and to receive comprehensive rehabilitation. On May 14, 2009, physical examination at the rehabilitation center revealed 4/5 strength in her left and right ankles

with the feet flexed. Her left leg showed edema mostly in the thigh. She exhibited difficulty controlling her blood sugar. Records note she probably had "critical care myelopathy/polyneuropathy with lower extremity weakness due to her prolonged state of immobility and recently prolonged ICU care." She was participating in therapy and, by her discharge date of May 26, 2009, ambulating 350 feet with a walker with standby assistance. Records on May 27, 2009, report Appellee was doing well; however, range of motion in her left hip was painful and she had a three-and-a-half centimeter discrepancy in leg length.

On June 10, 2009, Appellee complained of hip pain and inability to sit for extended periods of time due to pain. She reported inability to walk because of weakness and cramping in her legs. Her doctor prescribed a shoe with a lift to account for her leg length discrepancy, and continued therapy.

On July 8, 2009, Appellee attended a follow-up evaluation reporting tailbone pain while sitting, and numbness in her legs from the knee down. X-rays showed dislocation of the prosthesis. Surgery on July 21, 2009, occurred to avoid further dislocation. Appellee underwent "conversion of the left hip bipolar hemiarthroplasty to constrained total hip arthroplasty." X-rays taken after the surgery noted degenerative changes to the right hip and spine.

On July 28, 2009, Appellee began post-surgical comprehensive rehabilitation and was cleared for weightbearing as tolerated. By August 4, 2009, she was walking up to 300 feet with a walker with standby assistance, and required standby assistance for transfers. From an occupational therapy perspective, records indicate Appellee was modified independent with eating; required set up for grooming, hygiene, and upper extremity dressing; needed minimal assistance for lower extremity daily activities; and required moderate assistance with bathing. She

was discharged home to continue physical therapy on August 6, 2009. For the next six weeks, she received physical therapy, occupational therapy, and skilled nursing care at home.

On September 8, 2009, Appellee was seen for an infection of the left total hip arthroplasty and sacral osteomyelitis. She also had an ulcer on her left heel. The following day she reported steadily decreasing left hip pain, but continued groin pain. Her leg length discrepancy was now between eight and ten centimeters. Her doctor recommended continued weightbearing.

On September 18, 2009, bone scan findings suggested infection of the left hip prosthesis with overlying cellulitis. Subsequently, Appellee's physician reviewed the scan and noted they indicated "some inflammatory changes in the left hip but no evidence of osteomyelitis." Appellee reported difficulty getting around and ability only to undertake transfers; she was unable to do much walking and her doctor observed swelling in her feet.

By November 4, 2009, Appellee reported continued left hip pain and use of six to eight hydrocodone per day to manage her pain. She was not doing physical therapy and was only transferring from bed to bedside commode. She reported inability to walk around her house at all, and her physician noted a limp when asked to stand and take a few steps. Appellee was able to take approximately six-inch steps and had to hop when applying pressure on her left leg. Her doctor opined that her high narcotic usage was likely due in part to pain and in part to narcotic resistance due to the length of time she had been taking them.

On November 20, 2009, Dr. Edward Roybal, an orthopedic surgeon, examined Appellee. He opined she had not yet reached maximum medical improvement ("MMI") and her expected date of MMI was July 1, 2010.

On December 2, 2009, Appellee was evaluated for ongoing leg pain and numbness. Appellee was neurologically intact to her bilateral lower extremities, but weakness was noted in both legs. Review of the lumbar spine MRI showed no evidence of significant stenosis that would account for the numbness in the leg.

By early 2010, Appellee's condition appeared to worsen. On January 11, 2010, Dr. Mrochek evaluated Appellee for issues related to pain control. She reported pain over the low back, the sacral region, the left hip, and radiating down the side of the left leg into the foot with tingling in her foot. She rated her pain at a level of 7/10. She remained in a wheelchair and was unable to stand and walk outside of parallel bars. She reported her pain quality was aching, burning, spasming, and constant. Dr. Mrochek noted severe atrophy in her legs. He diagnosed her with, among other things, polyneuropathy in diabetes and chronic pain syndrome.

On January 12, 2010, Appellee sought treatment from a chiropractor, Luis Marioni, D.C. She presented with lumbar spine and left hip pain rated at 7/10. During his examination, he noted muscle weakness, cervical and lumbar spine tenderness, left hip tenderness, decreased sensations, and decreased and painful lumbar and left hip range of motion. He diagnosed Appellee with a sprain of ligaments of the lumbar spine and displacement of a thoracic intervertebral disc without myelopathy. He referred her to a chronic pain management program. Records from Appellee's pain management program protocol indicate they were ineffective at lowering her pain levels.

On January 27, 2010, Appellee reported continued tailbone and lateral-sided hip pain. However, she could walk around the house with assistance and showed good range of motion in her hip rotation without discomfort. Records noted significant atrophy in both legs. She had diminished sensation and diffuse tenderness throughout her legs.

During early 2010, Appellee continued reporting pain in her left hip into her left leg, lower back pain and tenderness, decreased range of motion in her spine, difficulty with mobility, and issues related to pain management. Dr. Mrochek completed a MMI and Impairment Rating evaluation and placed Appellee on MMI as of February 24, 2010, with an impairment rating of 30 percent.

As 2010 went on, Appellee's overall condition continues to decline. In April, an examination by Dr. Mrochek revealed weakness in the right ankle compared to the left. On May 11, 2010, Dr. Marioni performed a Functional Capacity Evaluation on Appellee and determined she was not capable of performing even sedentary work demands. In June of 2010, records from multiple appointments indicate Appellee suffered from significant back and left hip pain, weakness in her trunk and legs, and atrophy of both lower extremities.

On July 15, 2010, Dr. Mrochek evaluated Appellee for pain she reported in spite of being wholly non-weightbearing. She complained of pain radiating from her left hip down the leg to her knee. X-rays showed a non-displaced femoral condyle fracture in her left leg.

In August of 2010, records indicate Appellee was no longer able to walk and was almost completely incapable of transferring out of bed, even with assistance. Dr. Mrochek opined she required a hospital bed to assist with transfers, as well as a lightweight wheelchair with an elevating leg lift. He opined that her condition was a direct result of her June 5, 2008, work injury. Appellee continued chiropractic care from September through November of 2010, with ongoing complaints of lumbar spine pain and left hip pain.

A September 16, 2010, peer review completed by Dr. Edward Roybal, an orthopedic surgeon, indicated he believed Appellee's lumbar syndrome was the result of prolonged sitting

and deconditioning. However, he attributed the bilateral neuropathy in Appellee's legs as a condition secondary to her diabetes and not related to the compensable injury. He opined Appellee's MRI findings showed degenerative disease issues and were pre-existing and unrelated to her compensable injury.

During October of 2010, Appellee continued reporting significant left leg pain. Additionally, she continued experiencing sacral pain and left lateral hip and thigh pain. Her left knee pain started following the supracondylar fracture. An evaluation note from October 11, 2010, revealed the complete absence of any reflexes in either her left or right knee or ankle, and both lower extremities were "very atrophic." Severe weakness in both ankles and significant atrophy of the legs was noted in December of 2010, and severe range of motion restriction on Appellee's lumbar spine. As 2010 ended and 2011 began, Appellee continued to receive treatment for chronic pain in the lumbar spine and left hip, and her doctors noted bilateral ankle weakness.

On March 4, 2011, Appellee saw Dr. Mrochek for pain in her right thigh which came on while trying to walk. Dr. Mrochek noted Appellee experienced pain in both legs related to chronic neuropathy which came on as she was recovering from the June 5, 2008, hip fracture.

As 2011 continued, Appellee repeatedly sought treatment for severe pain in the lower back and left hip, and pain radiating down her left leg. The pain increased when she attempted to walk, and as a result she mostly sat in a wheelchair. Dr. Mrochek again noted atrophy in the lower legs and weakness in her ankles, as well as the absence of any reflexes in either leg.

On June 20, 2011, Appellee reported foot swelling in addition to her ongoing issues. Her physician noted diminished sensation to both feet. She transferred out of bed on a very limited basis due to her pain issues. On August 19, 2011, Dr. Mrochek again noted advanced atrophy in

her legs, particularly the quadriceps and calves of both legs. She exhibited no reflexes in either leg. On August 29, 2011, Dr. Marioni stated Appellee was unable to participate in any work activities. He noted lumbar spine pain radiating to the buttocks, left leg numbness and tingling, and restricted range of motion due to intense pain.

On August 29, 2011, Dr. Roybal completed a Peer Review for evaluation of Appellee's ability to return to work. He opined she was unable to return to work because of dysfunction of her left hip associated with chronic pain syndrome and required daily narcotics. He deemed her condition permanent. In addition to her ongoing complaints of pain and loss of range of motion, Roybal noted significant pigmentation on her feet and lack of tendon reflexes in both knees and Achilles tendons. She also experienced decreased sensation in the feet and legs.

As 2011 came to an end, Appellee's issues related to pain and mobility worsened further. A December 2011 evaluation by Dr. Mrochek indicated Appellee developed severe neuropathy and had been in a wheelchair as a result, and still had to wear a brace on her hip to keep it from dislocating.

Appellee's medical treatment in 2012 consisted of ongoing pain management related to her chronic issues. Records from Dr. Marioni indicate her continued inability to work even for very short periods and noted her total disability. Her reports of severe pain continued through the end of 2012, as did doctor's notes regarding continued atrophy in her legs.

On March 4, 2013, Appellee began seeing Dr. John Jackson, another orthopedic surgeon. By that time, Appellee was wheelchair-bound. He diagnosed Appellee with chronic deep infection of her left lower extremity, and noted "extensive lysis along the proximal femur consistent with

osteomyelitis." He recommended resection arthroplasty and likely a single stage revision with the placement of a total femur.

Dr. Jackson performed the surgery on March 21, 2013. Postoperatively, he diagnosed Appellee with deep infection to the left hip status post total hip arthroplasty with proximal femoral replacement. From March 26, 2013, through April 8, 2013, Appellee received inpatient rehabilitative care. Therapy produced some progress; Appellee required minimal assistance with bathing, contact guard assistance with dressing and standby to supervision with other daily activities. She was able to ambulate up to fifty feet with a walker and minimal assistance. However, x-rays taken on April 6, 2013, showed "a dislodging of the acetabular cup from the reamed acetabulum." Dr. Jackson thus performed Appellee's fifth hip surgery on April 8, 2013, to correct the issue. Appellee received further inpatient rehabilitative care following the fifth hip surgery.

On May 8, 2013, Appellee saw Dr. Marioni. He noted that she was unable to work even short periods of time and was in a wheelchair. He stated she was unable to stand by herself or walk without assistance, and opined that any stress to Appellee as a result of attempting to work could cause re-injury. He stated she had a permanent disability. Appellee's reports of ongoing severe pain in both legs and her back continued through 2013.

Medical records throughout 2014 indicate Appellee's condition remained largely unchanged. Her mobility continued to decrease incrementally and she was completely wheelchair bound. Records in 2015 reiterate weakness and decreased range of motion in Appellee's right ankle, and the absence of reflexes in the legs, in addition to her other chronic pain and mobility issues. Appellee's medical examinations in 2016 revealed her condition remained unchanged. On July 19, 2016, an exam by Dr. Mrochek again showed decreased range of motion and weakness in

Appellee's right ankle, and an absence of reflexes in the right leg. Records indicate she continued receiving treatment for her ongoing conditions through at least September of 2017. During this time, weakness in her right leg progressed. By March 24, 2017, Appellee was unable to transfer without full assistance from her husband.

Trial on the Merits

At trial, Appellee testified she began working for Fabens ISD in 1992. At the time of her initial injury, she was the head custodian. Her job was physical in nature, and also included administrative tasks. She typically walked to work each day, which took her about twenty minutes. She worked a ten hour day, arriving at 6 a.m. and leaving at 4 p.m.

Appellee testified about her history with diabetes. She was first diagnosed in 1992, but testified it was under control at that time through diet and exercise. She also took Metformin to manage her diabetes. She saw her primary care physician regularly to monitor her diabetes. She testified she did not experience any issues with her legs or any other bodily system prior to the accident. Following the accident in 2008, she began experiencing difficulty managing her diabetes.

Appellee testified she has been unable to walk without assistance since the injury. She stated her legs are now very weak and she cannot walk more than a few steps with assistance before she has to stop due to fear of falling. Appellee has been unable to stand on her own since the date of the injury. She testified she would be unable to return to her previous job because she cannot walk, and her use of narcotic medication to manage her pain makes her drowsy. Her previous work experience was also physical in nature. She was unable to think of any job she would be able to do requiring the use of her feet. Appellee indicated her feet get numb and are very weak and as a result she is unable to move them to walk.

Appellee reported back pain to several of her doctors, including Dr. Roybal, Dr. Marioni, and her first orthopedic surgeon, Dr. Campbell. Dr. Roybal told her he could not attribute her back pain to the compensable injury because it was not documented nearer in time to the initial injury. She testified both legs have changed in size and shape since the incident, as well as her feet. She stated she used to wear a size seven shoe and now wears a five.

Portions of the deposition of Dr. Michael Albrecht were played into the trial record. He was retained by counsel for Appellant to prepare a peer review of Appellee's medical records. He opined that, "Aside from the left hip fracture and the complications associated with the left hip fracture…I found no objective evidence to conclude that any other diagnosis is related to the work-compensable left hip fracture." Dr. Albrecht testified he did not believe Appellee had diminished utility of her feet, and stated the purpose of the human foot was to walk. His opinion was based on indications in the medical records showing Appellee was able to do some walking after the first and second surgeries.

Dr. Albrecht testified the atrophy Appellee experienced in her legs was due to her muscles shrinking, and agreed Appellee exhibited atrophy in both legs. However, he denied any record of atrophy in Appellee's feet. He stated atrophy can be caused by nerve injury or prolonged disuse of the muscle. He also testified that motion of the foot is largely controlled by muscles in the legs. Dr. Albrecht stated a patient who had been wheelchair-bound for approximately ten years would likely experience atrophy in one or both feet.

Dr. Jackson, one of Appellee's treating orthopedic surgeons, also testified at trial. He testified Appellee's prolonged periods of immobility following her multiple surgeries resulted in her right side getting progressively weaker and atrophying. It was his opinion Appellee's left side

was permanently disabled and her right side was progressively declining. Medical reports from Dr. Jackson indicating Appellee's foot function was "normal" meant only that she could move her toes; the portion above her foot through her knee and hip was very abnormal and were not functional for walking. He was unaware of any employment in which Appellee could engage given her condition. He also testified that he believed the atrophy in Appellee's legs was not the result of her diabetes.

PROCEDURAL BACKGROUND

Appellee filed a Contested Case Hearing with the Texas Department of Insurance, Workers' Compensation Division (the "Division") to determine her entitlement to LIBs based on the loss of both feet at or above the ankles. A benefit review conference was held on October 16, 2017, in an attempt to mediate a resolution of the disputed issue. However, such mediation was unsuccessful and on February 6, 2018, the Division held a contested case hearing. The Division's Findings of Fact stated in relevant part:

> 4. The following conditions were not caused, accelerated, worsened or enhanced as a result of the compensable injury: an injury to her spine or an injury to her right lower extremity.
>
> 5. Claimant did not establish that she no longer possesses any substantial utility of both feet at or above the ankle as a result of the compensable injury.
>
> 6. Claimant did not establish that she has permanent loss of use of both feet as members of her body as a result of the compensable injury.
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> 7. Claimant's condition is not such that she cannot get and keep employment requiring the use of both feet at or above the ankle as a result of the compensable injury sustained on June 5, 2008.
>
> 8. Since Claimant is not entitled to Lifetime Income Benefits, an accrual date cannot be determined.

Accordingly, the Division concluded that Appellee was not entitled to LIBs based on the loss of both feet at or above the ankles. Appellee appealed to the Workers' Compensation Appeals Panel ("the Panel"), which issued a notice that the Division's order denying Appellee's request for LIBs became final on April 10, 2018.

Appellee filed suit in district court seeking judicial review of the Division's ruling. Appellant filed its answer, asserting a general denial to Appellee's allegations.

The parties tried the case to a jury. After hearing the evidence, the jury determined that Appellee's June 5, 2008, injury extended to and included an injury to the spine and/or the right lower extremity. The jury also found Appellee suffered an injury to both feet at or above the ankles that was a producing cause of the total loss of use of both feet at or above the ankles. Accordingly, the trial court awarded LIBs to Appellee, reversing the Division's decision.

Appellant filed a motion for new trial and motion for judgment notwithstanding the verdict. Following a hearing, the trial court denied both motions. This timely-filed appeal followed.

DISCUSSION

On appeal, Appellant raises four issues. In its first and second issues, Appellant asserts the jury's determination that Appellee suffered an injury to both feet at or above the ankles that was a producing cause of permanent and total loss of use of both feet at or above the ankles is not supported by legally or factually sufficient evidence. In its third and fourth issues, Appellant claims the jury's determination that Appellee's compensable injury of June 5, 2008, extended to and included the spine and/or right lower extremity is not supported by legally or factually sufficient evidence.

Legal and Factual Sufficiency Standards of Review

A legal sufficiency or "no evidence" challenge will only be sustained on appeal if the record demonstrates: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson,* 168 S.W.3d 802, 810 (Tex. 2005); *Dallas Nat. Ins. Co. v. Morales,* 394 S.W.3d 826, 831 (Tex.App.—El Paso 2012, no pet.); *Region XIX Service Center v. Banda,* 343 S.W.3d 480, 484 (Tex.App.—El Paso 2011, pet. denied); *El Paso Independent School District v. Pabon,* 214 S.W.3d 37, 41 (Tex.App.—El Paso 2006, no pet.). When conducting a legal sufficiency review, we consider the evidence in the light most favorable to the verdict, crediting favorable evidence if a reasonable juror could, and disregarding contrary evidence unless a reasonable juror could not. *City of Keller,* 168 S.W.3d at 810; *Region XIX Service Center,* 343 S.W.3d at 485. The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller,* 168 S.W.3d at 827.

When reviewing the factual sufficiency of evidence, we examine all the evidence and set aside a finding only if the evidence supporting the jury finding is so weak as to be clearly wrong and manifestly unjust. *See Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986). Under both a legal and factual sufficiency review, we are mindful that the jury, as fact finder, was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller,* 168 S.W.3d at 819. We may not substitute our judgment for the fact finder's, even if we would reach a different answer on the evidence. *See Golden Eagle Archery, Inc. v. Jackson,* 116 S.W.3d 757, 761 (Tex. 2003).

Applicable Law

The Texas Workers' Compensation Act (the "Act") authorizes the award of LIBs to employees who lose certain body parts or suffer certain injuries in work-related accidents. *Insurance Company of State of Pennsylvania v. Muro*, 347 S.W.3d 268, 269 (Tex. 2011). Section 408.161 of the Act enumerates the specific body parts and injuries that qualify an employee for this type of benefit. *Id.* (*citing* TEX.LAB. CODE ANN. § 408.161(a)(1)-(7)). According to section 408.161, LIBs are paid to an employee for:

> (1) total and permanent loss of sight in both eyes;
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> (2) loss of both feet at or above the ankle;
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> (3) loss of both hands at or above the wrist;
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> (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
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> (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg;
>
> (6) a physically traumatic injury to the brain resulting in incurable insanity or imbecility; or
>
> (7) third degree burns that cover at least 40 percent of the body and require grafting, or third degree burns covering the majority of either both hands or one hand and the face.

TEX.LAB. CODE ANN. § 408.161(a). "[T]otal and permanent loss of use of a body part is the loss of that body part." *Id.* § 408.161(b). The Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." *Id.* § 401.011(26); *see also Dallas Nat. Ins. Co. v. De La Cruz*, 470 S.W.3d 56, 58 (Tex. 2015). As the terms pertain to workers' compensation, "damage" and "harm" have been distinguished as follows:

> The ordinary as well as legal connotation of "harm" is that it is of broader import than "damage." Damage embraces direct physical injury to a cell, tissue, organ or organ system; "harm" to the physical structure of the body embraces also impairment of use or control of physical structures, directly caused by the accident. This interference with use or control in an organism whose good health depends upon unified action and balanced synthesis can be productive of the same disabling signs and symptoms as direct physical injury to the cells, tissues, organs or organ systems.

Bailey v. American General Ins. Co., 279 S.W.2d 315, 319 (Tex. 1955). Further, "'physical structure of the body,' as it is used in the statute, must refer to…the whole, to the complex of perfectly integrated and interdependent bones, tissues and organs which function together by means of electrical, chemical and mechanical processes in a living, breathing, functioning individual." *Id.* at 318.

"For total loss of use of a member to be compensable, the loss of use must have resulted from injury to the member itself, as opposed to the loss of use resulting from injury to another part of the body." *De La Cruz*, 470 S.W.3d at 58. The injury can be direct or indirect; however, "there must be damage or harm to the physical structure of the member in order for that member to be injured under the Act." *De La Cruz*, 470 S.W.3d at 58 (*citing Muro*, 347 S.W.3d at 275). Pain in the member without other symptoms is not an injury under the Act. *Id.*

Here, Appellee claims her compensable injury falls under subsection (a)(2), "loss [or lost use] of both feet at or above the ankle[.]" *See* TEX.LAB. CODE ANN. § 408.161(a)(2), (b). Appellant disagrees.

Appellant relies primarily on two cases out of the Texas Supreme Court: *Muro* and *De La Cruz*. *See Muro*, 347 S.W.3d 268; *De La Cruz*, 470 S.W.3d 56. In *Muro*, Carmen Muro, the claimant, injured her hips, lower back, right shoulder, and neck in a slip and fall accident at work. *Muro*, 347 S.W.3d at 270. Muro's injuries did not encompass a specific injury or body part

enumerated in section 408.161. *Id.* However, Muro's hip injuries affected the use of her feet to the extent that she could no longer work. *Id.* at 270. According to Muro, after surgery and the replacement of her hips, she returned to work but had difficulty "walking from the parking lot and sitting at her desk." *Id.* Muro then stopped working and sought LIBs under the Texas Workers' Compensation Act "because her workplace accident caused her to lose the use of her right hand and both feet." *Id.* Although Muro's feet were not injured, per se, a jury found that she was entitled to LIBs. *Id.* at 269-70. The court of appeals affirmed the employee's award, concluding that section 408.161 does not limit the award of LIBs to the specific injuries and body parts enumerated in the statute. *Id.*

The Texas Supreme Court reversed by denying LIBs. *Muro*, 347 S.W.3d at 277. The Court began its discussion by laying out the seven circumstances, or the seven enumerated body parts that section 408.161(a) provides "for the payment of lifetime income benefits[.]" *Id.* at 271. The Court raised the issue that the statute does not define "what it means to lose the use of one of the enumerated body parts ...." *Id.* at 271. Accordingly, the Court examined prior case law, particularly *Travelers Insurance Co. v. Seabolt*, 361 S.W.2d 204 (Tex.1962), which defined the "total loss of the use of a member." *Id.* at 272. The Court explained that the earlier version of the Act used the term "member" instead of "body part." *Id.* The Court also discounted a number of cases from the courts of appeals used by the parties by classifying them as "old-law cases." *Id.* at 273. The Court explained that these "old-law cases" were decided under an "earlier version of the workers' compensation act," which included six enumerated injuries and an all-encompassing "other loss" clause. *Muro*, 347 S.W.3d at 273-74. The Court then noted that the current version of the Act does not include the all-encompassing "other loss" clause. *Id.* at 274. Therefore, the Court determined

that the cases that rely upon the "other loss" clause are "neither relevant nor useful[.]" *Id.* at 274. The Court further explained that had the Texas Legislature wanted to include impairment or disability in the Act, it would have retained the "other loss" clause. *Id*. at 274-75. The Court concluded by stating, "The injury to the statutory body part may be direct or indirect, as in *Burdine*, but the injury must extend to and impair the statutory body part itself to implicate section 408.161." *Id*. at 276. Finding no evidence the injuries extended to Muro's feet or right hand, no contention that her feet or hand "ceased to possess 'any substantial utility as a member of the body,'" and "no evidence of injury to these body parts that prevented her from procuring and retaining employment requiring their use," the Court concluded the claimant was not entitled to LIBs. *Id.* at 276.

De La Cruz is the most recent Texas Supreme Court case dealing with LIBs. There, the claimant, Gloria De La Cruz, fell and injured her left knee and back while working as a cook at a restaurant in 2004. *De La Cruz*, 470 S.W.3d at 57. Her doctors diagnosed her with intervertebral disc herniations. *Id.* She had back surgery and, later, arthroscopic left knee surgery. *Id.* In spite of surgical treatment, she continued to experience pain and numbness in her legs, and continued treatment for back and knee pain. *Id.* De La Cruz sought LIBs from the Division of Workers' Compensation in 2009 pursuant to Section 408.161 of the Act, claiming her injury "caused the total loss of use of both her feet at or above the ankle, [and] the loss of use was permanent[.]" *De La Cruz*, 470 S.W.3d at 57 (*citing s*ee TEX.LAB. CODE ANN. § 408.161). Following a contested case hearing, the hearing officer denied her right to LIBs, which De La Cruz appealed. *Id.* An appeals panel from the Division affirmed, and De La Cruz appealed to the district court. *Id.* (*citing* TEX.LAB. CODE ANN. §§ 410.252, 410.301). After a non-jury trial, the district court found "her

injury resulted in the total and permanent loss of use of both her feet at or above the ankle and awarded LIBs." *Id.*

On appeal, this Court affirmed. *Dallas Nat'l Ins. Co. v. De La Cruz*, 412 S.W.3d 36, 38 (Tex.App.—El Paso 2013), *rev'd*, *Dallas Nat'l Ins. Co. v. De La Cruz*, 470 S.W.3d 56 (Tex. 2015). We held that the evidence was both legally and factually sufficient based on references in the medical records to radiculopathy, an impairment rating for radiculopathy, records demonstrating a "dermatomal loss on right side of L2 and left side L3," De La Cruz's use of a cane, and her complaints of pain radiating to her toes. *De La Cruz*, 412 S.W.3d at 43.

The Texas Supreme Court reversed, finding "[t]he closest the evidence comes to proving damage or harm to the physical structure of De La Cruz's feet are piecemeal, unexplained statements in various medical records." *De La Cruz*, 470 S.W.3d at 59. The Court noted two instances in the medical records where doctors noted De La Cruz suffered from problems secondary to radiculopathy and postlaminectomy syndrome, as well as "dermatomal loss due to nerve damage in her back." *Id.* [internal quotations omitted]. However, the Supreme Court found the records did not indicate "what parts of her lower extremities were involved or whether there was any physical damage or harm to them." *Id.* In particular, one medical record noted the absence of reflexes bilaterally in the ankles, but

> [D]oes not identify whether the condition was transient or permanent in both ankles; whether it reflected more than damaged nerve roots in De La Cruz's back; whether De La Cruz's feet were unable to function properly; or whether the condition was permanent and caused permanent total loss of use of both her feet. *Id.*

The Court held that it was not enough for the evidence to indicate her injury to her back merely affected her lower extremities, including her feet. *De La Cruz*, 470 S.W.3d at 59. Rather,

the Court reiterated its holding in *Muro* – that "absent evidence of damage or harm to the physical structure of the enumerated body part or parts" which resulted in the permanent total loss of use of those parts, the evidence is legally insufficient to meet the requirements to qualify for LIBs under section 408.161. *Id.* (*citing Muro*, 347 S.W.3d at 275).

Appellee relies on several cases, the first of which is *Liberty Mutual Ins. Co. v. Adcock*, 412 S.W.3d 492 (Tex. 2013). In *Adcock*, claimant Ricky Adcock injured his right ankle at work. *Id.* at 493. He underwent reconstructive surgery, but nevertheless developed reflex sympathetic dystrophy in his injured ankle. *Id.* The loss of use of his right foot, in combination with loss of use in his right hand at the wrist, entitled him to LIBs per the decision of the workers' compensation appeals panel. *Id.* A decade later, Liberty Mutual, his former employer's workers' compensation carrier, sought a new contested case hearing based on their belief Adcock regained use of his extremities. *Id.* at 493-94.

Adcock primarily deals with the Texas Department of Insurance, Division of Workers' Compensation's ("Division") authority to re-open LIB determinations. *See Adcock*, 412 S.W.3d at 494. The narrow issue decided in *Adcock* is not at issue in the case now before us. However, Appellee relies on *Adcock* for the proposition that Adcock's injury entitling him to LIBs was a foot injury at the ankle and a hand injury at the wrist; that is, although no injury or harm befell his foot **below** the ankle or his hand **below** the wrist, the subject foot and hand were still deemed injured consistent with the statutory language describing injuries to the foot "at or above" the ankle and injuries to the hand "at or above" the wrist. *See* TEX.LAB. CODE ANN. § 408.161(a)(4); *Adcock*, 412 S.W.3d at 494.

Appellee quotes the Supreme Court in *Adcock*, wherein the Court reiterated, "'Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers choose….'" *Adcock*, 412 S.W.3d at 494 (*quoting Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009)). Although the high court was not construing section 408.161(a)(4) in *Adcock* when it made the foregoing statement, we are mindful of the quote's applicability in all instances where we are called upon to interpret legislative mandates. Nevertheless, we cannot ignore the Supreme Court's unequivocal requirement in *Muro* and reiterated in *De La Cruz* that "absent evidence of damage or harm to the physical structure of the enumerated body part or parts" which resulted in the permanent total loss of use of those parts, the evidence is legally insufficient to meet the requirements to qualify for LIBs under section 408.161. *De La Cruz*, 470 S.W.3d at 59 (*citing Muro*, 347 S.W.3d at 275).

Appellee also relies on *Travelers Indem. Co. of Connecticut v. Thompson*, No. 05-16-00816-CV, 2018 WL 524860 at *2 (Tex.App.—Dallas Jan. 24, 2018, pet. denied)(mem. op.). There, Billy Thompson injured his back, right elbow, head and neck when he fell off a six-foot ladder onto some pipes. *Id.*, at *1. None of the four back surgeries he endured provided lasting relief. *Id.* His doctor diagnosed him with cervical disc disorder, radiculopathy, and lumbar disc disorder with radiculopathy. *Id.* Thompson underwent a number of treatments prescribed by multiple physicians. *Id.* Nearly sixteen years following his accident, Thompson saw a doctor of osteopathy who reviewed his earlier medical records and determined his numerous issues resulted from the injury he sustained in his fall from the ladder. *Id.* The Division, however, determined his previous compensable injury included a right elbow contusion but did not extend to his other injuries. *Id.* It determined Thompson was not entitled to LIBs because it concluded "Thompson's

injury was not a producing cause of the total loss of use of either hand at or above the wrist or either foot at or above the ankle." *Id.* The appeals panel declared the order final and Thompson appealed to the district court, seeking a jury trial. *Id.*, at *2.

At trial, Thompson testified he suffered from "bilateral leg pain that travels all the way down to his feet[,]" which surgery failed to alleviate. *Thompson*, 2018 WL 524860, at *2. He described the pain as numbness and tingling. *Id.* He testified to his inability to wear normal shoes due to foot swelling, and requiring a cane to walk. *Id.* Thompson's osteopathist testified regarding Thompson's intravertebral disc displacement in multiple locations, as well as radiculitis, neuralgia and neuritis. *Id.* He testified that Thompson's fall affected Thompson's nerves, causing his injuries and "'to experience pain and physical limitations'" as well as mood and pain disorders. *Id.*

A second physician performed an independent medical exam of Thompson, during which time the doctor did not observe Thompson in acute distress. *Thompson*, 2018 WL 524860, at *2. Among other things, Thompson walked without assistance at the appointment, and "had a normal swing and stance phase unlike someone suffering significant changes in his spine, knees, hips, or legs." *Id.* The doctor did not observe any atrophy on Thompson. Additionally, the doctor attributed diminished range of motion in Thompson's arms and legs to "lack of cooperation rather than injury or spinal disease." *Id.* He did, however, note that Thompson "exhibited weakness in multiple muscles that could not be explained by any anatomic or neurologic bases." *Id.*

Following the trial, the jury found Thompson's compensable injury included thirteen additional injuries, and "found [his] compensable injury was a producing cause of the permanent loss of the use of both feet at or above the ankles," among other things. *Thompson*, 2018 WL 524860, at *3. The jury found Thompson was entitled to LIBs, and Travelers appealed. *Id*.

On appeal, Travelers argued insufficient evidence exists to establish Thompson "suffered an injury to either foot at or above the ankle…and that any such injury he suffered resulted in the permanent and total loss of use of those members of his body." *Thompson*, 2018 WL 524860, at *4. It argued that the lack of expert evidence showing damage or harm to Thompson's foot or hand resulted in legally insufficient evidence to support the jury's award. *Id.*, at *4-5. Travelers also contended that "because the various medical records do not elaborate on how any injury to the nerve roots in his back may have affected his hands or feet[,]…the evidence amounts to nothing more than the type of unexplained, piecemeal records the supreme court rejected in *De La Cruz*." *Id.*, at *5 (*citing De La Cruz*, 470 S.W.3d at 59).

The Dallas court disagreed, noting that although Thompson received no direct injury to his hands or feet in the fall, medical records indicate the radiculopathy he indisputably suffered from "caused more than pain in his hands and feet." *Thompson*, 2018 WL 524860, at *6. The court noted Thompson's complaints of swelling, burning pain, hot and cold temperature changes, numbness and tingling in his arms, hands and feet. *Id.* It also noted his increasing weakness and absence of reflexes. *Id.* Thus, because of his diagnosis of radiculopathy resulting from the incident, in combination with the onset of these symptoms indicating more than mere pain, it was reasonable to infer "Thompson's radiculopathy caused indirect physical damage and harm to his feet at or above the ankles and to his hands at or above his wrists to support the jury's LIBs award." *Id.*

Appellee also relies on *see Hartford Underwriters Ins. Co. v. Burdine*, 34 S.W.3d 700 (Tex.App.—Fort Worth 2000, no pet.). Claimant Jean Burdine fell backwards while standing up from her desk, landed in her chair, but injured her back when the arm and base of the chair broke. *Id.* at 702. She underwent treatment from several doctors, a chiropractor, and physical therapist,

but was unable to return to work due to lingering pain and medication. *Id.* Burdine sought LIBs from the Texas Workers' Compensation Commission, which denied her request. *Id.* Appeal to a district court resulted in a jury finding that "Burdine's work injury was the producing cause of permanent and total loss of use of both legs and permanent and total loss of use of both feet at or above the ankles." *Id.* The jury also found Burdine received an injury to both feet at or above the ankle that was a producing cause of the total loss of use of both feet at or above the ankle. *Id.* at 704. Hartford appealed, claiming the record contained legally insufficient evidence to support the jury's finding. *Id.* at 705. Specifically, Hartford argued there was no evidence of injury to Burdine's legs, only her spine, "which indirectly affected the use of her feet and legs." *Id.* at 706.

Evidence at Burdine's trial showed she was diagnosed with "lumbosacral disk disease with radiculopathy," considered a type of "nerve irritation." *Burdine*, 34 S.W.3d at 706 [internal quotations omitted]. Radiology findings showed abnormalities in the discs in her lower back and "nerve injury to the associated nerve roots that exit at those levels." *Id.* [internal quotations omitted]. Her treating physician testified the nerves at issue "go down the legs into the feet." *Id.* [internal quotations omitted]. He also testified Burdine suffered from "footdrop" due to the nerve injuries, which "caused a muscular malfunction in Burdine's feet, causing her to be unable to lift her feet, causing her feet to 'slap the ground,' and causing a tendency for her to trip over her own toes." *Id.* He testified her total loss of use of her legs and feet at or above the ankles was permanent, and she was completely physically disabled. *Id.* He also opined that her compensable work injury produced the total loss of use of her legs. *Id.* at 707. Specifically, he stated her compensable work injury "'precipitated the current problem which has led to the chronic pain and the lower extremity weakness and pain.'" *Id.*

Burdine testified she experienced persistent pain and numbness in both legs, inability to bend her legs, and occasional inability to "maneuver" her legs in order to walk. *Id.* [internal quotations omitted]. Her medical records also indicated she suffered from a back injury that resulted in problems with both the function of her legs and the function of both feet at or above the ankles. *Id.*

The Fort Worth Court of Appeals affirmed the jury's findings on both legal and factual sufficiency grounds. *Id.* It held that the evidence showed Burdine's back injury fit the jury charge's definition for "injury" under the statute, which was "damage to the physical structure of the body that caused the incitement, precipitation, acceleration, or aggravation of the condition of both her legs and/or feet at or above the ankles[.]" *Id.* [internal quotations omitted]. Moreover, the Court found "an overwhelming amount of evidence in the form of testimony and medical records to support the jury's finding…that Burdine's feet and/or legs no longer possess 'any substantial utility as a member of the body'… 'such that [Burdine] cannot get and keep employment regarding [their] use.'" *Id.* [bracketed text original].

Analysis

A. Legal Sufficiency of the Evidence

In examining the evidence favorable to the verdict, and disregarding all evidence contrary to the verdict unless a reasonable juror would be unable to do so, we find more than a scintilla of evidence exists in the record proving Appellee suffered an injury[2] to both feet at or above the

[2] The jury received instructions that "'injury' means damage or harm to the physical structure of the body and such disease or infections as naturally result from such damage or harm." The instructional definition is consistent with the statutory definition. *See* TEX.LAB. CODE ANN. § 401.011(26).

ankles that was a producing cause of permanent and total loss of use of both feet at or above the ankles. *See City of Keller,* 168 S.W.3d at 810. We likewise find the record demonstrates more than a scintilla of evidence proving Appellee's compensable injury of June 5, 2008, extended to and included the spine and/or right lower extremity. *See id.*

Appellee's initial surgery included replacement of her femur with a prosthetic. Placement of a prosthesis prevents muscles and ligaments from attaching to it, unlike the case with a bone itself. Dr. Jackson testified that one of the surgeries performed on her left leg in which he replaced her hip socket, femur, and knee, resulted in the entire length of her leg from hip to knee being replaced with titanium prosthetics. As a result, there were no longer any places for the muscles in her leg to attach, which weakened her leg and precluded her from ever being able to walk normally again. He further testified that these prosthetics decrease mobility because the muscle has nothing upon which to anchor itself.

The medical records confirm Dr. Jackson's testimony. As early as December 18, 2008, medical records indicated Appellee's lower extremities were atrophic, she was experiencing weakness in both ankles and significant low back pain. On January 5, 2009, Appellee reported difficulty walking and Dr. Mrochek noted severe atrophy in both legs and weakness in the right leg. On February 4, 2009, Appellee reported difficulty getting up and moving around due to pain in her coccygeal area. She reported pain going down her legs, and physical examination revealed lower extremity atrophy. In May of 2009, records note she probably had "critical care myelopathy/polyneuropathy with lower extremity weakness due to her prolonged state of immobility and recently prolonged ICU care." On June 10, 2009, Appellee reported inability to walk because of weakness and cramping in her legs. An evaluation note from October 11, 2010,

revealed the complete absence of any reflexes in either her left or right knee or ankle, and both lower extremities were "very atrophic." Severe weakness in both ankles and significant atrophy of the legs was noted in December of 2010. At multiple appointments in late 2010 and into 2011, her doctors noted bilateral ankle weakness. The foregoing examples are but a handful of references in Appellee's medical records to Appellee's steady decline in strength, muscle tone, and lower leg function following the June 5, 2008, injury and subsequent numerous surgeries and complications, as fully set out in the background section of our opinion.

Furthermore, Appellee's testimony and that of her treating physicians provide more than a scintilla of evidence that an injury to her feet at or above the ankles was the producing cause of her total loss of use of both feet at or above the ankles. Appellee testified to her previous ability to walk to work daily, and her ability to complete the physical portions of her job without incident. She also testified the injury to her hip exacerbated her diabetes, which she previously controlled through diet and medication. Appellee testified she cannot walk without assistance since the injury. She stated her legs are very weak and she cannot walk more than a few steps with assistance before she has to stop due to fear of falling. Appellee has been unable to stand on her own since the date of the injury. Appellee indicated her feet get numb and are very weak and as a result she is unable to move them to walk. She testified both legs have changed in size and shape since the incident, as well as her feet.

Dr. Albrecht testified the atrophy Appellee experienced in her legs was the muscles shrinking, and agreed Appellee exhibited atrophy in both legs. He stated atrophy can be caused by nerve injury or prolonged disuse of the muscle. He testified that motion of the foot is largely

controlled by muscles in the legs, and the main function of the foot is to provide a platform for walking.

Dr. Jackson testified that Appellee's prolonged periods of immobility following her multiple surgeries resulted in her right side getting progressively weaker and atrophying. Reports in which he indicated Appellee's foot function was "normal" meant only that she could move her toes; the portion above her foot through her knee and hip was very abnormal and were not functional for walking. He was unaware of any employment in which Appellee could engage given her condition. He also testified that he believed the atrophy in Appellee's legs was not the result of her diabetes.

Of the authority relied upon by the parties, we find the instant case most analogous to *Burdine*. *See Burdine*, 34 S.W.3d at 706-707. Here, as was the case in *Burdine*, numerous references in the medical records to neurological changes and nerve damage, as well as severe pain and weakness, were brought on following the injury in question. *See id.* at 707. Burdine's back injury caused nerve damage to affect the function of her feet and resulted in her inability to walk, much like Appellee's left hip injury and complications therefrom resulted in lengthy immobilization and atrophy in both lower legs to the extent that she is unable to use her feet. *See id.* at 706-707.

Additionally, unlike the claimants in *Muro* and *De La Cruz*, Appellee produced more than a scintilla of evidence that the compensable injury was the producing cause of damage or harm to the physical structures of her feet, which the Texas Supreme Court held is a requirement under section 408.161. *See Muro*, 347 S.W.3d at 276; *see also De La Cruz*, 470 S.W.3d at 59. Her medical records and the testimony of Dr. Jackson and Dr. Albrecht indicate weakness and severe

atrophy in her legs, and complete absence of reflexes in both legs at the knee and ankle, which they attribute to prolonged immobility following the accident and resulting complications. This evidence indicates the physical structure of both of Appellee's feet were injured according to the statutory definition of "injury" under the Code; that is, the physical structure of both feet at or above the ankles were damaged and/or harmed such that Appellee no longer had use or control of them. *See* TEX.LAB. CODE ANN. § 408.161(a)(2); *see also Adcock*, 412 S.W.3d at 494; *Bailey*, 279 S.W.2d at 319. There is also ample evidence Appellee no longer had the ability to walk, her condition would worsen, and she would be unable to obtain any employment requiring the use of her feet at or above the ankles.

We find the evidence legally sufficient to support the jury's findings and overrule Appellant's first and third issues.

B. Factual Sufficiency of the Evidence

Turning to Appellant's factual sufficiency issues, we examine all the evidence and set aside a finding only if the evidence supporting the jury finding is so weak as to be clearly wrong and manifestly unjust. *See Cain*, 709 S.W.2d at 176. Although some evidence indicates Appellee's condition was caused or worsened by pre-existing or other factors not attributable to her fall at work, we do not find the evidence supporting the jury's finding is so weak that justice can only be done by overturning their verdict and ordering a new trial. *See Burdine*, 34 S.W.3d at 707 (*citing Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965)). Accordingly, for the same reasons we find the evidence legally sufficient to support the jury's findings, we find the evidence factually sufficient to support the jury's findings. Appellant's second and fourth issues are overruled.

CONCLUSION

We hold the record demonstrates legally and factually sufficient evidence to support the jury's findings that Appellee's compensable injury extended to and included an injury to the spine and/or the right lower extremity, and Appellee suffered an injury to both of her feet at or above the ankles that was a producing cause of the total loss of use of both of her feet at or above the ankles.

Having overruled each of Appellant's four issues on appeal, we affirm the judgment of the trial court.

YVONNE T. RODRIGUEZ, Chief Justice

August 20, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.