

APPEAL NO. 121075
FILED AUGUST 13, 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 April 30, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to sexual dysfunction; (2) the date of maximum medical improvement (MMI) is July 27, 2011; (3) the respondent's (claimant) impairment rating (IR) is 19%; and (4) the claimant had disability from September 10, 2010, through July 27, 2011. The appellant (carrier) appeals the hearing officer's extent-of-injury determination as well as the determinations of the MMI date, IR, and disability. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. B] as the designated doctor to determine MMI and IR; (3) Dr. B certified that the claimant reached MMI on July 7, 2011, with a 5% IR; (4) [Dr. M], acting in place of the treating doctor, certified that the claimant reached MMI on July 27, 2011, with a 19% IR; (5) the date of statutory MMI is July 27, 2011; and (6) by Division Order it was determined that the compensable injury extends to a lumbar herniation with radiculopathy at L5-S1, scarring of the penis, and recurrent inguinal and umbilical hernias.

DISABILITY

The hearing officer's determination that the claimant had disability from September 10, 2010, through July 27, 2011, is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The claimant sustained a compensable lifting injury while in the course and scope of his employment. The hearing officer added an extent-of-injury issue at the CCH, finding good cause. At issue was whether the compensable injury extended to sexual dysfunction. The hearing officer found that the claimant's sexual dysfunction arose out of or naturally flowed from the compensable injury. The hearing officer noted in the Background Information portion of her decision that the more persuasive

evidence from the claimant's physicians including Dr. M and [Dr. F] supported that the compensable injury extends to sexual dysfunction. As previously noted, it has been administratively determined that the compensable injury extends to scarring of the penis.

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 (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).

Dr. F in his medical narrative dated February 16, 2011, noted in the history of the claimant's illness that the claimant reported an injury of the penis during the ilioinguinal nerve release surgery and "[had] stabbing pains in that region." Dr. F noted that the claimant reported that he could not have sex due to the pain. Additional medical records from Dr. F gave the same history but Dr. F did not attempt to explain how the compensable injury or the treatment for such injury would result in sexual dysfunction.

Dr. M in his narrative report of August 30, 2011, stated that the claimant was noted to have a 1.5 cm X 4 mm abrasion of the glans penis that was attributed to removal of a surgical dressing that had adhered to the skin. However, at the CCH, the claimant described the injury as a cut. Dr. M stated that the claimant reported that his sexual dysfunction began at that time and has not improved and that the claimant described the specific problems he was having. However, Dr. M did not include sexual dysfunction in his diagnoses of the claimant, although he provided an IR for such. Dr. M did not attempt to explain how the compensable injury or the claimant's treatment for that injury may have resulted in sexual dysfunction.

Dr. B, the designated doctor, noted in his narrative report dated December 5, 2011, that the claimant said he was injured during groin surgery and had a cut to his penis, but that it was well healed and he did not even see a scar where the claimant states he was injured, although the claimant still complained of pain. A clinical note dated May 10, 2011, from [Clinic] noted that the cut to the claimant's penis is now well healed.

There was conflicting evidence regarding how the claimant's penis was injured. However, there was no medical evidence in the record to explain how any injury whether it was a cut or abrasion caused the claimant to have sexual dysfunction. Rather, the doctors simply reported the claimant's subjective complaints.

Under the facts of this case, the diagnosis of sexual dysfunction without attendant explanation by any doctor or expert of how this condition may be related to the compensable injury or treatment for the compensable injury does not establish sexual dysfunction is related to the compensable injury within a reasonable degree of medical probability. See State Office of Risk Mgmt. v. Adkins, 347 S.W.3d 394 (Tex. App.-Dallas, 2011, no pet.), Transcontinental Insurance Company v. Crump, 330 S.W.3d 211 (Tex. 2010), and APD 101323-s, decided November 8, 2010. The hearing officer's finding that the claimant's sexual dysfunction arose out of or naturally resulted from the [date of injury], compensable injury is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's decision that the compensable injury of [date of injury], extends to sexual dysfunction. We render a new decision that the compensable injury of [date of injury], does not extend to sexual dysfunction.

MMI AND IR

The hearing officer found that a preponderance of the evidence supports Dr. M's, the referral doctor, certification of MMI and assignment of IR. Dr. M examined the claimant on August 30, 2011, and certified that the claimant reached statutory MMI on July 27, 2011, and assessed a 19% IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. M assessed 10% impairment for the claimant's lumbar spine, placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category III: Radiculopathy, noting that the claimant had loss of relevant reflexes. Dr. M assessed 5% impairment for ilioinguinal nerve entrapment using Table 24, page 4/152 of the AMA Guides. However, Dr. M did not document sensory or motor abnormalities of the nerve. Dr. M assessed 5% impairment for sexual dysfunction using Table 19, page 4/149 of the AMA Guides. Dr. M did not assess a rating for the claimant's umbilical hernia.

The hearing officer's determination that the compensable injury extends to sexual dysfunction was reversed and a new decision rendered that the compensable injury does not extend to sexual dysfunction. Therefore, the certification given by Dr. M cannot be adopted. Accordingly, the hearing officer's determination that the claimant's date of MMI is July 27, 2011, and the claimant's IR is 19% is reversed.

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the

Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

As previously noted, the Division appointed Dr. B as the designated doctor to determine MMI and IR. Dr. B initially examined the claimant on November 30, 2009, and certified that the claimant reached clinical MMI on that date with a 0% IR, using the AMA Guides, rating an inguinal hernia and lumbar strain. This certification cannot be adopted because it does not rate the entire compensable injury. As previously discussed, the Division has administratively determined that the [date of injury], compensable injury extends to a lumbar herniation with radiculopathy of L5-S1, scarring of the penis, and recurrent inguinal and umbilical hernias.

The claimant had surgery for his inguinal hernia on August 24, 2009. On October 26, 2009, the claimant had surgery for his umbilical hernia. A letter of clarification (LOC) was sent to Dr. B and he responded in a letter dated March 17, 2010. Dr. B after reviewing additional medical records stated that considering the claimant's umbilical hernia he changed the MMI date to January 5, 2010, which would be 12 weeks "post op."

On February 4, 2010, the claimant underwent a right ilioinguinal nerve block and on February 25, 2010, the claimant had a right groin exploration with release of nerve and Marlex plug of revised repair. A second LOC was sent to Dr. B and in a response dated May 5, 2010, Dr. B noted that the claimant did not have nerve entrapment upon his examination.

The claimant underwent a right L5-S1 partial hemilaminotomy, right L5-S1 partial foraminotomy and right L5-S1 discectomy on January 7, 2011. On December 5, 2011, Dr. B re-examined the claimant and certified that the claimant reached MMI on July 7, 2011, with a 5% IR using the AMA Guides. Dr. B assessed 0% impairment for both the umbilical and inguinal hernias; 0% for the injury to the penis; and 5% for the lumbar spine, placing the claimant in Lumbosacral DRE Category II: Minor Impairment.

The hearing officer found that a preponderance of the evidence does not support Dr. B's certification of MMI or assignment of IR because "Dr. [B] failed to rate [the] [c]laimant's sexual dysfunction and ilioinguinal nerve entrapment" and that the claimant was not at clinical MMI on July 7, 2011, "as he was pending spinal surgery."

However, a new decision has been rendered that the compensable injury does not extend to the claimant's sexual dysfunction. Dr. B assessed 0% impairment for the claimant's umbilical and inguinal hernias. Dr. B certified July 7, 2011, as the date of the claimant's MMI because it was six months after his lumbar surgery. Dr. B noted that the loss of sensation on the claimant's right side does not correspond with the distribution of any nerve or dermatome and noted there was no wasting of muscle that indicated a neurological problem. Dr. B noted that the post-operative MRI and EMG/NCV were essentially normal except for the post-operative change for which one would expect to have scarring. Dr. B opined that the claimant had recovered as much as possible.

For reasons explained above, the certification from Dr. M, the referral doctor, cannot be adopted. The hearing officer rejected the certification from the designated doctor, Dr. B, of MMI on July 7, 2011, with a 5% IR in part because he did not rate sexual dysfunction. The hearing officer's determination that the compensable injury extends to sexual dysfunction has been reversed and a new decision rendered that the compensable injury does not extend to sexual dysfunction. Dr. B rated the entire compensable injury as administratively determined and opined that the claimant had recovered as much as possible. Therefore, the hearing officer's finding that Dr. B's certification of MMI/IR is contrary to the preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The hearing officer's determination that the claimant's date of MMI is July 27, 2011, and the claimant's IR is 19% is reversed and a new decision rendered that the claimant reached MMI on July 7, 2011, with a 5% IR.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability from September 10, 2010, through July 27, 2011.

The hearing officer's decision that the compensable injury of [date of injury], extends to sexual dysfunction is reversed and a new decision rendered that the compensable injury of [date of injury], does not extend to sexual dysfunction.

The hearing officer's determination that the claimant's date of MMI is July 27, 2011, and the claimant's IR is 19% is reversed and a new decision rendered that the claimant reached MMI on July 7, 2011, with a 5% IR.

The true corporate name of the insurance carrier is **WAUSAU BUSINESS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge