APPEAL NO. 121269
FILED SEPTEMBER 4, 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 May 23, 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 right shoulder rotator cuff tear, cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, cervical disc herniations at C5-6 and C6-7; and (2) the respondent (claimant) reached maximum medical improvement (MMI) on April 4, 2012, with 24% impairment rating (IR). The appellant (self-insured) appeals the hearing officer's extent of injury and MMI/IR determinations. Additionally, the self-insured contends that the hearing officer erred in admitting a claimant's exhibit over its objection. The claimant responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded 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 as first designated doctor, [Dr. B] to determine the claimant's ability to return to work; (3) the Division appointed as second designated doctor, [Dr. P] to determine MMI, IR, and the extent of the compensable injury; (4) Dr. P certified that the claimant reached MMI on March 22, 2011, with 8% IR; (5) [Dr. AS] certified that the claimant reached MMI on April 4, 2012, with 24% IR; and (6) the date of statutory MMI is May 5, 2012. The claimant, a teacher, testified that she was hurt at work when she was shoved into a door jam by students engaged in an altercation.

EXTENT OF INJURY

In the Background Information section of her decision, the hearing officer states:

An issue has arisen as to whether the injury extends to [r]ight shoulder rotator cuff tear, cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, cervical disc herniation[s] at C5-6 and C6-7. However, the more persuasive evidence from orthopedic surgeon [Dr. R] and designated doctor [Dr. B], supports that the compensable injury does include the above noted diagnoses.

The Division appointed designated doctor [Dr. P] to determine MMI, IR and extent of the compensable injury . . . . A careful review of the record reveals that Dr. [P's] opinion regarding the extent of the compensable injury is not supported by a preponderance of the credible evidence.

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). In APD 110054, decided March 21, 2011, the Appeals Panel stated that "[a]lthough the claimed conditions are listed in the record, there is not any explanation of causation for the claimed conditions in the record. We hold that in this case the mere recitation of the claimed conditions in the medical records without attendant explanation how those conditions may be related to the compensable injury does not establish those conditions are related to the compensable injury within a reasonable degree of medical probability."

Right Shoulder Rotator Cuff Tear

In evidence is an "Initial Medical Report" dated October 19, 2010, by [Dr. C], a treating doctor for the claimant. In that report, Dr. C states that "[the claimant] was caught in a doorway and was pushed by a group of students. Her right arm was caught and leveraged behind her body causing immediate pain in her right shoulder . . . Right shoulder MRI reviewed today reveals a . . . partial thickness tear of the supraspinatus involving approximately 50% of the tendon." Dr. C noted in that same report that the claimant has continuing symptoms consistent with MRI findings of a torn right rotator cuff. Dr. C provided an attendant explanation how the right shoulder rotator cuff tear was causally linked to the work injury.

That portion of the hearing officer's determination that the compensable injury of [date of injury], extends to right shoulder rotator cuff tear is supported by sufficient evidence and is affirmed.

Cervical Radiculopathy, Multiple Nerve Root Impingement Bilaterally at C5-6, Cervical Disc Herniations at C5-6 and C6-7

Pursuant to Section 408.0041(a)(3) and 28 TEX. ADMIN. CODE § 127.1(a)(3) (Rule 127.1(a)(3)) at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to

resolve any question about the extent of the employee's compensable injury. Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Dr. P examined the claimant on April 26, 2011, and on the question of the extent of the compensable injury, stated in his narrative dated that same day that:

The [claimant's] compensable injuries are right shoulder sprain/strain, chest contusion and right wrist sprain/strain. Please note the [claimant] does have multiple findings of degenerative joint disease to include osteophytes and herniated disk. However, these are clearly the result of the aging process and not related to her injury. I do acknowledge these. I do feel that throughout the body of her medical records, it looks like there has been a lot of commingling of diseases of aging and the [claimant's] overall condition and the [claimant's] injury that has been bleeding over into what we are finding throughout the chart. The [claimant's] compensable injury is more of a soft tissue injury that has, for the most part, resolved at this time and does not have any long lasting deficits. The findings of the osteophytes, the radiculopathy by EMG findings and ongoing pain issues, are most likely the result of diseases of age, aging process and not related to the compensable injury.

The hearing officer found that a preponderance of the evidence does not support Dr. P's opinion regarding the extent of the compensable injury. As discussed above, we have affirmed the hearing officer's decision regarding the right shoulder rotator cuff tear. However, we must review the evidence in regards to the other claimed extent-of-injury conditions.

The hearing officer stated in her decision that the opinion of Dr. B, the first designated doctor to determine MMI/IR and the claimant's ability to return to work, was persuasive in finding that Dr. P's opinion on the extent of the compensable injury of [date of injury], was not supported by a preponderance of the evidence.

Dr. B examined the claimant on August 13, 2010, for purposes of MMI/IR. In his narrative report dated August 30, 2010, Dr. B lists his findings on physical examination of the right shoulder, musculoskeletal, reflexes, and motor upper extremities as well as his range of motion (ROM) measurements for the right shoulder and the findings revealed by the cervical MRI dated March 8, 2010. Dr. B includes the cervical MRI findings of disk space narrowing C5-6, C6-7, facet disease C2-T1, disk bulges at C5-6 and C6-7 with impingement central canal (spinal cord and bilateral nerve roots) at the C6-7 level, and the findings of a EMG dated April 22, 2010, interpreted as right C6 radiculopathy. Dr. B lists the diagnoses as right shoulder rotator cuff tear, intervertebral disk (IVD) cervical, and radiculopathy cervical. In this report, Dr. B lists a mere recitation of a portion of the claimed conditions in the medical records without attendant

explanation how those conditions may be related to the compensable injury of [date of injury].

Dr. B examined the claimant a second time on September 17, 2010, for purposes of the claimant's ability to return to work. In a narrative dated October 12, 2010, Dr. B states the diagnoses of right rotator cuff tear, IVD cervical, and radiculopathy cervical. The report is a mere recitation of these diagnoses without attendant explanation how these conditions may be related to the compensable injury.

The hearing officer stated in her decision that the opinions of Dr. R, an orthopedic surgeon, were persuasive in finding that Dr. P's opinion on the extent of the compensable injury of [date of injury], was not supported by a preponderance of the evidence.

Dr. C referred the claimant to Dr. R, an orthopedic surgeon. In evidence is a medical report dated February 2, 2011, in which Dr. R states that a previous MRI revealed disk herniations at C3-4, C4-5, C5-6, and C6-7 and that upon review of the MRI "the MRI, which revealed multilevel degenerative disk disease cervical spine and a partial rotator cuff tear." Dr. R in that report assessed that the claimant had "old problems: cervical recompression C5-6 and C6-7 on the right and also 50% rotator cuff tear both related to the injury." Also in evidence is a medical note dated February 21, 2011, in which Dr. R assesses cervical radiculopathy and recommends nerve root blocks. There is a medical note dated July 11, 2011, which discusses his plan for the claimant to undergo nerve root blocks C5-6 on the right. There is a medical note dated September 7, 2011, in which Dr. R assesses a possible C5 and C6 radiculopathy on the right and a right shoulder rotator cuff tear. Dr. R also states that the claimant has not had her nerve root blocks which were recommended to find out if the problems were associated with her shoulder. An October 19, 2011, medical note states it needs to be determined whether or not C5-6 is involved prior to fixing the rotator cuff. Also in evidence is a letter dated March 13, 2012, in which Dr. R states that as the claimant's treating doctor he is in disagreement with the certification of MMI/IR by Dr. P because Dr. P did not include the cervical spine in the IR. Dr. R states "[the claimant's] cervical spine was part of the original compensable injury therefore it should have been included in that rating. [The claimant] may need to be sent back to Dr. [P] for further evaluation of the cervical spine. The [claimant] needs C5-6 nerve root blocks to start . . . on the right and then rotator cuff repair on the right." There is no attendant explanation in any of Dr. R's medical records in evidence how the claimed cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7 may be related to the compensable injury of [date of injury].

A review of other medical records in evidence do not establish an attendant explanation of how the conditions of cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, cervical disc herniations at C5-6 and C6-7 may be related to the compensable injury of [date of injury].

Accordingly, the finding by the hearing officer that as to the claimed conditions of cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7, a preponderance of the evidence does not support Dr. P's opinion regarding the extent of the compensable injury is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse that portion of the hearing officer's determination that the compensable injury of [date of injury], extends to cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7 and render a new decision that the compensable injury of [date of injury], does not extend to cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7.

MMI/IR

Dr. P, the second designated doctor appointed by the Division to determine MMI/IR, examined the claimant on April 26, 2011, and certified that the claimant reached clinical MMI on March 22, 2011, with 8% IR. In his narrative report dated April 26, 2011, Dr. P diagnosed the claimant with a right shoulder sprain/strain, chest contusion, and right wrist sprain/strain. The 8% IR was based on: (1) Dr. P determined that the chest contusion was a soft tissue injury and had "no ratability;" (2) Dr. P measured the ROM of the right wrist, attaching his worksheet for the ROM measurements, and based on those measurements correctly determined there was 0% impairment for the right wrist; and (3) Dr. P measured an abnormal ROM for the right shoulder, attaching his worksheet for the ROM measurements, and based on those measurements correctly determined that the measurements resulted in 14% upper extremity impairment which converts to 8% whole person impairment.

The hearing officer in her Background Information states that the certification of MMI/IR by Dr. P cannot be adopted because Dr. P did not evaluate the claimant's neck. While the hearing officer is correct that Dr. P's certification of MMI/IR cannot be adopted, it is not for this reason because we have reversed that portion of the hearing officer's extent-of-injury determination regarding the neck and rendered a new decision that the compensable injury of [date of injury], does not extend to cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7.

However, as discussed above, the hearing officer determined (and the Appeals Panel affirmed) that the compensable injury extends to right shoulder rotator cuff tear. In his certification of MMI and assigned IR, Dr. P considered the diagnosis of right shoulder sprain/strain but did not consider the diagnosis of right shoulder rotator cuff tear. Therefore, the hearing officer's finding that a preponderance of the evidence does not support Dr. P's certification of MMI/IR is supported by the evidence.

Because the designated doctor's certification cannot be adopted, we must consider other certifications of MMI/IR admitted into evidence.

In Dr. R's letter dated March 13, 2011, in which he disagrees with Dr. P's certification of MMI/IR, Dr. R states that he has referred the claimant to Aquatic Care (AQ) for an independent evaluation. In evidence are a Report of Medical Evaluation (DWC-69) and an Amended DWC-69 both reflecting an examination on September 29, 2011. Neither DWC-69 indicates who the certifying doctor is or is signed by a certifying doctor or contains a date of certification. Each DWC-69 contains a prospective date of clinical MMI on October 19, 2011, based on the date of the certifying exam of September 29, 2011. The first DWC-69 assigns the claimant 10% IR and the amended DWC-69 assigns 15% IR. Attached to each DWC-69 are AQ physical therapy notes. These certifications of MMI/IR cannot be adopted because neither is a valid certification of MMI/IR as provided in Rules 130.1 and 130.12.

However, there is a certification of MMI/IR by Dr. AS, a referral doctor selected by treating doctor acting in place of the treating doctor. Dr. AS examined the claimant on April 4, 2012, and certified that the claimant reached statutory MMI on that date with 24% IR. The 24% IR is based on: (1) measuring abnormal ROM of the right shoulder, attaching his worksheet with the ROM measurements, which based on those measurements results in 19% upper extremity impairment which converts to 11% whole person IR; (2) placing the claimant in Diagnosis-Related Estimate Cervicothoracic Category III: Radiculopathy for 15% whole person IR; and (3) combining 15% with 11% resulting in 24% whole person IR.

However, Dr. AS's certification of MMI/IR cannot be adopted because Dr. AS in certifying MMI and assigning IR included cervical radiculopathy. As discussed above, the hearing officer's decision that the compensable injury included cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, and cervical disc herniations at C5-6 and C6-7 has been reversed and a new decision rendered that the compensable injury does not extend to these claimed conditions. Dr. AS included a non-compensable condition in his certification of MMI/IR. The hearing officer's finding that a preponderance of the evidence supports Dr. AS's certification of MMI and assignment of IR and that his impairment evaluation was performed in accordance with

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) 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 decision that the claimant reached MMI on April 4, 2012, with 24% IR. Because there is no certification of MMI/IR that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

PROCEDURAL ERROR

To obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. *See* APD 051705, decided September 1, 2005.

At the CCH, the claimant offered into evidence the certification of AS. The self-insured objected on the basis of there was no good cause for admitting an exhibit which was not timely exchanged. The hearing officer did not attempt to discuss the facts surrounding the exhibit and the reasons for the date of the alleged late exchange. The hearing officer did not make any determination of good cause but summarily admitted the exhibit.

Even if the admission of this document could be considered error under the facts of this case, any error was harmless, because the hearing officer's decision on MMI/IR based on this exhibit was reversed for other reasons and the issues of MMI/IR remanded to the hearing officer for further action consistent with this decision. Therefore, the admission of the certification of MMI/IR by Dr. AS does not amount to reversible error.

SUMMARY

We affirm that portion of the hearing officer's decision that the compensable injury of [date of injury], extends to right shoulder rotator cuff tear.

We reverse that portion of the hearing officer's decision that the compensable injury of [date of injury], extends to cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7 and render a new decision that the compensable injury of [date of injury], does not extend to cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7.

We reverse the hearing officer's decision that the claimant reached MMI on April 4, 2012, with 24% IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. P is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. P is still qualified and available to be the designated doctor. If Dr. P is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI/IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a right shoulder strain and soft tissue injury to the claimant's left breast (as accepted by the self-insured). Furthermore, it has been administratively determined by the Division that the compensable injury of [date of injury], extends to a right shoulder rotator cuff tear but it does not extend to cervical radiculopathy, multiple nerve root impingement bilaterally at C5-6, or cervical disc herniations at C5-6 and C6-7.

The hearing officer is to advise the designated doctor that Rule 130.1(c)(3) provides that the doctor assigning the IR shall: (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury; (B) document specific laboratory or clinical findings of an impairment; (C) analyze specific clinical and laboratory findings of an impairment; and (D) compare the results of the analysis with the impairment criteria and provide the following: (i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides. The doctor's inability to obtain required measurements must be explained.

The designated doctor is to be requested to re-examine the claimant and to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the injured employee's condition as of the MMI date, which can be no later than the parties' stipulated date of statutory MMI, May 5, 2012, considering the claimant's medical record and the certifying examination.

After the designated doctor re-examines the claimant and submits a new certification of MMI/IR (DWC-69 and narrative report), the parties are to be provided with the designated doctor's new certification of MMI/IR (DWC-69 and narrative report). The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/IR consistent with this decision.

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

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

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge