

APPEAL NO. 121547
FILED OCTOBER 1, 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 June 11, 2012, with the record closing on June 25, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the four disputed issues; the hearing officer determined that: (1) the compensable injury of [date of injury], extends to right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, partial tear of the posterior inferior labral margin, and cervical radiculopathy at C6-7; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant is not at MMI no impairment rating (IR) may be assigned; and (4) the claimant had disability from September 28, 2010, through the date of the hearing, which was the period of disability in dispute.

The appellant (carrier) appealed, contending that: (1) the hearing officer's determinations on the extent-of-injury issue are not supported by sufficient evidence; (2) the claimant reached MMI on August 4, 2011, with a five percent IR pursuant to the certification from [Dr. K] the post-designated doctor required medical examination (RME) doctor; and (3) disability ended at statutory MMI. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he injured his neck and right shoulder lifting heavy tools from a truck at work. The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The carrier accepted cervical herniations and spasms at C7-T1, acute C7-8 radiculopathy, aggravation to cervical disc degeneration, and foraminal stenosis at C5-7.

The parties in a Benefit Dispute Agreement (DWC-24) dated September 27, 2010, agreed "the compensable injury of [date of injury], extends to . . . cervical herniations & spasms [at] C7-T1, acute C7-8 radiculopathy, and aggravation to cervical disc degeneration & [foraminal] stenosis [at] C5-7" and that the "claimant did not have disability from [date of injury], to present [September 27, 2010]." The claimant testified that he entered into the DWC-24 in order to obtain medical treatment for his neck.

That portion of the hearing officer's decision that the claimant's compensable injury includes cervical radiculopathy at C6-7 is supported by sufficient evidence and is affirmed.

[Dr. JB] in a report dated April 26, 2012, recommended proceeding with a cervical laminectomy and decompression C3-6 bilaterally, with foraminotomy, laminectomy at C3-4, C5-6, and C7-T1. The claimant testified, and the medical evidence supports, that the claimant has been recommended for further surgery for the compensable cervical injury and that further material recovery can reasonably be anticipated. See Section 401.011(30)(A). Accordingly, the hearing officer's decision that the claimant has not reached MMI is supported by sufficient evidence and is affirmed.

The hearing officer's decision that no IR can be assigned is supported by sufficient evidence and is affirmed.

The hearing officer's decision that the claimant had disability from September 28, 2010, through the date of this CCH is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. Appeals Panel Decision 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).

At the CCH, the hearing officer asked the claimant whether there was a causation letter "regarding the tears and the SLAP lesion." The response was "there's no specific detailed causation letter" other than the records of [Dr. B].

The claimant was initially seen at a hospital emergency room (ER) on July 1, 2009, with complaints of neck and upper back pain. One pain diagram indicates right shoulder pain and another pain diagram indicates bilateral mild shoulder pain. [Dr. R], a designated doctor appointed to give an opinion on extent of injury and disability, in a report dated December 19, 2009, diagnosed right shoulder pain/strain and a cervical strain. Nerve conduction studies were performed that did not address the right shoulder condition. The hearing officer, in her Background Information, commented:

An issue has arisen as to whether the injury extends to right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, partial tear of the posterior inferior labral margin, and cervical radiculopathy at C6-7. However, the more persuasive evidence

from designated doctor [Dr. J] and treating surgeons [Dr. B] and [Dr. W], supports that the compensable injury does extend to include right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, partial tear of the posterior inferior labral margin, and cervical radiculopathy at C6-7.

Dr. J, a designated doctor appointed to opine on the ability to return to work and on the extent of injury, in a report dated March 15, 2012, listed the reports and diagnostic studies that he reviewed. Regarding the extent of injury, Dr. J stated: “[t]he extent of injury is to include right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, [and] partial tear posterior inferior labral margin”

Dr. J merely lists the shoulder conditions without any attendant explanation regarding causation or how any pre-existing condition may have been aggravated by the claimant’s work injury. Dr. J’s report does not constitute sufficient expert medical evidence based on a reasonable medical probability that the compensable injury caused the claimant conditions of: right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, and partial tear of the posterior inferior labral margin.

The hearing officer also cited as persuasive evidence that the compensable injury includes the claimed conditions, the reports of the treating surgeons, Dr. B and Dr. W. Dr. B, in an office note of July 22, 2011, discussed that the claimant had adhesive capsulitis and recommended shoulder surgery for the adhesive capsulitis which is not one of the disputed conditions at issue. In another office note of June 24, 2011, Dr. B noted a follow-up visit and discussed only the right shoulder adhesive capsulitis, not at issue in this case.

Dr. W, in a report dated April 7, 2010, stated that the claimant “within a week [of the compensable injury] developed pain around his shoulder blade posteriorly I know that [the claimant] had complained of right hand, right arm and shoulder injuries as results of [heavy lifting]. However, it is my opinion that his upper extremity symptoms are likely all related to a disk herniation present at C7-T1 in his lower cervical spine.” In a report dated June 15, 2010, Dr. W stated “[i]t is my opinion that the disk degeneration present at these levels [C5-7] and the resulting foraminal stenosis is not a direct result of his injury.” Dr. W’s office notes do not establish within a reasonable medical probability causation of the right shoulder conditions in dispute and in fact indicates that the claimant’s shoulder problems may originate in the cervical spine.

In contrast, in a report dated June 14, 2012, and in his testimony at the CCH, Dr. K, the carrier’s RME doctor, in commenting on the claimant’s shoulder injury, stated:

Had the patient's rotator cuff tear, labral tear and other MRI changes in the right shoulder been caused by the [date of injury], injury, then the patient would have been acutely symptomatic in the right shoulder and this would not have been missed by the ER staff. Hence, all right shoulder symptoms and physical and MRI findings are not related to the [date of injury], injury based on reasonable medical probability.

That portion of the hearing officer's determination that the compensable injury of [date of injury], extends to right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, and partial tear of the posterior inferior labral margin is against the great weight and preponderance of the evidence. There is insufficient expert medical evidence linking the claimed shoulder extent-of-injury conditions to the compensable injury. We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, and partial tear of the posterior inferior labral margin and render a new decision that the compensable injury of [date of injury], does not extend to right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, and partial tear of the posterior inferior labral margin.

SUMMARY

That portion of the hearing officer's decision that the claimant's compensable injury includes cervical radiculopathy at C6-7 is supported by sufficient evidence and is affirmed.

The hearing officer's decision that the claimant has not reached MMI is supported by sufficient evidence and is affirmed.

The hearing officer's decision that no IR can be assigned is supported by sufficient evidence and is affirmed.

The hearing officer's decision that the claimant had disability from September 28, 2010, through the date of this CCH is supported by sufficient evidence and is affirmed.

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, and partial tear of the posterior inferior labral margin and render a new decision that the compensable injury of [date of injury], does not extend to right shoulder sprain/strain with impingement, full thickness tear of the supraspinatus, type I SLAP lesion, and partial tear of the posterior inferior labral margin.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge