

APPEAL NO. 121647
FILED OCTOBER 24, 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 July 12, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before her, the hearing officer determined that: (1) the compensable injury of [date of injury], includes lumbar disc herniation at L4-5; (2) the compensable injury of [date of injury], does not include a left knee medial meniscal tear; (3) the respondent (claimant) has not reached maximum medical improvement (MMI) and no impairment rating (IR) may be assigned; and (4) the claimant had disability from November 8, 2011,¹ through the date of the CCH.

The appellant (carrier) appealed, contending that the hearing officer abused her discretion in admitting certain evidence over the carrier's objection, and that the hearing officer erred in her determination on the extent of injury, MMI, and IR issues. The appeals file does not contain a response from the claimant.

The hearing officer's determination that the compensable injury of [date of injury], does not include a left knee meniscal tear has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered in part, and reversed and remanded in part.

The claimant testified that he was a mechanic/electrician and was standing with one foot in a hole when he slipped and fell backward hitting his back and head while he was at work.

EVIDENTIARY RULING

At the CCH the carrier objected to the admission of a medical report from [Dr. B], the claimant's treating doctor, on the grounds that the report had not been timely exchanged. To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the

¹ In the stipulations, Conclusion of Law No. 6 and the Decision portion of the hearing officer's decision and order, the hearing officer inadvertently omitted the word "November" in referring to the November 8, 2011, MMI date and beginning date of disability.

Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex.1986).

28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 143.13(c)(1)) provides that the parties exchange documentary evidence “no later than 15 days after the benefit review conference [BRC].” Rule 142.13(c)(2) further provides that “[t]hereafter, parties shall exchange additional documentary evidence as it becomes available.” Rule 142.13(c)(3) provides that the hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. A party who belatedly investigates the facts and then does not disclose known information in order to make further investigation and development runs the risk of having evidence excluded for failure of exchange. See APD 991744, decided October 1, 1999.

In this case, the BRC was held on May 14, 2012. The claimant’s position on the extent-of-injury issue at the BRC was that the claimant “states the medical reports from the treating doctor will support that the compensable injury extends to include the listed conditions.” The exchange deadline pursuant to Rule 142.13(c)(1) was May 29, 2012. The exhibit in question, a report from the treating doctor, labeled “Causation Letter” is dated May 25, 2012. No evidence was developed at the CCH as to when the letter of causation was requested, or when the claimant may have received the letter. After the carrier objected to the letter, the hearing officer asked the claimant (actually the ombudsman) “Any Response?” The ombudsman replied that the letter from Dr. B had been “received earlier,” that there was a problem with the letter, that the claimant brought the letter in for “the prep” (preparation for the CCH) which was apparently held on June 28, 2012, and that the letter was exchanged that day, after “the prep.” The carrier does not dispute that the exchange of this report took place via e-mail on June 28, 2012. The hearing officer then stated “For those reasons I will allow the exhibits.”²

As noted previously, to be reversible, an error in the admission or exclusion of evidence must show the error was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. In this case the claimant had the burden of proof that the claimed condition was caused, or aggravated, by the compensable injury, through expert medical evidence, within a reasonable medical probability. See APD 022301, decided October 23, 2002; and Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). The causation letter from Dr. B is the only medical documentation that exists to

² The carrier also objected to two other exhibits which were summarily admitted but the admission of which did not constitute reversible error.

establish a causal connection between the lumbar disc herniation at L4-5 and the compensable injury.

The claimant did not present sufficient evidence of good cause for the failure to timely exchange Dr. B's report. There was insufficient discussion or evidence presented of what good cause may have existed and there is no finding of fact on good cause.

We review a hearing officer's ruling on the admission or exclusion of evidence on an abuse of discretion standard and in determining whether there has been an abuse-of-discretion we look to see whether the hearing officer acted without reference to any guiding rules or principles. We hold that the hearing officer abused her discretion in admitting the medical report of Dr. B and that abuse of discretion caused the rendition of an improper judgment. We further hold that the hearing officer erred in not making a finding of fact on good cause as required by Rule 143.13(c)(3).

EXTENT OF INJURY

The carrier, in a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) accepted as the compensable injury "a head contusion, lumbar strain and possible left and right knee strains." At the CCH the carrier accepted bilateral knee and lumbar strains/sprains. 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. APD 022301, *supra*, See also Guevara, *supra*. 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 this case whether a fall, as described by the claimant, caused or aggravated, lumbar disc herniations at L4-5 is beyond common knowledge to find a causal connection and requires expert medical evidence, based on reasonable medical probability.

Because we have found that the hearing officer abused her discretion in admitting Dr. B's "Causation Letter" dated May 25, 2012, and because that letter was the only expert medical evidence of causation, we reverse the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar disc herniations at L4-5 as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the compensable injury of [date of injury], does not include a lumbar disc herniation at L4-5.

MMI/IR

Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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. 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.

The parties stipulated that [Dr. Y] was appointed as the designated doctor to determine MMI, IR and return to work. The parties also stipulated that Dr. Y certified that the claimant reached MMI on November 8, 2011, with a four percent IR. In a report dated November 8, 2011, Dr. Y diagnosed a minor blunt head injury, bilateral knee strains, and a "[l]umbar strain with pre-existing degenerative changes L4-5 and L5-S1, L2-5 osteophytes." Regarding the MMI date, Dr. Y states that the claimant's lumbar findings are degenerative in nature and need no further treatment. Dr. Y certified MMI on November 8, 2011, the date of his exam. Dr. Y rated the claimant's lumbar strain as Diagnosis-Related Estimates Lumbosacral Category I: Complaints and Symptoms for a zero percent whole person IR. Dr. Y rated the claimant's left knee strain based on range of motion (ROM) figures in Table 41, page 3/78, of 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) and assessed a four percent whole person rating. The ROM figures indicate that the claimant had a zero percent impairment for the right knee. Dr. Y rated the conditions accepted by the carrier. Dr. Y's certification of MMI and assessment of IR is supported by preponderance of the evidence.

The hearing officer based her determination that the claimant had not reached MMI and no IR may be assigned on the fact that further material recovery from, and lasting improvement to, the claimant's lumbar injury could reasonably be anticipated after Dr. Y's MMI date of November 8, 2011, because the claimant had an epidural steroid injection (ESI) "to his lumbar spine on November 14, 2011, which improved his condition" and that the claimant had work hardening in July 2012. The ESI and the work hardening were due to the alleged lumbar disc herniation at L4-5 which we have

rendered is not part of the compensable injury. Accordingly, we reverse the hearing officer's determination that MMI has not been reached and no IR may be assigned. We render a new decision that the claimant reached MMI on November 8, 2011, with a four percent IR in accordance with the designated doctor's report.

DISABILITY

The carrier appealed the hearing officer's disability determination on the basis that temporary income benefits (TIBs) would not be owed after the date of MMI. Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 408.102 provides that TIBs continue until the employee reaches MMI. Therefore, disability pursuant to Section 401.011(16) can continue past the MMI date, but TIBs will continue only until MMI is reached.

The hearing officer determined that the claimant had disability from November 8, 2011, through the date of the CCH, based on the compensable injuries of lumbar and knee strains accepted by the carrier and a lumbar disc herniation at L4-5 as determined by the hearing officer. In that we have reversed the hearing officer's determination that the compensable injury includes a lumbar disc herniation at L4-5, we also must reverse the hearing officer's determination on disability as it was, at least in part, based on the determination of a lumbar disc L4-5 herniation being part of the compensable injury.

Accordingly, we reverse the hearing officer's determination that the claimant had disability from November 8, 2011, through the date of the CCH and remand the disability issue to the hearing officer for a determination on disability from November 8, 2011, through the date of the CCH, based only on the compensable bilateral knee and lumbar sprains/strains injuries (as accepted by the carrier).

SUMMARY

We reverse the hearing officer's determination that the compensable injury of [date of injury], includes a lumbar disc herniation at L4-5 and render a new decision that the compensable injury of [date of injury], does not include a lumbar disc herniation at L4-5.

We reverse the hearing officer's determination that the claimant has not reached MMI and no IR may be assigned and render a new decision that the claimant reached MMI on November 8, 2011, with a four percent IR as assessed by Dr. Y, the designated doctor.

We reverse the hearing officer's determination that the claimant had disability from November 8, 2011, through the date of the CCH and remand the disability issue to the hearing officer for a determination of disability based only on the compensable injury and in accordance 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 **VALLEY FORGE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge