

APPEAL NO.121909
FILED NOVEMBER 19, 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 August 10, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the four issues before her, the hearing officer determined that: (1) the compensable injury of [date of injury], extends to a right shoulder full thickness tear of the supraspinatus tendon; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) no impairment rating (IR) may be assigned; and (4) the claimant had disability from October 15, 2010, through August 10, 2012, the date of the CCH.

The appellant (carrier) appealed, contending that there was a significant gap in the treatment of the claimant's right shoulder injury and that the hearing officer's determination's on all four issues should be reversed. The claimant responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The claimant testified that he was a carpenter and was working outdoors when he slipped and fell on his outstretched right arm and wrist. The parties stipulated that the claimant sustained a compensable injury on [date of injury]. In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated March 8, 2012, the carrier accepted a right wrist sprain/strain only. The parties also stipulated that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. N] to determine MMI, IR, and extent of the compensable injury, and that Dr. N certified that the claimant reached MMI on December 19, 2011, with a two percent IR.

EXTENT OF INJURY

After the claimant's fall on [date of injury], the claimant was taken to an occupational health clinic the next day, [day after date of injury], where he was seen by [Dr. M]. The medical record reflects that the claimant complained of right hand, forearm, elbow, wrist and finger pain. X-rays were taken of the right hand and wrist. The claimant was given a "wrist support," diagnosed with the right wrist strain, and released to return to work without restrictions. The claimant testified that he returned to light duty for about one week and that he then had to return to his regular duties or lose his job. The claimant testified that he continued to work his regular duties, in pain, until he was laid off in a reduction in force on October 15, 2010. The claimant also testified

that about 2 months after he was laid off, the employer called him to return to work. At an interview, the claimant complained that he was unable to lift his right arm above shoulder level and the employer refused to return him to work.

The first documented mention of a shoulder injury was in an Initial Medical Report, dated February 7, 2011, from [Dr. W], the treating doctor, which stated “[d]ue to the fall, [the claimant] injured his right wrist, right hand, right elbow and shoulder.” Dr. W’s diagnosis was internal derangement of the right wrist and right hand sprain/strain. Dr. W took the claimant off work on February 7, 2011, 21 months after the date of injury. Dr. W sent the claimant for an orthopedic consultation with [Dr. J]. Dr. J, in a report dated June 6, 2011, noted a chief complaint of right wrist pain, and noted that the claimant had injured “his right wrist, elbow and shoulder.” Dr. J’s diagnoses was right wrist sprain, degenerative joint disease right wrist, grip strength weakness right wrist, and compressive neuropathy right hand and wrist.

The claimant subsequently went to [Hospital] on September 26, 2011. In a report of that date, the medical history noted “an injury 2 years ago” and that the claimant “has not been able to lift his arm over his head since then.” The claimant was noted to have “pain with all movement to shoulder and wrist-active and passive.” The diagnoses were right wrist pain and frozen shoulder. In a report dated October 6, 2011, Dr. W noted that the claimant reports “ongoing pain of the right shoulder” and that “[the claimant] reports having had right shoulder pain since the injury occurred, and he wants to get the shoulder included as part of the compensable injury.” A right shoulder MRI performed on November 19, 2011, at [Hospital], had an impression of “[t]endinopathy with full thickness tear of the supraspinatus tendon.” A [Hospital] note dated December 12, 2011, noted that the claimant needs physical therapy and that “[the claimant’s] [rotator cuff (RTC)] tear could be due to trauma or overuse.” The diagnosis was: “1. [RTC] . . . 2. Frozen shoulder.”

Section 408.0041(a)(3) provides that at the request of the insurance carrier or an employee, or 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.

The designated doctor, Dr. N, was appointed to determine the extent of the compensable injury and disability. Dr. N in her report dated March 20, 2012, noted that she had previously evaluated the claimant for MMI and IR on December 19, 2011.¹ Dr.

¹ Dr. N, the designated doctor, examined the claimant two times: (1) on December 19, 2011, for MMI and IR; and (2) on March 20, 2012, for extent of injury and disability as a direct result of the work injury.

N listed the various reports and diagnostic studies she had reviewed, listed the results of her examination, and regarding the extent of injury concluded:

In my opinion, the extent of injury includes right wrist sprain/strain only. All other degenerative and osteoarthritic findings are natural disease of life and are not related. There is also no objective evidence of a right shoulder injury based on [a] medical record prior to 2011.

Regarding disability, Dr. N opined:

The [claimant's] inability to perform the pre-injury employment from [October 1, 2010], to [p]resent is not a direct result of the compensable 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 (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).

When an injury is asserted to have occurred by way of aggravation of a pre-existing condition, there must be evidence that there was a pre-existing condition and there was some enhancement, acceleration, or worsening of the underlying condition. The burden of proving that there is a compensable injury or aggravation of a pre-existing condition is on the claimant. See APD 001825, decided September 12, 2000.

The hearing officer, in the Background Information, commented that the “more persuasive evidence from [Dr. W] supports that the compensable injury does extend to [the diagnosed right shoulder full thickness tear of the supraspinatus tendon].” The hearing officer recognizes that there “is an attenuation factor in this case” and that there “was a significant gap in treatment . . . with no mention of the right shoulder in the sparse early medical records.” The hearing officer relies on, and quotes from, a “Causation Letter” dated April 9, 2012, from Dr. W as follows:

A fall onto the outstretched upper extremity can certainly cause injury of the elbow and tear of the rotator cuff of the shoulder. There is no prior history of injury to the right shoulder and elbow regions. Prior to this injury [the claimant] enjoyed good health and the ability to perform heavy work daily without complication. Following this injury, he has had ongoing pain,

weakness and limited use of this right upper extremity. He is also noted to have continued working injured until the employer could no longer provide modified duties.

On [March 20, 2012], the designated doctor found right shoulder tenderness and weakness of the entire right upper extremity. Despite [Dr. N's] own findings, he opined that the injury was limited to right wrist sprain/strain only on the basis that there is 'no objective evidence of a right shoulder injury based on the medical record prior to 2011.' I find this opinion invalid. There is MRI evidence of internal derangement injury of the right shoulder. Also, the absence of documentation of an injury does not reflect absence of injury, rather it reflects lack of investigation or documentation of the injury, which is frequently subject to carrier approval.

The subjective complaints, clinical findings, and MRI findings are consistent with the reported mechanism of injury. In all reasonable medical probability, the [claimant] suffered injuries to the right shoulder and elbow as a direct result of the [[date of injury]], work injury, by way of the mechanism of injury described by the [claimant]. Return to his work activities at this time places [the claimant] at risk of exacerbating his condition, limiting his clinical improvement with treatment and potentially further injury. This [claimant] has the potential of further recovery with treatment. Administrative resolution of the claim should be expedited so that this [claimant] may receive the appropriate treatment and thereby return to same or similar work.

We note that Dr. W states that the claimant continued working "until the employer could no longer provide modified duties." In fact, the claimant's testimony was that he worked one week on light duty and then worked his regular duty until he was laid off in a general reduction in force on October 15, 2010.

Dr. W also states that the designated doctor "found right shoulder tenderness and weakness of the entire right upper extremity." In fact, while the designated doctor noted "right shoulder tenderness" the designated doctor also noted that right shoulder range of motion (ROM) was "decreased on submaximal effort." Strength measurements were noted as being "[p]oor effort."

Dr. W does not explain how the fall would result in a right shoulder full thickness tear of the supraspinatus tendon or how that condition might go without medical documentation for 21 months, a portion of which the claimant continued to work full duty. Merely saying the absence of documentation does not reflect an absence of injury does not constitute medical evidence and is just an observation rather than establishing

causation. Proof of causation must be established to a reasonable medical probability. In this case, Dr. W does not address the almost two years the claimant went without treatment between the date of injury and when he first saw Dr. W.

[Dr. B] performed a post-designated doctor required medical examination on August 2, 2012. In a report of that date Dr. B concluded:

Only four months after the claimant was laid off, which was approximately almost two years after the original injury, did the claimant seek treatment for a shoulder problem which he claims to have been there all along. However, I must go by the medical records and they are quite clear in the two days surrounding the injury that the wrist was sprained and no other body parts were mentioned or complained about and the claimant never sought treatment for anything else for the next two years. Thus, the extent of the injury is only a wrist strain which resolved back in 2009.

The hearing officer's determination that the compensable injury of [date of injury], extends to a right shoulder full thickness tear of the supraspinatus tendon is so against the great weight and preponderance of the evidence has to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to a right shoulder full thickness tear of the supraspinatus tendon and render a new decision that the compensable injury of [date of injury], does not extend to a right shoulder full thickness tear of the supraspinatus tendon.

MMI/IR

The hearing officer's determination that the claimant has not reached MMI and no IR may be assigned is premised on the determination that the compensable injury includes a right shoulder full thickness tear of the supraspinatus tendon and that condition may require further treatment and surgery where further material recovery and lasting improvement could be anticipated. We have reversed the hearing officer's determination on the extent-of-injury issue and rendered a new decision that the compensable injury does not extend to a right shoulder full thickness tear of the supraspinatus tendon. The carrier has accepted a compensable right wrist strain only.

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." 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.

Dr. N, the designated doctor, was appointed to determine MMI and IR, extent of the compensable injury, and disability. Dr. N examined the claimant on December 19, 2011. In a Report of Medical Evaluation (DWC-69) and narrative, Dr. N certified that the claimant reached clinical MMI with a two percent IR based on loss of ROM of the right wrist. Dr. N rated the accepted compensable right wrist sprain/strain by measuring the loss of ROM in the right wrist. Dr. N cited the definition of MMI and stated that based on the information provided and her examination of December 19, 2011, the claimant reached MMI on that date.

The claimant relies on the reports of Dr. W to show that the claimant is not at MMI. As previously discussed, the opinions that the claimant is not at MMI are dependent upon a determination that the full thickness tear of the supraspinatus tendon is compensable. The hearing officer's findings that "[f]urther material recovery from and lasting improvement to' [the] [c]laimant's injury could reasonably be anticipated after December 19, 2011" and that "[a] preponderance of the evidence does not support Dr. [N's] certification of MMI or assignment of [an] IR" 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 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 December 19, 2011, with a two percent IR as certified by Dr. N, the designated doctor.

DISABILITY

The disability issue from the benefit review conference was framed as did the claimant have disability resulting from an injury sustained on [date of injury], from October 15, 2010, through the present. Because we have reversed the hearing officer's determination that the compensable injury of [date of injury], extends to a full thickness tear of the supraspinatus tendon we also reverse the hearing officer's determination that the claimant had disability from October 15, 2010, through August 10, 2012, the date of the CCH. Dr. N, the designated doctor appointed to opine on disability, in her report dated March 20, 2012, stated that the claimant's inability to perform the pre-injury employment from October 1, 2010, to the March 20, 2012, date of her examination is not a direct result of the compensable injury. It is noted that the claimant continued to

work full duty until October 15, 2010, when he was laid off in a reduction of force. Dr. N's opinion that the claimant did not have disability after October 1, 2010, is supported by preponderance of the evidence. Accordingly, we reverse the hearing officer's determination that the claimant had disability from October 15, 2010, through August 10, 2012, the date of the CCH, and render a new decision that the claimant did not have disability from October 15, 2010, through August 10, 2012, the date of the CCH.

SUMMARY

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to a right shoulder full thickness tear of the supraspinatus tendon. We render a new decision that the compensable injury of [date of injury], does not extend to a right shoulder full thickness tear of the supraspinatus tendon.

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 December 19, 2011, with a two percent IR as assigned by Dr. N, the designated doctor.

We reverse the hearing officer's determination that the claimant had disability from October 15, 2010, through the present and render a new decision that the claimant did not have disability from October 15, 2010, through the date of the CCH.

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

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge