APPEAL NO. 121927
FILED NOVEMBER 8, 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 8, 2012, with the record closing on August 17, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer determined that: (1) the compensable injury of [date of injury], extends to a cervical disc herniation at C5-6 and cervical radiculitis; (2) the respondent (claimant) has not reached maximum medical improvement (MMI) and no impairment rating (IR) may be assigned; and (3) the claimant had disability from November 11, 2011, through January 29, 2012, and from May 1, 2012, through August 8, 2012, the date of the CCH.

The appellant (carrier) appealed, contending that there was insufficient evidence of causation to support the hearing officer's decision; and that the medical evidence supports the designated doctor's certification of MMI and IR; and that the claimant did not have disability after November 11, 2011. The claimant responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

We note that the hearing officer states that Hearing Officer's Exhibit No. 3 is an EES-14 letter and Hearing Officer's Exhibit No. 4 is a Request for Designated Doctor (DWC-32) and "those exhibits will be Hearing Officer exhibits." No Hearing Officer Exhibit Nos. 3 and 4 are in evidence.

The claimant testified that she was doing field work and wearing a hard hat when a piece of angle iron fell from above and hit her on the head on [date of injury]. The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that the carrier had accepted cervical and lumbar sprains/strains. The claimant was taken to a hospital emergency room on the date of injury and after diagnostic tests, the claimant was discharged with an impression of "no acute intracranial abnormality" and "no acute findings in the cervical spine." The claimant then sought treatment with [Clinic] on October 3, 2011, and was diagnosed with cervical and lumbar sprains. A doctor at [Clinic] ordered a cervical MRI which was performed on October 7, 2011. The medical evidence reflects that on October 18, 2011, the claimant began treating with [Dr. O] who diagnosed headache, cervical radiculitis, lumbar radiculitis, lumbar strain/sprain and cervical strain/sprain.

The parties stipulated that [Dr. I] was appointed as the designated doctor to determine MMI, IR, and extent of injury and that Dr. I certified that the claimant reached MMI on November 11, 2011, with a zero percent IR.

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). In this case, how a falling piece of metal hitting the claimant on the head, while wearing a hard hat, can cause a cervical disc herniation at C5-6 and cervical radiculitis requires expert medical evidence within a reasonable medical probability.

The hearing officer, in the Background Information, cited the designated doctor, Dr. I's report, and his amended opinion (to be discussed later), and stated that Dr. I's "final conclusion regarding the extent of the compensable injury is not supported by a preponderance of the evidence." (That statement is also essentially repeated in Finding of Fact No. 6). The hearing officer goes on to state in the Background Information, that "[t]he more persuasive evidence from Drs. [O], [N], [L] and [P] supports that the compensable injury does extend to . . . the above diagnoses."

Dr. O, one of the treating doctors, in a report dated October 18, 2011, diagnosed headaches, cervical radiculitis, lumbar radiculitis, lumbar strain/sprain and cervical strain/sprain. In a letter report dated November 29, 2011, Dr. O disagreed with the designated doctor's opinion on the IR, and argued that the claimant should be in "[Diagnosis-Related Estimate (DRE)] [C]ategory II for the cervical [C]ategory II for the lumbar" and recommended further treatment. Dr. O does not explain how a blow to the top of the head could or did cause a cervical disc herniation at C5-6 and/or cervical radiculitis. In fact, Dr. O never even mentions a C5-6 disc herniation, which is one of the conditions at issue. The MRI performed on October 7, 2011, noted a C5-6 "left paracentral disc protrusion which is very small. This may partially contact the existing nerve root." In a "Letter of Medical Necessity" dated February 7, 2012, Dr. O mentions a "cervical MRI is positive for four disc bulges" but does not specifically mention a C5-6 disc herniation or causation.

Dr. N, another treating doctor, in the same clinic as Dr. O, in a "Letter of Medical Necessity" dated August 6, 2012, refers to Dr. L "who is a board certified orthopedic

spine surgeon who has found the [claimant] to have cervical radiculopathy and stated [the claimant] is a candidate for cervical spine surgery." Dr. N states that "in all medical probability based on the injury that occurred . . . the pre-existing condition was aggravated by the injury in question . . . ." Dr. N does not mention a C5-6 disc herniation and/or cervical radiculitis (as opposed to cervical radiculopathy), what the pre-existing condition was, or how the compensable injury caused or aggravated a cervical disc herniation at C5-6 and/or cervical radiculitis.

Dr. L, the orthopedic spine surgeon, in a report dated April 24, 2012, does state that the claimant "is symptomatic with cervical radiculopathy and cervicalgia secondary to her C5-6 disc herniation." Elsewhere in the history of the present illness, Dr. L mentions the mechanism of the injury but does not address causation or link the mechanics of the injury to the C5-6 disc herniation and/or cervical radiculitis. Dr. L recommended a C5-6 anterior cervical discectomy and fusion.

Dr. P, a consultant, in a report dated November 4, 2011, records a medical history that "a metallic piece fell from about 20 feet hitting [the claimant] on the head. She had a safety helmet." Dr. P's assessment was cervical discogenic pain, cervical radiculitis, and lumbar discogenic pain. Neither the C5-6 cervical disc herniation or causation were addressed by Dr. P.

Dr. I, the designated doctor, was originally appointed only to address MMI and IR. Dr. I, in a report dated November 11, 2011, certified MMI on that date with a zero percent IR. Dr. I lists the various records that he reviewed and diagnosed a head contusion, cervical and thoracolumbar spine strain, and pre-existing disc disease at C3-4, C4-5, C5-6, and L4-5.

Dr. I was subsequently appointed to address the extent of injury. In a report dated April 27, 2012, Dr. I commented "a piece of angle iron from about 20 feet fell on her head/hard hat, injuring head, neck, and back." Regarding the extent of injury, Dr. I stated:

> It is my opinion that, after review of the medical records presented and a thorough examination, the extent of the [claimant's] compensable injury would be post-traumatic cervical and lumbar strains. The [claimant] sustained injury to cervical and lumbar spine. Because of cervical and lumbar disc findings aggravation of pain exists. The [claimant] will continue treating with her doctor for this persistent pain. The disputed injuries of cervical [herniated nucleus pulposus (HNP)] were aggravated by the cervical strain causing severe headaches which are secondary to this aggravation.

Although Dr. I stated that the cervical HNP was aggravated by the cervical strain, Dr. I did not specifically address the C5-6 level which is in dispute.

Subsequently, Dr. I was sent a letter of clarification on June 1, 2012, requesting clarification stating:

> In your report, you used the term 'aggravation' in regard to cervical and lumbar discs. When you use the term 'aggravation,' do you mean 1) new damage or harm to the physical structure of the body or 2) a mere manifestation of symptoms from a pre-existing condition? Please explain your answer.

Dr. I, in a report dated June 6, 2012, responded:

> There is no new damage or harm to the physical structure of the body in regards to cervical and lumbar discs.
>
> The absence of objective sensory loss and/or muscle weakness and presence of subjective pains like facet joint inflammation or instability are mere manifestations of symptoms from unrelated pre-existing conditions.

In this case, because none of the letters/reports from Drs. O, N, L, and P referred to by the hearing officer, specifically link the cervical disc herniation at C5-6 and cervical radiculitis to the mechanism of injury or establish causation within a reasonable medical probability, the hearing officer's determination that the compensable injury of [date of injury], extends to a cervical herniated disc at C5-6 and cervical radiculitis 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 determination that the compensable injury of [date of injury], extends to a cervical disc herniation at C5-6 and cervical radiculitis. We render a new decision that the compensable injury of [date of injury], does not extend to a cervical disc herniation at C5-6 and cervical radiculitis.

MMI/IR

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 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.

Dr. I, the designated doctor to opine on MMI and IR, in a report dated November 11, 2011, certified the claimant at MMI on November 11, 2011, with a zero percent IR. As previously indicated, Dr. I found the claimant at MMI on the date of the examination and commented "[o]n pain management follow-up she was found to be stable." Dr. I lists the various medical records that were in existence as of the date of MMI. Dr. I considered the compensable injury to be a head contusion, and cervical and lumbar strains. The hearing officer's finding that the claimant was not at MMI was based on the fact that further material recovery or lasting improvement could reasonably be anticipated by epidural steroid injection or spinal surgery for the cervical disc herniation at C5-6, a condition we have reversed. Accordingly, Dr. I's date of MMI is supported by a preponderance of the evidence.

Regarding the IR, Dr. I in his report dated November 11, 2011, commented that a full physical examination with range of motion and a neurological examination were performed on both the cervical and lumbar spines. Dr. I assessed the claimant with DRE Cervicothoracic Category I: Complaints or Symptoms with a zero percent impairment and DRE Lumbosacral Category II: Complaints or Symptoms zero percent impairment for a total zero percent whole person IR. The designated doctor rated the compensable cervical and lumbar strains/sprains. Dr. I's IR is supported by a preponderance of the evidence.

The hearing officer's finding that a preponderance of the evidence does not support Dr. I's certification of MMI and IR, is premised on the conclusion that the claimant's compensable injury extends to the disputed extent-of-injury conditions which we have reversed. We reverse the hearing officer's determination that the claimant has not reached MMI and no IR may be assigned as being so against the great weight of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the claimant reached MMI on November 11, 2011, with a zero percent IR as assessed by the designated doctor.

DISABILITY

Disability is defined as the inability because of the compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. *See* Section 401.011(16). The hearing officer in the Background Information section commented that the claimant "was unable to perform the requirements of her pre-injury employment

. . . .” However, a review of the evidence indicates that statement is based on the determination that the C5-6 cervical disc herniations and cervical radiculitis are part of the compensable injury.

Dr. I certified that the claimant reached MMI on November 11, 2011, and on a Work Status Report (DWC-73), returned the claimant to work without restrictions on November 11, 2011, based on the compensable injury of a head contusion and cervical and lumbar strains. Other medical providers, DWC-73's in evidence taking the claimant off work, or returning the claimant to modified duty, are based on the diagnosis of a herniated cervical disc and cervical radiculitis, conditions which we have reversed and rendered non-compensable in the absence of expert medical evidence of causation within a reasonable medical probability. The hearing officer's disability determination 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 determination that the claimant had disability from November 11, 2011, through January 29, 2012, and from May 1, 2012, through the present. We render a new decision that the claimant did not have disability from November 11, 2011, through January 29, 2012, and from May 1, 2012, through August 8, 2012, the date of the CCH.

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