

APPEAL NO. 131641
FILED AUGUST 29, 2013

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 5, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on March 18, 2010; (2) the impairment rating (IR) is 18%; (3) the first certification of MMI and assigned IR from [Dr. G] did become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (4) the compensable injury of [date of injury], does extend to herniated discs at L3-4, L4-5, C4-5, C5-6, and C6-7; right shoulder chronic pain syndrome; cervical and lumbar spondylosis; and L4-5 and L5-S1 radiculopathy; (5) the appellant (self-insured) has waived the right to contest compensability of the diagnoses of herniated discs at L3-4 and L4-5; and L4-5 and L5-S1 radiculopathy by not timely contesting the date of MMI and IR in accordance with Rule 130.102(h); and (6) the self-insured has not waived the right to contest compensability of the diagnoses of herniated discs at C4-5, C5-6, and C6-7; right shoulder chronic pain syndrome; and cervical and lumbar spondylosis by not timely contesting the date of MMI and IR in accordance with Rule 130.102(h).

The self-insured appeals, disputing that portion of the hearing officer's extent-of-injury determination that the compensable injury extended to herniated discs at the L3-4, L4-5 levels, herniated discs at the C4-5, C5-6, and C6-7 levels, right shoulder chronic pain syndrome, and spondylosis as well as the determination that the self-insured waived the right to contest compensability of the herniated discs at L3-4 and L4-5 by not timely contesting the rating under Rule 130.102(h). The claimant responded, urging affirmance of the determinations appealed by the self-insured. The hearing officer's determinations that: (1) the claimant reached MMI on March 18, 2010; (2) the IR is 18%; (3) the first certification of MMI and assigned IR from Dr. G did become final under Section 408.123 and Rule 130.12; (4) the self-insured has not waived the right to contest compensability of the diagnoses of herniated discs at C4-5, C5-6, and C6-7; right shoulder chronic pain syndrome; and cervical and lumbar spondylosis by not timely contesting the date of MMI and IR in accordance with Rule 130.102(h); (5) the self-insured has waived the right to contest L4-5 and L5-S1 radiculopathy by not timely contesting the date of MMI and IR in accordance with Rule 130.102(h); and (6) the compensable injury extends to L4-5 and L5-S1 radiculopathy were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury], that included cervical, lumbar, and right shoulder sprain/strains; (2) Dr. G was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR, and extent of the compensable injury; (3) Dr. G certified that the claimant reached MMI on March 18, 2010, assigned an 18% IR and was the first doctor to certify MMI and assign an IR; (4) the claimant received written notice of Dr. G's certification by verifiable means on March 30, 2010; and (5) the self-insured received written notice of Dr. G's certification by verifiable means on March 30, 2010. The claimant testified that she was injured in a motor vehicle accident while working as a bus monitor.

WAIVER PURSUANT TO RULE 130.102(h)

Rule 130.1(c)(1) states that an IR is the percentage of permanent impairment of the whole body resulting from the current compensable injury. Section 401.011(24) defines IR as the percentage of permanent impairment of the whole body resulting from a compensable injury. Rule 130.102(h) provides that if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter supplemental income benefits (SIBs), the date of MMI and IR shall be final and binding. Once the IR became final pursuant to Rule 130.102(h), what was included in the underlying compensable injury was established. See Appeals Panel Decision (APD) 040150-s, decided March 8, 2004, and APD 090515, decided June 12, 2009.

The hearing officer found that the self-insured failed to prove that there was a pending dispute of MMI and IR prior to the expiration of the first quarter of SIBs. The self-insured argues on appeal that lumbar radiculopathy was the only diagnosis of the lumbar spine rated by Dr. G.

Dr. G assessed an 18% IR using 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) (AMA Guides). Dr. G assessed 6% upper extremity impairment for loss of range of motion to the right shoulder, which he then converted to 4% whole person impairment using Table 3, page 3/20 of the AMA Guides. Dr. G additionally assessed 5% impairment for the cervical spine, placing the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category II: Minor Impairment. Dr. G assessed 10% impairment for the lumbar spine placing the claimant in Lumbosacral DRE Category III: Radiculopathy. Dr. G combined 10%, 5%, and 4% to arrive at the 18% impairment assessed for the claimant's compensable injury. Dr. G noted in his report in part that the claimant's compensable injury is degenerative disc disease manifested by herniated nuclei pulposi at L3-4, L4-5, and L5-S1. Additionally, Dr. G noted that light touch, sharp touch, and

two-point discrimination were definitely reduced in the L4-5 and L5-S1 dermatomes of the right foot. Dr. G noted that upon review of the medical records and physical examination, the claimant showed clinical evidence of lumbosacral injury with radiculopathy.

That portion of the hearing officer's determination that the self-insured waived the right to contest compensability of her herniated discs at L3-4 and L4-5 by not timely contesting the date of MMI and IR in accordance with Rule 130.102(h) is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury of [date of injury], extends to herniated discs at L3-4, L4-5, C4-5, C5-6, and C6-7; and cervical and lumbar spondylosis is supported by sufficient evidence and is affirmed.

The parties stipulated that the Division appointed Dr. G to determine MMI, IR, and the extent of the compensable injury. Dr. G examined the claimant on March 18, 2010, and opined in part that the extent of the claimant's compensable injury is "[m]ajor right shoulder muscle strain/associated tendon sprain, resolution beginning, and probable evolving chronic pain syndrome."

The Texas courts have long established the general rule that "expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience" of the fact finder. Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). 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, decided October 23, 2002. See also City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing Guevara.

The hearing officer noted that Dr. G diagnosed a "probable" evolving right shoulder chronic pain syndrome and was persuaded that the evidence was sufficient to establish a causal relationship between the diagnosed right shoulder chronic pain syndrome and the injury the claimant sustained on [date of injury]. However, Dr. G only diagnosed the right shoulder chronic pain syndrome as being a probable diagnosis and did not specifically explain how the mechanism of the injury would cause a right shoulder chronic pain syndrome. The medical records in evidence reflect that the claimant has been diagnosed with a shoulder sprain and right shoulder tendonitis, and right rotator cuff tendonitis. A peer review in evidence noted that a right shoulder MRI showed hypertrophic changes in the acromioclavicular joint. No other medical record in evidence reflects that the claimant was diagnosed with right shoulder chronic pain

syndrome. As previously noted, Dr. G only diagnosed a “probable” evolving right shoulder chronic pain syndrome. Accordingly, the hearing officer’s determination that the compensable injury extends to a right shoulder chronic pain syndrome 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 right shoulder chronic pain syndrome and render a new decision that the compensable injury of [date of injury], does not extend to right shoulder chronic pain syndrome.

SUMMARY

We affirm that portion of the hearing officer’s determination that the self-insured waived the right to contest compensability of her herniated discs at L3-4 and L4-5 by not timely contesting the date of MMI and IR in accordance with Rule 130.102(h).

We affirm that portion of the hearing officer’s determination that the compensable injury of [date of injury], extends to herniated discs at L3-4, L4-5, C4-5, C5-6, and C6-7; and cervical and lumbar spondylosis.

We reverse that portion of the hearing officer’s determination that the compensable injury of [date of injury], extends to right shoulder chronic pain syndrome and render a new decision that the compensable injury of [date of injury], does not extend to right shoulder chronic pain syndrome.

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

**[MN]
[ADDRESS]
[CITY], TEXAS [ZIP CODE].**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge