

APPEAL NO. 132760  
FILED FEBRUARY 3, 2014

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 May 31, 2013,<sup>1</sup> and concluded on October 21, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to cervical sprain/strain, C4-5, C5-6, and C6-7 herniations, cervical radiculitis, cervical radiculopathy, right wrist, right forearm, otalgia, TMJ, and traumatic jaw injury; (2) the compensable injury of [date of injury], does not extend to eagle syndrome; (3) the respondent (claimant) has not reached maximum medical improvement (MMI); (4) since the claimant has not reached MMI an impairment rating (IR) cannot be assigned at this time; and (5) the claimant had disability from July 25, 2012, and continuing through the date of the CCH.

The appellant (carrier) appealed the hearing officer's extent-of-injury determination adverse to it, as well as the hearing officer's MMI, IR, and disability determinations, contending that the evidence is legally and factually insufficient to support those determinations. The appeal file does not contain a response from the claimant. The hearing officer's determination that the compensable injury does not extend to eagle syndrome has not been appealed and has become final pursuant to Section 410.169.

DECISION

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

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury to include at least a facial contusion; (2) the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division), [Dr. C], was appointed to determine MMI, IR, and extent of injury; Dr. C determined that the claimant has not reached MMI and the compensable injury extended to include all of the disputed conditions except for eagle syndrome; and (3) [Dr. H], a doctor selected by the treating doctor to act in his place, determined that the claimant had not reached MMI (we note that the decision incorrectly identifies Dr. H as the treating doctor). The claimant testified that he was injured when a leaf spring struck his face while he was deconstructing a car. The evidence did not establish that the spring struck the claimant's right upper extremity.

---

<sup>1</sup> We note that the hearing officer's decision does not list the May 31, 2013, CCH date.

## DISABILITY

The hearing officer's determination that the claimant had disability from July 25, 2012, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

## EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], extends to cervical sprain/strain, C4-5, C5-6, and C6-7 herniations, cervical radiculitis, and traumatic jaw injury is supported by sufficient evidence is affirmed.

The hearing officer also determined that the compensable injury extends to cervical radiculopathy. However, at the CCH the parties agreed to amend the extent-of-injury issue to exclude that condition, and the hearing officer indicated this agreement in the decision. We therefore strike that portion of the hearing officer's determination that the compensable injury extends to cervical radiculopathy as exceeding the scope of the issue before the hearing officer.

The hearing officer also determined that the compensable injury extended to right wrist, right forearm, otalgia, and TMJ.

The hearing officer noted at the CCH that the extent-of-injury issue contained on the Benefit Review Conference Report listed "right wrist and right forearm," and asked the parties if an injury was being asserted to the right wrist and right forearm. The claimant responded that "[j]ust the radicular symptoms, the pain and numbness, tingling," were being claimed. There was no agreement by the parties to amend the extent-of-injury issue to specify what injuries to the right wrist and forearm were being claimed. We note that the claimant did not testify to any specific injury to the right wrist and right forearm, although the claimant did testify that he experienced pain radiating down his right arm.

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. Appeals Panel Decision (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*.

In APD 110054, decided March 21, 2011, the Appeals Panel stated that “[a]lthough the claimed conditions are listed in the record, there is not any explanation of causation for the claimed conditions in the record. We hold that in this case the mere recitation of the claimed conditions in the medical records without attendant explanation how those conditions may be related to the compensable injury does not establish those conditions are related to the compensable injury within a reasonable degree of medical probability.”

Otalgia and TMJ are conditions that are a matter beyond common knowledge or experience and would require expert medical evidence. The hearing officer noted in the Background Information section of the decision that the claimant relied on the records of [Dr. D], the treating doctor, Dr. H, a doctor selected by the treating doctor to act in his place, and Dr. C, the designated doctor, to support his position on the extent-of-injury issue.

There are two letters from Dr. D, both dated November 23, 2012. In both letters Dr. D discusses the claimant’s injury and notes that he had been diagnosed with facial/head pain, cervicalgia, TMJ disc disorder, dizziness, eagle syndrome, and otalgia. Dr. D did not discuss the right wrist and right forearm, nor did Dr. D provide any explanation of how the compensable injury caused an injury to the right wrist and right forearm, otalgia, and TMJ.

In a narrative report dated January 15, 2013, Dr. H listed the claimant’s diagnoses as cervical sprain/strain, TMJ sprain/strain, traumatic fracture of tooth, and cervical radiculitis resultant of disc herniations at C4-5, C5-6, and C6-7. Dr. H did not discuss the right wrist and right forearm or otalgia, nor did Dr. H provide any explanation of how the compensable injury caused an injury to the right wrist and right forearm, otalgia, and TMJ.

In a narrative report dated August 2, 2013, Dr. C listed the claimant’s diagnoses as concussion, cervical strain, cracked tooth, right wrist and forearm sprain, and right [TMJ] sprain. Regarding his opinion on the extent of the claimant’s injury, Dr. C stated:

The extent of the [claimant’s] compensable injury includes a cervical sprain; C4-5, C5-6, and C6-7 disc herniations; [TMJ] injury; and otalgia. The mechanism of injury is consistent with all of the additional diagnosis except the Eagle syndrome. He has not yet received treatment for these diagnoses.

Dr. C did not specifically explain how the compensable injury caused otalgia and TMJ. Although Dr. C does list right wrist and forearm sprain as diagnoses, a right wrist and right forearm sprain was not litigated at the CCH. As noted above, the claimant’s

position at the CCH was that the injury to the right wrist and right forearm was radicular symptoms, pain, numbness, and tingling.

In evidence are records from [Dr. Hu], the claimant's dentist. In those records Dr. Hu diagnosed the claimant with TMJ disc disorder and otalgia, among other things, and stated that: "[i]n my opinion, to a reasonable degree of medical/dental certainly this disorder resulted from the accident of [date of injury]." However, in none of his records did Dr. Hu specifically explain how the compensable injury caused TMJ and otalgia.

In this case, none of the medical records, including those of Dr. H, Dr. D, Dr. C, and Dr. Hu, causally link otalgia and TMJ to the compensable injury. Accordingly, we reverse the hearing officer's determination that the compensable injury extends to otalgia and TMJ. As noted above, although Dr. D noted diagnoses of right wrist and forearm sprain, the extent-of-injury condition was not specific to those conditions, and those conditions were not litigated at the CCH. The hearing officer's determination that the compensable injury extends to right wrist and right forearm is against the great weight of the evidence. We therefore reverse the hearing officer's determination that the compensable injury extends to right wrist and right forearm, and we render a new decision that the compensable injury does not extend to right wrist and right forearm.

#### **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 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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (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 hearing officer determined that the claimant has not reached MMI per Dr. C, and since he has not reached MMI an IR cannot be assigned

Dr. C examined the claimant on August 2, 2013, and in a Report of Medical Evaluation (DWC-69) of that same date, certified that the claimant had not reached MMI but was expected to do so on or about November 2, 2013. In an attached narrative report, Dr. C listed diagnoses of, among other things, right wrist and forearm sprain and right TMJ sprain. As previously discussed, we have reversed the hearing officer's determination that the compensable injury extends to cervical radiculopathy, right wrist, right forearm, otalgia, and TMJ. There is no agreement by the parties that the compensable injury extends to TMJ sprain, nor was that specific condition litigated at the CCH. Dr. C considers conditions that have not been determined to be a part of the compensable injury, and as such his MMI/IR certification cannot be adopted. See APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

There is one other MMI/IR certification in evidence certifying that the claimant has not reached MMI, which is from Dr. H. Dr. H examined the claimant on January 15, 2013, and in a DWC-69 of that same date, certified that the claimant had not reached MMI but was expected to do so on or about May 15, 2013. In an attached narrative report, Dr. H listed diagnoses of, among other things, cervical sprain/strain, TMJ sprain/strain, and cervical radiculitis resultant of disc herniations at C4-5, C5-6, and C6-7. Dr. H also stated that there had not been enough time to allow the claimant an opportunity to heal from his injury, and that the treating doctors had not had enough opportunity to administer or prescribe treatment necessary for the injury. Dr. H considers conditions that have not been determined to be a part of the compensable injury, and as such his MMI/IR certification cannot be adopted. Furthermore, although Dr. H considers cervical radiculitis resultant of disc herniations at C4-5, C5-6, and C6-7, Dr. H does not specifically consider and rate herniations at those levels, and therefore, did not consider and rate the entire compensable injury. Accordingly, we reverse the hearing officer's determinations that the claimant has not reached MMI, and because the claimant has not reached MMI an IR cannot be assigned at this time.

There are three other DWC-69s in evidence, Dr. C's first MMI/IR certification, and two from [Dr. S], the post-designated doctor required medical examination (RME) doctor.

Dr. C initially examined the claimant on October 26, 2012. In a DWC-69 of that same date, Dr. C certified that the claimant reached clinical MMI on October 24, 2012, with a five percent IR. In an attached narrative report, Dr. C listed diagnoses of right TMJ sprain, disc herniations at C5-6 and C6-7, and right upper molar fracture. Dr. C placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment for five percent impairment. Furthermore, Dr. C only considered disc herniations at C5-6 and C6-7. The hearing officer's determination that the compensable injury extends to herniations at C4-5, C5-6, and C6-7 and traumatic jaw injury has been

affirmed as being supported by the evidence. Additionally, the parties stipulated that the compensable injury extends to a facial contusion. Dr. C did not consider the entire compensable injury in making his MMI/IR determination. See APD 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005. Therefore, his MMI/IR certification cannot be adopted.

Dr. S, the post-designated doctor RME doctor, examined the claimant on September 5, 2013, and in a DWC-69 of that same date, certified that if the compensable injury extends to the disputed extent-of-injury conditions, which includes a cervical sprain/strain, C4-5, C5-6, and C6-7 herniations, cervical radiculitis, right wrist, right forearm, otalgia, eagle syndrome, TMJ, and traumatic jaw injury, the claimant reached clinical MMI on January 7, 2013, with a five percent IR. However, given that we have reversed the hearing officer's determination that the compensable injury extends to right wrist, right forearm, otalgia, and TMJ, this certification cannot be adopted.

Dr. S included an alternate DWC-69 certifying that if the compensable injury does not extend to the disputed extent-of-injury conditions, the claimant reached clinical MMI on October 24, 2012, with a zero percent IR. In an attached narrative, Dr. S opined that the compensable injury extended to the cervical sprain/strain but not to C4-5, C5-6, and C6-7 disc herniations. However, the hearing officer's determination that the compensable injury extends to those disc herniations has been affirmed. Therefore, Dr. S does not consider and rate the entire compensable injury and as such his MMI/IR certification cannot be adopted.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

## **SUMMARY**

We affirm the hearing officer's determination that the claimant had disability from July 25, 2012, and continuing through the date of the CCH.

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to cervical sprain/strain, C4-5, C5-6, and C6-7 disc herniations, cervical radiculitis, and traumatic jaw injury.

We reverse that portion of the hearing officer's decision that the compensable injury of [date of injury], extends to cervical radiculopathy as exceeding the scope of the issue before the hearing officer and strike that portion of the hearing officer's

determination that the compensable injury of [date of injury], extends to cervical radiculopathy.

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to right wrist, right forearm, otalgia, and TMJ, and we render a new decision that the compensable injury of [date of injury], does not extend to right wrist, right forearm, otalgia, and TMJ.

We reverse the hearing officer's determinations that the claimant has not reached MMI and because the claimant has not reached MMI an IR cannot be assigned, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], extends to a facial contusion as stipulated to by the parties, as well as a cervical sprain/strain, C4-5, C5-6, and C6-7 disc herniations, cervical radiculitis, and traumatic jaw injury as administratively determined. The hearing officer is also to advise the designated doctor that the compensable injury of [date of injury], does not extend to right wrist, right forearm, otalgia, and TMJ as administratively determined.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with 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) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR consistent 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 **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3232.**

---

Carisa Space-Beam  
Appeals Judge

CONCUR:

---

Cristina Beceiro  
Appeals Judge

---

Margaret L. Turner  
Appeals Judge