

APPEAL NO. 132816  
FILED JANUARY 27, 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 October 23, 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], does not extend to an aggravation of a L4-5 disc bulge with left para central disc protrusion, L3-4 disc bulge, and left SI joint syndrome; (2) the compensable injury of [date of injury], does extend to an aggravation of a L5-S1 disc protrusion, and "L4-5 disc protrusion and with encroachment, left, L5 nerve root"; (3) the respondent (claimant) had disability resulting from an injury sustained on [date of injury], from November 21, 2012, through the date of the CCH; (4) the claimant has not reached maximum medical improvement (MMI); and (5) because the claimant has not reached MMI an impairment rating (IR) cannot be assigned. The appellant (carrier) appeals the hearing officer's determinations of the MMI, IR, disability, and the portion of the extent-of-injury determination that was adverse to it. The carrier contends that the hearing officer erred in finding compensable a condition that was not in dispute. The carrier further argues that there is insufficient causation to support the extent-of-injury determinations, which necessitates reversal of the MMI, IR, and disability determinations as well. The claimant responds, urging affirmance of all the determinations. The hearing officer's determination that the compensable injury does not extend to a L3-4 disc bulge and left SI joint syndrome was not appealed and has become final pursuant to Section 410.169.

### DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that [Dr. D] is the designated doctor appointed for the issues of MMI and IR. The claimant testified that he injured his low back while loading a steel locker onto a pallet and it got caught on a nail.

### DISABILITY

The hearing officer's determination that the claimant had disability resulting from an injury sustained on [date of injury], from November 21, 2012, through the date of the CCH is supported by sufficient evidence and is affirmed.

## 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 (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).

The hearing officer's determination that the compensable injury of [date of injury], does extend to an aggravation of a L5-S1 disc protrusion is supported by sufficient evidence and is affirmed.

The hearing officer also determined in Finding of Fact No. 4 and Conclusion of Law No. 3 that the compensable injury of [date of injury], does not extend to a L4-5 disc bulge with left para central disc protrusion. However, in Finding of Fact No. 3 and Conclusion of Law No. 4, the hearing officer found that the compensable injury does extend to a "L4-5 disc protrusion and with encroachment, left, L5 nerve root." These determinations are internally inconsistent in that in the former, the protrusion at the L4-5 level is held to be not compensable, whereas in the latter, the protrusion at that level is held to be compensable. We reverse the hearing officer's decision as being internally inconsistent, and we remand the case for the hearing officer to make a decision regarding the compensability of a L4-5 disc bulge with left para central disc protrusion which is consistent and is supported by the evidence.

We further note that the unresolved issue at the benefit review conference (BRC) and certified at the CCH was "[d]oes the compensable injury of [date of injury], extend to include an aggravation of the L5-S1 disc protrusion, L4-5 disc bulge with left para central disc protrusion, L3-4 disc bulge and left SI joint syndrome?" The portion of the extent condition at the L4-5 level which reads "encroachment, left, L5 nerve root" was not certified as a condition in dispute at the CCH. Section 410.151(b) and 28 TEX ADMIN. CODE § 142.7 (Rule 142.7) essentially provide that issues not considered at a BRC may only be added by consent of the parties or upon a showing of good cause. While consent may be inferred if the parties actually litigated an issue not otherwise identified, the record in this case does not establish that the parties litigated the extent-of-injury condition of "encroachment, left, L5 nerve root." The hearing officer's determination that the compensable injury extends to this condition exceeded the scope of the issue before him. We therefore reverse that portion of the hearing officer's decision that the compensable injury of [date of injury], extends to "L4-5 disc protrusion

and with encroachment, left, L5 nerve root,” and we remand the issue to the hearing officer for further action consistent with this decision.

### **MMI/IR**

The Appeals Panel has held that an extent-of-injury issue is a threshold issue that must be resolved before MMI and IR can be resolved, and that the resolution of the MMI and IR issues will flow from the resolution of the extent issue. See APD 110854, decided August 15, 2011. See *also* APD 130499, decided May 6, 2013. Because we have reversed and remanded a portion of the extent-of-injury issue, we also reverse the hearing officer’s determination that the claimant has not reached MMI and because the claimant has not reached MMI an IR cannot be assigned, and 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 resulting from an injury sustained on [date of injury], from November 21, 2012, through the date of the CCH.

We affirm the hearing officer’s determination that the compensable injury of [date of injury], does extend to an aggravation of a L5-S1 disc protrusion.

We reverse the hearing officer’s determinations that the compensable injury of [date of injury], does not extend to a L4-5 disc bulge with left para central disc protrusion but does extend to a L4-5 disc protrusion and with encroachment, left, L5 nerve root as being internally inconsistent and beyond the scope of the issue, and we remand the issue for the hearing officer to make a decision regarding the compensability of a L4-5 disc bulge with left para central disc protrusion.

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

### **REMAND INSTRUCTIONS**

On remand, the hearing officer is to make a decision regarding the compensability of a L4-5 disc bulge with left para central disc protrusion which is consistent and is supported by the evidence.

Dr. D is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. D is still qualified and available to be the designated doctor. If Dr. D 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.

After the hearing officer makes an extent-of-injury determination on the condition of a L4-5 disc bulge with left para central disc protrusion, the hearing officer is to advise the designated doctor of his extent-of-injury determination. Also, the hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a lumbar sprain/strain as accepted by the carrier and an aggravation of a L5-S1 disc protrusion, as administratively determined. The hearing officer is to further advise the designated doctor that the compensable injury of [date of injury], does not include a L3-4 disc bulge and left SI joint syndrome.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and IR by rating 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, IR, and extent of injury 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 Texas Department of Insurance, Division of Workers' Compensation, 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723.**

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Cristina Beceiro  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge