APPEAL NO. 140234
FILED MARCH 24, 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 was held on December 12, 2013, in [City], Texas, with [hearing officer] presiding as the hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease, bladder/bowel dysfunction, and cauda equina syndrome; (2) the compensable injury of [date of injury], extends to urinary incontinence and fecal incontinence (cauda equina lesion); (3) the respondent (claimant) reached maximum medical improvement (MMI) on August 26, 2009; and (4) the claimant's impairment rating (IR) is 23%.

The appellant (carrier) appealed the hearing officer's determination that the compensable injury of [date of injury], extends to urinary incontinence and fecal incontinence (cauda equina lesion). The carrier also appealed the hearing officer's determinations regarding MMI and IR. The carrier argued in its appeal that the hearing officer did not have the authority to add the issue of whether the compensable injury extends to cauda equina lesion after the close of the hearing, as it was not actually litigated and no party asked to add it as an issue. The carrier further argued that the evidence failed to establish that the mechanism of injury caused urinary incontinence and fecal incontinence, and that if those conditions are not compensable, then the hearing officer's determinations regarding MMI and IR must also be reversed. The claimant responded, urging affirmance.

The hearing officer's determination that the compensable injury of [date of injury], does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease, bladder/bowel dysfunction, and cauda equina syndrome was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on [date of injury]; and (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. H] as the second designated doctor on the issues of extent of injury, MMI, and IR. The claimant testified that on the date of injury she was helping a patient get out of bed and the patient coded after he sat up. The

patient then began falling back in the bed, and the claimant stated that she was concerned he would hit the side rail so she tried to hold him up. While she was holding him up, she felt a pop in her lower back. The claimant further testified that her back was achy for the next three months, during which time she switched from working the day shift to the night shift. The day after her first day back on the day shift in May of 2007, which required more lifting again, the claimant stated that she was walking across the floor at home when her back spasmed and swelled up.

The evidence reflects that on January 15, 2009, the claimant had a lumbar discogram at L3-4, L4-5, and L5-S1. The claimant then had a lumbar fusion at L4-5 and L5-S1 on May 13, 2009. In evidence is a Division order that extended the claimant's statutory date of MMI for spinal surgery. The order, signed May 1, 2009, extended the claimant's statutory date of MMI until August 26, 2009.

EXTENT OF INJURY

The hearing officer stated in his decision that the issue of whether the compensable injury of [date of injury], extends to cauda equina lesion was added because it was actually litigated and the claimant's entire compensable injury had to be determined to resolve MMI and IR. The Benefit Review Conference Report did not certify any issues regarding "cauda equina lesion" and the evidence and testimony reflect that the parties did not litigate whether the compensable injury of [date of injury], extends to cauda equina lesion. We find that the hearing officer exceeded the scope of his authority in adding Issue No. 4, and we strike Issue No. 4 and references to "cauda equina lesion" from the decision and order.

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*. Under the facts of this case, urinary incontinence and fecal incontinence are outside the scope of common knowledge and experience and require expert medical evidence to establish causation.

While multiple doctors diagnose the claimant with urinary incontinence and fecal incontinence, no doctor provides an explanation of how the mechanism of injury caused urinary incontinence and fecal incontinence. Dr. H, the second designated doctor on extent of injury, MMI, and IR, conducted his examination on July 18, 2013, and opined

that the claimant's compensable injury includes "[l]umbar sprain/strain with aggravation of pre-existing degenerative changes, small herniation/protrusion at L4-5 and a L3-4 bulge, L5-S1 compression, urinary incontinence, fecal incontinence, cauda equina syndrome, and other bladder/bowel dysfunction." Dr. H simply concluded that the compensable injury extends to those conditions and did not explain how the mechanism of injury caused urinary incontinence and fecal incontinence.

[Dr. S], the first designated doctor appointed to address extent of injury, examined the claimant on November 7, 2011, and opined that she "had an extensive injury with lifting a heavy patient" and has "cauda equina syndrome from her bladder incontinence and her bowel incontinence." However, Dr. S did not explain how the mechanism of injury caused urinary incontinence and fecal incontinence and the hearing officer determined that the injury does not extend to cauda equina syndrome.

[Dr. St], the claimant's urologist, testified at the hearing and opined in several reports in evidence that the claimant's urinary incontinence and fecal incontinence began before her back surgery and were due to a cauda equina injury. Dr. St further testified that these conditions extend from her original injury, that the only explanation for these conditions is neurological, and that "the only neurological thing she has is her back injury." When asked to explain the causal relationship between the mechanism of injury and the urinary incontinence and fecal incontinence, Dr. St stated that " . . . she herniated a disc at that time, which produced an injury in the cauda equina." Dr. St further testified that "the most common injury is at [L4-5] rupture of the disc, and the second most common . . . [L5-S1]." Finally, Dr. St confirmed that he believes her mechanism of injury caused a disc protrusion at L4-5 and bulge L5-S1, and that most likely the disc protrusion at L4-5 caused the cauda equina injury.

As previously discussed, the hearing officer's determination that the compensable injury of [date of injury], does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease has become final. Since Dr. St opined that the urinary incontinence and fecal incontinence were due to the noncompensable disc protrusion at L4-5 and bulge at L5-S1, his opinion fails to provide a causal link between the mechanism of injury and the urinary incontinence and fecal incontinence.

There is nothing in evidence that provides an explanation of how the [date of injury], mechanism of injury caused urinary incontinence and fecal incontinence. Accordingly, we reverse the hearing officer's determination that the compensable injury of [date of injury], extends to urinary incontinence and fecal incontinence, and render a new decision that that the compensable injury of [date of injury], does not extend to urinary incontinence and fecal incontinence.

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 reached MMI on August 26, 2009, and that the claimant's IR is 23% as certified by [Dr. O], a doctor who performed a post-designated doctor required medical examination (RME) on September 17, 2013. However, the 23% IR assigned by Dr. O included ratings for the lumbar spine, urinary incontinence, and fecal incontinence, and those conditions were considered when he certified the date of MMI as well. As discussed above, we have reversed the hearing officer's determination that the compensable injury extends to urinary incontinence and fecal incontinence. Dr. O's certification of MMI and IR considered and rated conditions that are not part of the compensable injury, and as such, cannot be adopted. See APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010. Accordingly, the hearing officer's determinations that the claimant reached MMI on August 26, 2009, and that the claimant's IR is 23% are reversed.

As noted above, the Division extended the claimant's date of statutory MMI for spinal surgery to August 26, 2009, pursuant to Section 408.104. Pursuant to Section 401.011(30), MMI means the *earlier* of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104.

Therefore, the latest date the claimant could have reached MMI was August 26, 2009, the date determined as provided by Section 408.104. There are several reports in evidence that found that the claimant was not at MMI, but since the claimant reached statutory MMI several years before the date of the hearing, it is not possible to find that the claimant had not reached MMI as of the date of the hearing.

Dr. S, the first designated doctor appointed to address MMI, IR, and extent of injury, conducted several examinations and issued multiple certifications. On September 14, 2009, Dr. S examined the claimant and certified that she reached MMI statutorily on August 26, 2009, with a 10% IR. The narrative report lists a diagnosis of "L4-S1 fusion." Because the hearing officer's determination that the compensable injury of [date of injury], does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease was not appealed and has become final, this certification considers and rates conditions that are not part of the compensable injury and cannot be adopted.

On March 9, 2010, Dr. S again examined the claimant, and certified that she reached MMI statutorily on August 26, 2009, with a 60% IR. The narrative report again lists a diagnosis of "L4-S1 fusion," and assigns a 60% IR, "Lumbosacral [Diagnosis-Related Estimate (DRE)] Category VII, cauda equina syndrome with bowel or bladder impairment." Because the hearing officer's determination that the compensable injury does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease, bladder/bowel dysfunction, and cauda equina syndrome was not appealed and has become final and we have reversed the hearing officer's determination that the compensable injury extends to urinary incontinence and fecal incontinence, this certification considers and rates conditions that are not part of the compensable injury and cannot be adopted.

On May 3, 2010, Dr. S conducted another examination of the claimant, and again certified that she reached MMI statutorily on August 26, 2009, with a 60% IR. The narrative report lists diagnoses of "[u]rinary and rectal incontinence," "status post multilevel discectomy and vertebral body fusion," and "[L3-4] disc, L5-S1 nerve irritation, right." Dr. S assigned a 60% IR, "Lumbosacral DRE Category VII, cauda equina syndrome with bowel or bladder impairment." Because the hearing officer's determination that the compensable injury of [date of injury], does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease, bladder/bowel dysfunction, and cauda equina syndrome was not appealed and has become final and we have reversed the hearing officer's determination that the

compensable injury extends to urinary incontinence and fecal incontinence, this certification considers and rates conditions that are not part of the compensable injury and cannot be adopted.

After an August 9, 2010, RME, [Dr. K] certified that the claimant reached MMI statutorily on August 26, 2009, with a 5% IR for an unspecified spine injury. Dr. K's narrative failed to specify the part of the spine or the specific diagnosis or diagnoses he considered and rated. Therefore, his certification cannot be adopted.

On July 18, 2013, Dr. H, the most recently appointed designated doctor, conducted a designated doctor examination and provided alternate certifications. For "[p]re-existing degenerative changes, small herniation/protrusion at L4-5 and a L3-4 bulge, L5-S1 compression, urinary incontinence, fecal incontinence, cauda equina syndrome, and other bladder/bowel dysfunction," Dr. H certified that the claimant reached MMI statutorily on May 6, 2009, with a 60% IR. Since the claimant did not reach statutory MMI until August 26, 2009, Dr. H certified an incorrect date of statutory MMI. Additionally, the hearing officer's determination that the compensable injury of [date of injury], does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease, bladder/bowel dysfunction, and cauda equina syndrome was not appealed and has become final and we have reversed the hearing officer's determination that the compensable injury extends to urinary incontinence and fecal incontinence. Since Dr. H certified the wrong date of statutory MMI and the certification considers and rates conditions that are not part of the compensable injury, it cannot be adopted.

In the alternate certification provided by Dr. H, he certified that the claimant reached MMI on April 16, 2007, with a 0% IR for a lumbar sprain/strain.

On September 17, 2013, Dr. O conducted a post-designated doctor RME and certified that the claimant reached MMI on April 3, 2008, with a 5% IR for a lumbar sprain/strain.

Since there is more than one certification of MMI and IR in evidence that can be adopted, we do not consider it appropriate to render a decision on the issues of MMI and IR, and we remand the issues of MMI and IR to the hearing officer to make a determination consistent with this decision.

SUMMARY

We strike Issue No. 4 and references to "cauda equina lesion" from the decision and order.

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to urinary incontinence and fecal incontinence, and render a new decision that that the compensable injury of [date of injury], does not extend to urinary incontinence and fecal incontinence.

We reverse the hearing officer's determinations that the claimant reached MMI on August 26, 2009, and that the claimant's IR is 23% and remand the issues of MMI and IR to the hearing officer to make a determination consistent with this decision.

REMAND INSTRUCTIONS

We note that it is undisputed that the claimant's compensable injury includes a lumbar sprain/strain. On remand, the hearing officer is to determine whether there is an adoptable certification of MMI and IR that rates the entire compensable injury in evidence or whether a new certification of MMI and IR by the designated doctor is necessary.

Dr. H is the designated doctor in this case. The hearing officer is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H is no longer qualified or available to serve as the designated doctor and a new certification of MMI and IR is necessary, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI and IR.

If a new certification of MMI and IR is necessary, the hearing officer is to inform the designated doctor that it has been administratively determined that the claimant's compensable injury of [date of injury], does not extend to the L3-4 disc bulge, L4-5 herniation/protrusion, L5-S1 compression/annular disc bulge, aggravation of L1-2, L2-3, L3-4, L4-5, and L5-S1 degenerative disc disease, bladder/bowel dysfunction, cauda equina syndrome, urinary incontinence, and fecal incontinence.

The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. The hearing officer is to then make determinations on MMI and IR consistent with the evidence and 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, 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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Tracey T. Guerra

Appeals Judge

CONCUR IN RESULT:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner

Appeals Judge