APPEAL NO. 142044
FILED NOVEMBER 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 (CCH) was held on August 25, 2014, in Amarillo, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury on [Date of Injury], extends to a disc herniation at C6-7; (2) the respondent (claimant) has disability resulting from the compensable injury for the period of April 25, 2014, through the date of the CCH; (3) the claimant has not reached maximum medical improvement (MMI); and (4) the impairment rating (IR) cannot be determined until the claimant reaches MMI.

The appellant (carrier) appealed the hearing officer's extent of injury, MMI, IR and disability determinations based on sufficiency of the evidence. Also, the carrier states that there is no evidence in the record to support the hearing officer's extent-of-injury determination, and that the extent-of-injury determination is critical to all of the hearing officer's other findings on the disputed issues. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified he sustained an injury when he stepped out of a truck and onto a loose step causing him to fall backwards and land on his back. It is undisputed that: the claimant sustained a compensable injury on [Date of Injury]; the compensable injury is a cervical sprain/strain, lumbar sprain/strain, and left knee sprain/strain; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. R) as the designated doctor for purposes of MMI, IR, and extent of injury.

## DISABILITY

The hearing officer's determination that the claimant does have disability from the compensable injury for the period of April 25, 2014, through the date of the CCH is supported by sufficient evidence and is affirmed.

## EXTENT OF INJURY

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."

Under the facts of this case, a disc herniation at C6-7 is a condition that is a matter beyond common knowledge or experience and thus requires expert medical evidence. Although there was conflicting evidence as to whether the claimant had a herniated disc at C6-7, the hearing officer relied on the opinion of the claimant's treating neurologist, (Dr. B), that the claimant's cervical MRI dated November 19, 2013, showed the claimant had a herniated disc at C6-7. Furthermore, the hearing officer found Dr. B's opinion more persuasive than Dr. R's, the designated doctor, in regard to the extent-of-injury condition at issue.

The hearing officer states in the Discussion portion of the decision that a cervical MRI dated November 19, 2013, "read to show cervical disc problems at C6-7 with nerve root impingement" and that the claimant was referred to Dr. B a neurologist for evaluation who reviewed the cervical MRI and "read it to show a disc herniation at C6-7 causing right sided foraminal stenosis and neural impingement of the existing C7 nerve root." Furthermore, the hearing officer states that:

> I find that [the] [c]laimant did sustain a herniated disc at the C6-7 level of the cervical spine as a result of the compensable injury of [Date of Injury]. He sustained significant trauma as a result of the fall causing immediate neck pain and headaches. The [cervical] MRI findings of a herniated disc at C6-7 with nerve root impingement correlates with the clinical findings as well as the diagnosis of [Dr. B].

The hearing officer made a finding of fact that the claimant has been diagnosed with a herniated disc at C6-7 with nerve root impingement by Dr. B. In evidence are two medical reports from Dr. B dated December 13, 2013, and May 6, 2014, respectively. In both reports Dr. B mentions the claimant's mechanism of injury and lists an impression "[h]erniated nucleus pulposus at C6-7," however, Dr. B does not provide an explanation of how the mechanism of injury caused an aggravation of the herniated disc at C6-7. Moreover, the record does not contain any medical report providing the necessary causation explanation regarding disc herniation at C6-7.

Because there is no explanation of how the compensable injury caused a disc herniation at C6-7, including Dr. B's medical reports dated December 13, 2013, and May 6, 2014, the hearing officer's determination that the compensable injury of [Date of Injury], extends to a disc herniation at C6-7 is not supported by the evidence. We therefore reverse the hearing officer's determination that the compensable injury of [Date of Injury], extends to a disc herniation at C6-7, and we render a new decision that the compensable injury of [Date of Injury], does not extend to a disc herniation at C6-7.

**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 only certification of MMI/IR in evidence was from Dr. R, the designated doctor. Dr. R examined the claimant on April 24, 2014, and certified that the claimant reached MMI on April 24, 2014, with a zero impairment. Dr. R considered and rated the claimant's cervical, lumbar and left knee sprains/strains 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). The hearing officer states in the Discussion portion of the decision that there are a number of problems with Dr. R's evaluation because Dr. R failed to list the medical records he reviewed, limited the compensable injury to a cervical sprain/strain, lumbar sprain/strain, and left knee sprain/strain, and failed to address Dr. B's opinion regarding the disc herniation at C6-7. The hearing officer found that Dr. R's certification of MMI/IR is contrary to the preponderance of the evidence.

In this case there was no other certification of MMI and IR, for the hearing officer to adopt. The hearing officer states in the Discussion portion of the decision that Dr. B, the neurologist, recommended conservative treatment for the disc herniation at C6-7, and if the claimant's symptoms did not improve with conservative care, Dr. B recommended surgery. The hearing officer states that the claimant has not reached MMI and is presently pending a recommendation for surgery. The hearing officer determined that the claimant has not reached MMI.

The Appeals Panel has held that a hearing officer can determine that the claimant is not at MMI in the absence of a Report of Medical Evaluation (DWC-69) when the only DWC-69 in evidence certifying a date specific for MMI is contrary to the preponderance of the other medical evidence. *See* APD 111393, decided November 23, 2011. We note that although there is no medical report specifically stating that the claimant has not reached MMI, there is a medical report from Dr. B recommending surgery at C6-7. However, given that we have rendered a new decision that the claimant's compensable injury does not extend to a disc herniation at C6-7, and that the recommended surgery is for a non-compensable injury at C6-7, the hearing officer's MMI and IR determinations are against the great weight and preponderance of the evidence. Accordingly, we reverse the hearing officer's determinations that the claimant has not reached MMI, and that the IR cannot be determined until the claimant reached MMI.

As previously mentioned, the only certification of MMI/IR in evidence is from Dr. R, the designated doctor. Dr. R's narrative report references the medical records he reviewed,[1] provides a summary of the claimant's medical provider's treatment and diagnostic studies, and considers and rates the compensable cervical, lumbar and left knee sprains/strains injuries using the AMA Guides. Although Dr. R did not mention Dr. B's opinion regarding a disc herniation at C6-7, Dr. R specifically references the MRI of the cervical spine, opines that claimant has degenerative changes at C6-7, and opines that the changes at C6-7 are unrelated to the mechanism of injury. Dr. R's MMI/IR certification can be adopted because he did consider and rate the entire compensable

[1] Dr. R states in his report "Medical Records Reviewed: See attached."

injury. Accordingly, we render a new decision that the claimant reached MMI on April 24, 2014, with a zero percent IR.

## SUMMARY

We affirm the hearing officer's determination that the claimant had disability from the compensable injury for the period of April 25, 2014, through the date of the CCH.

We reverse the hearing officer's determination that the compensable injury on [Date of Injury], extends to a disc herniation at C6-7, and we render a new decision that the compensable injury on [Date of Injury], does not extend to a disc herniation at C6-7.

We reverse the hearing officer's determination that the claimant did not reach MMI, and the IR cannot be determined until the claimant reached MMI, and we render a new decision that the claimant reached MMI on April 24, 2014, with a zero percent IR per Dr. R, the designated doctor.

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

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

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge