APPEAL NO. 142292
FILED DECEMBER 19, 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 September 23, 2014, in Fort Worth, 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 the lumbar spine annular tear at L5-S1; (2) the respondent (claimant) has not reached maximum medical improvement (MMI) as certified by (Dr. E); and (3) since the claimant has not reached MMI, she cannot be assessed an impairment rating (IR). The appellant (self-insured) appeals the hearing officer's determinations of extent of injury, MMI, and IR contending that there is insufficient evidence of causation to prove the disputed condition is compensable, and further, the hearing officer failed to consider and give proper weight to the designated doctor's opinion regarding extent of injury. The appeal file does not contain a response from the claimant.

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 the accepted injuries are a low back strain with radicular symptoms and sciatica. The parties additionally stipulated that (Dr. P) is the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed designated doctor to address MMI, IR, return to work, and extent of injury. The claimant testified that she felt back pain after pulling a heavy cart full of desks.

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 determined that the compensable injury extends to the lumbar spine annular tear at L5-S1 based on the causation opinion of Dr. E, a referral

doctor. In the Discussion portion of the hearing officer's decision, the hearing officer acknowledges that the report of the designated doctor has presumptive weight, and the self-insured relies on the opinion of the designated doctor. The hearing officer additionally states, "[h]owever, the [d]esignated [d]octor was not asked to address lumbar spine annular tear at L5-S1 and he gave no opinion on that disputed condition."

Dr. P initially examined the claimant on February 3, 2014, and in a report of the same date, he addressed whether the claimant's compensable injury extended to the conditions of lumbar disc degeneration, lumbar spondylosis, obesity, and knee injury. He did not address the disputed condition of the lumbar spine annular tear at L5-S1 at that time. However, in evidence is a subsequent report by Dr. P dated June 30, 2014, in which he states that he was asked to determine the extent of the claimant's injury and that the disputed injury is a midline and left of midline annular tear at L5-S1 without associated canal or significant neural foraminal encroachment. Dr. P explains the mechanism of injury and states that annular tears are common findings resulting from disease of life. He concluded that the compensable injury did not cause the additional injury of a midline and left of midline annular tear at L5-S1 without associated canal or significant neural foraminal encroachment. In addition to the narrative report, there is a Designated Doctor Examination Data Report (DWC-68) submitted by Dr. P dated June 30, 2014, that lists the extent-of-injury condition considered as a midline and left of midline annular tear at L5-S1 without associated canal or significant neural foraminal encroachment. Dr. P indicated on the form that he determined that the condition was not part of the compensable injury.

Although the hearing officer could accept or reject in whole or in part the opinion of Dr. P, or any other evidence, the hearing officer incorrectly noted that Dr. P gave no opinion on the disputed condition and failed to consider Dr. P's extent-of-injury report dated June 30, 2014. Accordingly, we reverse the hearing officer's determination that the compensable injury of [Date of Injury], extends to the lumbar spine annular tear at L5-S1, and we remand the extent-of-injury issue to the hearing officer. On remand, the hearing officer is to fully consider Dr. P's June 30, 2014, report and give it proper weight.

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 as certified by Dr. E, a doctor selected by the treating doctor to act in his place. Dr. E examined the claimant on May 1, 2014, and in a report of the same date, identified the diagnoses as lumbar spine sprain or strain, sciatica, and lumbar radiculopathy. Dr. E concluded that the claimant was not at MMI because there are remaining symptoms and objective findings, and there are additional venues of treatment being offered and needed. Specifically, Dr. E stated that he discussed the use of epidural steroid injections and the possibility of surgical remedy with the claimant, and that she would be willing to consider them. As noted above, the parties stipulated that the compensable injury includes low back strain with radicular symptoms and sciatica. Since Dr. E's certification is based on the accepted conditions, the hearing officer's determination that the claimant has not reached MMI as certified by Dr. E, and since the claimant has not reached MMI, she cannot be assessed an IR is supported by sufficient evidence and is affirmed.

SUMMARY

We reverse the hearing officer's determination that the compensable injury of [Date of Injury], extends to the lumbar spine annular tear at L5-S1, and we remand the extent-of-injury issue to the hearing officer for further action consistent with this decision.

We affirm the hearing officer's determination that the claimant has not reached MMI as certified by Dr. E, and since the claimant has not reached MMI, she cannot be assessed an IR.

REMAND INSTRUCTIONS

On remand, the hearing officer is to consider Dr. P's June 30, 2014, report on the extent-of-injury issue, and give the report proper weight in making his determination. The hearing officer is then to make a determination on whether the compensable injury of [Date of Injury], extends to the lumbar spine annular tear at L5-S1.

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 **DUBLIN INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

DR. RODNEY SCHNEIDER, SUPERINTENDENT
420 NORTH CAMDEN STREET
DUBLIN, TEXAS 76446.

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge