

APPEAL NO. 151161  
FILED JULY 20, 2015

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 6, 2015, in Denton, 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 a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the supraspinatus and infraspinatus tendons of the right shoulder; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, an impairment rating (IR) cannot be assigned at this time; and (4) the claimant had disability for the period beginning February 7, 2014, and continuing through the date of the hearing.

The appellant (carrier) appealed all of the hearing officer's determinations, contending that the evidence does not support those determinations. The claimant responded, urging affirmance of the hearing officer's determinations.

#### DECISION

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

The claimant testified he injured his right shoulder while lifting a tire at work on (date of injury). It is undisputed that the carrier has accepted a right shoulder sprain/strain.

#### DISABILITY

The hearing officer's determination that the claimant had disability for the period beginning February 7, 2014, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

#### EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury of (date of injury), extends to tendinosis of the supraspinatus tendon of the right shoulder is supported by sufficient evidence and is affirmed.

The hearing officer also determined that the compensable injury of (date of injury), extends to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder.

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*.

The hearing officer states in the discussion portion of the decision that “[Dr. M] wrote a letter of causation which related the supraspinatus, infraspinatus and labral damage to the injury of (date of injury), and explained how the mechanism of injury caused damage to those structures.” Furthermore, the hearing officer states in the discussion that “[Dr. M’s] explanation, together with the other medical evidence in the case was more persuasive on the causation issue” and “[Dr. M] is a board certified orthopedic surgeon.”

In evidence is Dr. M’s causation letter dated September 26, 2014, which describes the mechanism of injury and references an MRI of the right shoulder performed on October 2, 2013. Dr. M states “[t]he weight of the tire and the angle in which the patient was loading the tire caused the pain along with the need for surgical intervention. The MRI performed on 10/2/2013 showed distal supraspinatus tendonitis and mild bursitis. With the information provided and the physical examinations I have been able to obtain, it is my professional opinion the incident of (date of injury) is a plausible cause to the pain and disorder of the patient’s right shoulder.”

In evidence is an operative report dated October 10, 2014, from Dr. M, that states the claimant underwent a right shoulder “arthroscopy, subacromial decompression, bursectomy, and debridement of labrum.” An MRI of the right shoulder dated October 2, 2013, lists three impressions as follows: “1. Mild distal supraspinatus tendinosis. No evidence of partial or full-thickness rotator cuff tear. 2. Small amount of fluid in subacromial/subdeltoid space compatible with mild bursitis. No marrow edema or contusion. 3. Biceps anchor is intact. Mild hypertrophic changes in AC joint.” Also, an MRI of the right shoulder dated November 19, 2014, lists an impression of findings indicative of partial intrasubstance tear, partial articular surface tear, and tendinosis of the supraspinatus and infraspinatus tendons. We note Dr. M’s causation letter dated September 26, 2014, pre-dates the MRI of the right shoulder performed on November 19, 2014, which lists the extent-of-injury conditions in dispute in this case.

The conditions of a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder are conditions that are outside the common knowledge and experience of the fact finder, and as such requires expert medical evidence to establish causation. Although the diagnostic studies reference the extent-of-injury conditions in dispute, the medical records do not contain any explanation of how the compensable injury of (date of injury), caused a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder. The hearing officer's determination that the compensable injury of (date of injury), extends to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder is against the great weight and preponderance of the evidence.

Therefore, we reverse that portion of the hearing officer's determination that the compensable injury of (date of injury), extends to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder, and we render a new decision that the compensable injury of (date of injury), does not extend to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder.

#### **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 Texas Department of Insurance, Division of Workers' Compensation (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, and because the claimant has not reached MMI, an IR cannot be assigned. The hearing officer based his MMI and IR determinations on (Dr. B), certification which considers the

extent-of-injury conditions in dispute. Dr. B was appointed by the Division as designated doctor to opine on MMI and IR.

Initially, Dr. B examined the claimant on April 29, 2014, and in Report of Medical Evaluation (DWC-69) dated May 5, 2014, certified that the claimant reached MMI on February 6, 2014, with a zero percent IR for a right shoulder sprain/strain 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). Dr. B re-examined the claimant on January 29, 2015, and in a DWC-69 dated February 2, 2015, certified that the claimant reached MMI on February 6, 2014, with a zero percent IR for a right shoulder sprain/strain using the AMA Guides. In an alternative certification Dr. B certified in a DWC-69 dated February 2, 2015, that the claimant had not reached MMI for the extent-of-injury conditions in dispute, which considers conditions that have been determined in this decision not to be part of the compensable injury. The hearing officer based his MMI and IR determinations on Dr. B's certification that the claimant has not reached MMI.

The hearing officer's MMI and IR determinations are against the great weight and preponderance of the evidence, given that we have reversed the hearing officer's extent-of-injury determination and rendered a new decision that the compensable injury of (date of injury), does not extend to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder. We reverse the hearing officer's determinations that the claimant is not at MMI and an IR cannot be assigned, because it is based on a certification and opinion that considers conditions that are not part of the compensable injury.

As previously mentioned, in two separate DWC-69s one dated May 5, 2014, and the other dated February 2, 2015, Dr. B certified that the claimant reached MMI on February 6, 2014, with a zero percent IR for a right shoulder sprain/strain. Neither certification can be adopted because they do not consider or rate tendinosis of the supraspinatus tendon of the right shoulder, which has been determined to be part of the compensable injury of (date of injury).

There is one other certification in evidence from (Dr. L), the referral doctor. Dr. L examined the claimant on June 27, 2014, and in a DWC-69 dated June 27, 2014, certified that the claimant had not reached MMI because the claimant needed another consultation with an orthopedic surgeon for his right shoulder. This certification cannot be adopted because it does not consider tendinosis of the supraspinatus tendon of the right shoulder. Also, we note that the claimant received an orthopedic consultation with Dr. M on February 6, 2014, prior to Dr. L's date of examination.

There are no other certifications of MMI/IR in evidence that can be adopted. Accordingly, 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 for the period beginning February 7, 2014, and continuing through the date of the CCH.

We affirm that portion of the hearing officer's extent-of-injury determination that the compensable injury of (date of injury), extends to tendinosis of the supraspinatus tendon of the right shoulder.

We reverse that portion of that the hearing officer's extent-of-injury determination that the compensable injury of (date of injury), extends to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder, and we render a new decision that the compensable injury of (date of injury), does not extend to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder.

We reverse the hearing officer's determinations that the claimant is not at MMI and 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. B is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B 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), is a right shoulder sprain/strain and tendinosis of the supraspinatus tendon of the right shoulder. The hearing officer is to advise the designated doctor that the compensable injury of (date of injury), does not extend to a labral tear, partial intrasubstance tear, partial articular surface tear, and tendinosis of the infraspinatus tendon of the right shoulder.

The hearing officer is to request the designated doctor to rate the entire compensable injury in accordance with the AMA Guides and 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 the claimant's MMI and IR for the (date of injury), compensable injury.

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 **OLD REPUBLIC 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 78701-3218.**

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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge