APPEAL NO. 130723
FILED MAY 6, 2013

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 February 11, 2013, in [City], Texas, with [hearing officer's] 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 plantar fasciitis and complex fasciitis, or complex regional pain syndrome/reflex sympathetic dystrophy (CRPS/RSD) of the right lower extremity; (2) the first certification of maximum medical improvement (MMI) and impairment rating (IR) from [Dr. S] on July 17, 2012, became final under Section 408.123; (3) the appellant (claimant) reached MMI on March 23, 2012; and (4) the claimant's IR is zero percent. The claimant appealed all of the hearing officer's determinations. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. S as the designated doctor on issues of MMI and IR. The claimant testified that she was injured when she stepped in a crack and rolled her right ankle.

EXTENT OF INJURY

The claimant testified that immediately after the injury she felt burning and tingling in her right foot and sought medical care on that same day. A medical record dated [date of injury], noted diagnoses of a right ankle sprain, right neuritis, and right ankle injury. A physical therapy prescription form dated February 2, 2012, noted symptoms of pain, stiffness, weakness, instability, and edema of the right ankle. The claimant first underwent physical therapy on February 14, 2012. Physical therapy notes in evidence reveal the claimant continued to complain of burning and tingling in her ankle throughout treatment, and beginning on February 24, 2012, the claimant began complaining of a cold feeling in her right foot. Medical records from March 19 through July 19, 2012, noted continued complaints and increased pain.

The claimant testified she underwent surgery for the plantar fasciitis in her right foot in June 2010, and that she had no further problems with her plantar fasciitis after this surgery until the injury that occurred on [date of injury]. On March 12, 2012, an MRI was taken of the claimant's right foot, which revealed a "[f]ocal thickening of the

proximal aspect of the plantar fascia without associated intrinsic or adjacent signal abnormality. This is more prominent on today's study and likely represents chronic fasciitis. No associated edema signal to suggest active inflammation." The claimant offered into evidence a letter dated November 7, 2012, from Dr. W, her treating doctor, arguing his letter established causation between the compensable injury and the claimed conditions of plantar fasciitis and complex fasciitis, and CRPS/RSD of the right lower extremity.

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.

However, the court in Guevara, *supra,* also noted that while temporal proximity alone does not by itself support an inference of medical causation, "[t]his is not to say that evidence of temporal proximity, that is, closeness in time between an event and subsequently manifested physical conditions is irrelevant to the causation issue," Id. at 668. The court further stated:

Evidence of an event followed closely by manifestation of or treatment for conditions [that] did not appear before the event raises suspicion that the event at issue caused the conditions. . . . But suspicion has not been and is not legally sufficient to support a finding of legal causation. . . . When evidence is so weak as to do no more than create a surmise or suspicion of the matter to be proved, the evidence is no more than a scintilla and, in legal effect, is no evidence. . . . Nevertheless, when combined with other causation evidence, evidence that conditions exhibited themselves or were diagnosed shortly after an event may be probative in determining causation."

Under the facts of this case, the conditions of plantar fasciitis and complex fasciitis, and CRPS/RSD of the right lower extremity are conditions outside the common knowledge and experience of the fact finder, and as such require expert medical evidence to establish causation. The claimant in this case offered evidence that the claimed conditions, particularly the CRPS/RSD of the right lower extremity, exhibited themselves or were diagnosed shortly after the date of injury, as well as a causation letter from Dr. W. We note that in Guevara, *supra*, evidence of an injury followed closely by the manifestation of or treatment for conditions that did not appear prior to

the injury may be combined with other causation evidence to be probative in determining causation.

In the Background Information section of his decision, the hearing officer discussed Dr. W's causation letter dated November 7, 2012, and noted that "[Dr. W's] opinion on causation of the disputed conditions is conclusory and merely recites the MRI findings, CRPS diagnosis, and a statement that they are related in his opinion to the injury."

Dr. W states in the letter dated November 7, 2012, that:

After examining [the claimant], it is my impression that she does have right ankle plantar fasciitis, right ankle complex fasciitis . . . and right ankle [CRPS/RSD] as a result of her work injury of [date of injury]. . . . I have reviewed the right ankle MRI report dated [May 12, 2010] and believe that [the claimant] did sustain right ankle plantar fasciitis as a result of the [date of injury] workers' compensation injury. I have also reviewed the right ankle MRI report dated [March 12, 2012] and believe that [the claimant] did sustain right ankle complex fasciitis as a result of her [date of injury] workers' compensation injury.

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Furthermore, in my medical opinion and within a reasonable degree of medical probability, stepping on a crack and rolling her ankle at work on [date of injury] caused torquing forces to (at least) her right ankle joint which stressed the joint structures of her right ankle and exceeded the strength of the joint structures of her right ankle and produced the right ankle plantar fasciitis, right ankle complex fasciitis . . . and right ankle [CRPS/RSD].

By finding Dr. W's letter dated November 7, 2012, conclusory regarding causation of the claimed conditions, the hearing officer in this case considered Dr. W's letter as though there was no sufficient expert evidence regarding causation of the claimed conditions. However, Dr. W's causation letter discussed not only the MRI findings, plantar fasciitis and complex fasciitis and CRPS/RSD diagnoses and a statement that those conditions, in his opinion, are related to the injury, as stated by the hearing officer, Dr. W's letter also explained and discussed the claimant's mechanism of injury of stepping on a crack and rolling her ankle at work on [date of injury], and how the torquing forces caused the claimed disputed conditions. Although the hearing officer could accept or reject in whole or in part the opinion of Dr. W, or any other evidence, the hearing officer misread Dr. W's causation letter dated November 7, 2012. Accordingly, we reverse the hearing officer's determination that the compensable injury of [date of injury], does not extend to plantar fasciitis and complex fasciitis, and

CRPS/RSD of the right lower extremity, and we remand the extent-of-injury issue to the hearing officer. We note that the record also contains evidence that the disputed conditions are not a part of the compensable injury. On remand the hearing officer is to fully consider Dr. W's November 7, 2012, causation letter as expert evidence and give it proper weight.

FINALITY

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. 28 TEX. ADMIN. CODE § 130.12(b) (Rule 130.12(b)) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. Section 408.123(f) provides in part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described in Subsection (e) if: (1) compelling medical evidence exists of: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR].

In APD 111227, decided October 13, 2011, the Appeals Panel reversed a hearing officer's determination that the first certification of MMI and assigned IR became final and rendered a new decision that the first certification did not become final. The certifying doctor had failed to rate the thoracic spine which had been administratively determined by the Division to be part of the compensable injury although the doctor had rated other parts of the body. In that decision, the Appeals Panel stated:

> The cases make clear that the failure to rate the entire compensable injury constitutes compelling medical evidence of a significant error by the certifying doctor in applying the appropriate [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)] or in calculating the IR.

In the case on appeal, Dr. S did not consider and rate plantar fasciitis and complex fasciitis and CRPS/RSD of the right lower extremity. We have reversed the hearing officer's determination that the compensable injury of [date of injury], does not

extend to those conditions and have remanded the extent-of-injury issue to the hearing officer. Should the hearing officer decide that the compensable injury of [date of injury], does extend to any one or all of those conditions, Dr. S' MMI/IR certification would not consider and rate the entire compensable injury as administratively determined, and therefore, the exception in Section 408.123(f)(1)(A) would apply. *See also* APD 121215, decided August 30, 2012; and APD 130036, decided February 28, 2013. Based upon the facts of this case, we reverse the hearing officer's determination that the first certification of MMI and IR from Dr. S on July 17, 2012, became final under Section 408.123, and we remand the issue of finality to the hearing officer for further action consistent with this decision.

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. 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.

Dr. S, the designated doctor, examined the claimant on July 6, 2012, and in a DWC-69 and narrative report dated July 17, 2012, Dr. S certified the claimant reached clinical MMI on March 23, 2012, with a zero percent IR. In his narrative report Dr. S discusses an ankle strain, but Dr. S does not discuss or even mention plantar fasciitis or complex fasciitis. Regarding CRPS/RSD, Dr. S states: "[t]he [claimant] was diagnosed with RSD by treating physician. I have no concrete findings suggesting RSD, except for the [claimant's] complaints of burning, pain and discolor. Upon examination today, there are no signs or symptoms of RSD."

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 120180, decided April 2, 2012. Dr. S does not consider and rate plantar fasciitis and complex fasciitis, or CRPS/RSD of the right lower extremity. Given that we have reversed the hearing officer's determination that the compensable injury of [date of injury], does not extend to plantar fasciitis and complex fasciitis or CRPS/RSD of the right lower extremity and have remanded that issue to the hearing officer, we also must also reverse the hearing officer's determination that the claimant reached MMI on March 23, 2012, with a zero percent IR and remand the issues of MMI/IR for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the compensable injury of [date of injury], does not extend to plantar fasciitis and complex fasciitis, or CRPS/RSD of the right lower extremity, and we remand the extent-of-injury issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the first certification of MMI and IR from Dr. S on July 17, 2012, became final under Section 408.123, and we remand the finality issue to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant reached MMI on March 23, 2012, and we remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is zero percent, and we remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to consider Dr. W's November 7, 2012, letter of causation as expert evidence on the extent-of-injury issue, and give the letter proper weight in making his determination. The hearing officer is then to make a determination whether the compensable injury of [date of injury], extends to plantar fasciitis and complex fasciitis, or CRPS/RSD of the right lower extremity. The hearing officer is then to make a determination whether the first certification of MMI/IR from Dr. S on July 17, 2012, became final under Section 408.123. The hearing officer is then to make a determination on the claimant's MMI and IR.

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

[DR. JR]
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge