APPEAL NO. 131524
FILED AUGUST 12, 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 May 16, 2013, in [City], 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 disc herniation at L3-4; listhesis at L3-4; lumbar radicular syndrome secondary to foraminal stenosis at L4-5; and foraminal stenosis on herniated disc at L5-S1; (2) the respondent (claimant) has not reached maximum medical improvement (MMI) based on [Dr. K] reports; (3) the issue of impairment rating (IR) is not ripe since the date of MMI has not yet been determined; and (4) the claimant had disability from March 2, 2012, through May 16, 2013. The appellant (carrier) appealed all of the hearing officer's determinations. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury in the form of a cervical strain/sprain and lumbar radiculitis while in the course and scope of his employment with the employer. The claimant testified that he was injured when he had a head-on collision with a large wooden bookcase lying in the middle of the highway on which he was driving.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], extends to a disc herniation at L3-4 and listhesis at L3-4 is supported by sufficient evidence and is affirmed.

The hearing officer also determined that the compensable injury extends to lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1.

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 conditions of lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1 are conditions that require expert evidence to establish a causal connection with the compensable injury.

An MRI dated December 28, 2011, shows the following findings at L4-5 and L5-S1:

> L4-5: Broad-based posterior annular disc bulge asymmetric to the left is noted causing moderate left lateral recess narrowing and bilateral neural foraminal narrowing. Moderate to severe facet osteoarthropathy is noted. No significant spinal canal stenosis is noted.
>
> L5-S1: Mild posterior annular disc bulge asymmetric to the right is noted causing moderate bilateral neural foraminal narrowing. No significant spinal canal stenosis is noted. Moderate right lateral recess narrowing is noted.

The MRI lists the following impression at L4-5 and L5-S1: "L4-5 level asymmetric disc bulge to the left causes moderate left lateral recess narrowing and severe bilateral neural foraminal narrowing" and "L5-S1 level shows moderate bilateral neural foraminal narrowing secondary to posterior annular disc bulge."

In evidence is a medical record from Dr. K dated June 6, 2012, in which Dr. K notes that: ". . . I think [the claimant's] symptoms are primarily coming from the [disc] herniation on the left at L3-4 and the herniation and stenosis on the right at L5-S1" and "[the claimant] does have both stenosis and herniation on the right at L5-S1." Dr. K's report is not sufficient expert medical evidence to establish causation between the compensable injury and foraminal stenosis on herniated disc at L5-S1.

Also in evidence is a letter from Dr. K dated October 16, 2012, in which he opines that: ". . . I do think the motor vehicle accident is the source of [the claimant's] symptoms. It did cause injury to his back. They did not only cause a new [disc] herniation at L3-4 and listhesis at L3-4, but aggravated his previous [disc] problems from the surgery in 2009." In another letter dated May 8, 2013, Dr. K again opines on the claimant's injury. However, Dr. K only discusses a disc herniation at L3-4 and listhesis at L3-4; he does not mention the remaining extent-of-injury conditions of lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1.

Also in evidence are letters from [Dr. G] regarding the claimant's injury. In a letter dated January 14, 2013, Dr. G states "[t]he work related injury was significant in that it certainly exacerbated the earlier injury." In another letter dated February 5, 2013, Dr. G states: "I am in support of [the claimant's] claim that this accident was responsible for the changes in his lumbar spine as outlined by [(Dr. Md)] description of his before and after MRI changes of his lumbar spine. These changes would be due to rapid deceleration and effect of the air bag deployment causing further herniation of the affected discs." There are no records from Dr. Md in evidence. Further, the only MRI in evidence is the MRI dated December 28, 2011, which is discussed above. That MRI does not list the specific diagnoses of lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1.

The record does not contain the specific diagnosis of lumbar radicular syndrome secondary to foraminal stenosis at L4-5. Further, there are no medical records, including the letters from Dr. K and Dr. G, that explain how the work injury of [date of injury], caused the claimed lumbar radicular syndrome secondary to foraminal stenosis at L4-5 or foraminal stenosis on herniated disc at L5-S1. Accordingly, we reverse the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1 and we render a new decision that the compensable injury of [date of injury], does not extend to lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1.

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 based on Dr. K's reports, and that the issue of IR is not ripe since the date of MMI has not yet been determined.

As discussed above, Dr. K notes in a medical record dated June 6, 2012, that he believed the claimant's symptoms were coming from the disc herniation at L3-4 and a herniation and stenosis on the right at L5-S1. As previously discussed, we have reversed the hearing officer's determination that the compensable injury extends to foraminal stenosis on herniated disc at L5-S1 and rendered a new decision that the compensable injury does not extend to foraminal stenosis on herniated disc at L5-S1. Accordingly, we reverse the hearing officer's determination that the claimant has not reached MMI based on Dr. K's reports and that the issue of IR is not ripe since the date of MMI has not yet been determined.

There is only one certification of MMI/IR in evidence, which is from [Dr. M]. Dr. M was appointed by the Division to determine in part MMI and IR. Dr. M examined the claimant on July 13, 2012, and in a Report of Medical Evaluation (DWC-69) dated that same date certified the claimant reached clinical MMI on March 1, 2012, with a five percent IR. In his attached narrative Dr. M opines that the claimant's compensable injury is a cervical strain/sprain and lumbar radiculitis only. Dr. M placed the claimant in Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment for five percent impairment. Given that we have affirmed the hearing officer's determination that the compensable injury extends to a disc herniation at L3-4 and listhesis at L3-4, Dr. M does not consider and rate the entire compensable injury. *See* APD 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005. Accordingly, his MMI/IR certification cannot be adopted.

There are no certifications of MMI/IR in evidence that can be adopted. Therefore, 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 compensable injury of [date of injury], extends to a disc herniation at L3-4 and listhesis at L3-4.

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1, and we render a new

decision that the compensable injury does not extend to lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1.

We reverse the hearing officer's determinations that the claimant has not reached MMI and that the issue of IR is not ripe since the date of MMI has not yet been determined, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M 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], includes a cervical strain/sprain and lumbar radiculitis as accepted by the carrier, as well as a disc herniation at L3-4 and listhesis at L3-4 as administratively determined. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not extend to lumbar radicular syndrome secondary to foraminal stenosis at L4-5 and foraminal stenosis on herniated disc at L5-S1.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with 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) 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 present further evidence in response to the designated doctor's opinion. The hearing officer is then to determine the issues of MMI and IR consistent with 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 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 **COMMERCE & INDUSTRY 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge