APPEAL NO. 132180
FILED OCTOBER 31, 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 (CCH) was held on August 5, 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 stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); and (3) because the claimant has not reached MMI, an impairment rating (IR) is premature. The appellant (carrier) appeals the hearing officer's determinations of the extent of the compensable injury, MMI, IR, and disability.[1] The carrier argues that the evidence fails to provide sufficient causation to support the hearing officer's extent-of-injury determination. The carrier further argues that the erroneous extent-of-injury determination caused error in the hearing officer's determinations of MMI, IR, and disability. The claimant responded, urging affirmance of the disputed determinations.

## DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed [Dr. M] as the designated doctor on the issues of MMI and IR. The claimant testified that he injured his back while attempting to straighten a part of the production line that was bent. On March 18, 2013, the claimant underwent an L4-5 hemilaminectomy with partial medial facetectomy and lateral recess decompression, L5-S1 left-sided hemilaminectomy, foraminotomy, and microdiskectomy and a left L5-S1 partial medial facetectomy and lateral recess decompression.

## 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

[1] We note that disability was a disputed issue at the CCH. The hearing officer made a finding of fact regarding disability but failed to make a conclusion of law or include the issue of disability in his decision.

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 the instant case, the conditions in dispute, stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy are conditions that are outside the common knowledge and experience of the fact finder, and as such require expert medical evidence to establish causation.

In the Background Information portion of his decision, the hearing officer noted that the claimant's treating doctor, [Dr. S] has written a letter explaining that the action of the claimant in pulling and straining on the metal pipe caused the disputed conditions with sudden onset of left sided low back symptoms. In a letter dated May 23, 2013, Dr. S stated that "I agree that the probability of the description of the pulling and straining on the metal pipe with a sudden onset of pain in the lower back on the left side would be a reasonable cause for the findings that have developed." Dr. S did not identify the specific findings he is referencing nor did Dr. S refer to a diagnostic test which would identify specific conditions.

Dr. M, the designated doctor, in a report dated April 9, 2013, stated the claimant was referred to [Dr. B] for orthopedic evaluation. Dr. B found a disc extrusion not mentioned on the MRI report. Dr. M referenced that there was a note from Dr. B on February 22, 2012, that stated the radiologist had misread the MRI. Dr. M noted that there were no reports available for review of EMG findings, operation, or corrected MRI report.

An MRI report dated August 20, 2012, is in evidence and listed the following impressions: mild left neural foraminal narrowing at the L3-4 level due to an asymmetric disc bulge, central canal and neural foramina are otherwise maintained with no focal disc herniation identified, and multilevel disc desiccation. A medical record dated September 11, 2012, from Dr. B noted "[t]here is no significant spinal stenosis at this time." In evidence is a peer review report dated November 6, 2012, from [Dr. Ma] who stated "it is my opinion based on reasonable medical probability and based on the [Official Disability Guidelines] that this should be classified predominantly as a soft tissue strain of the lumbosacral spine and that [the claimant] should fully recover within a three-month period of time just with time and conservative treatment."

As previously noted, the letter of causation relied on by the hearing officer in his extent-of-injury determination did not specify the conditions the doctor was opining were caused by the mechanism of injury or point to a specific diagnostic test to identify the conditions. Accordingly, the hearing officer's determination that the compensable injury of [date of injury], extends to stenosis at L4-S1, disc protrusion at L5-S1 on the left,

facet hypertrophy at L4-5, and S1 radiculopathy is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy and render a new decision that the compensable injury of [date of injury], does not extend to stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy.

**MMI AND 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.

There were three certifications of MMI/IR in evidence. The first certification is from [Dr. Be], the first designated doctor. Dr. Be examined the claimant on January 2, 2013, and certified that the claimant had not reached MMI. Dr. Be listed the single confirmed lumbar spinal diagnosis as a lumbar sprain/strain. Dr. Be noted that the claimant was still receiving treatment for his injury and had not attained MMI but estimated that he would reach MMI on or around February 2, 2013.

Subsequently, a second designated doctor was appointed, Dr. M. Dr. M examined the claimant on April 9, 2013, and certified that the claimant reached MMI on January 2, 2013, with a 5% IR 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. M's certification was based on a compensable injury of a lumbar

sprain/strain. In his narrative report, Dr. M noted that there were no reports available for review of EMG findings, operation, or corrected MRI report.

The hearing officer rejected the certifications from both Dr. Be and Dr. M because he found that the compensable injury extended to stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy. As discussed above, the hearing officer's extent-of-injury determination has been reversed and a new decision rendered that the compensable injury does not extend to stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy.

A third certification of MMI/IR was in evidence from [Dr. F], a doctor selected by the treating doctor to act in place of the treating doctor. Dr. F examined the claimant on June 26, 2013, and certified that the claimant reached MMI on June 21, 2013, with a 10% IR using the AMA Guides. Dr. F assessed 8% impairment under Table 75, page 3/113 of the AMA Guides for a surgically treated disc lesion without residual signs or symptoms which was done at 3 levels which would add an additional 2% impairment. The hearing officer rejected the certification from Dr. F because of his failure to follow the AMA Guides regarding use of the Diagnosis-Related Estimates model for assessing impairment for the lumbar spine. The hearing officer determined that the claimant was not at MMI because there was no certification in evidence that could be adopted.

As previously noted, the second designated doctor, Dr. M, specifically stated in his narrative report that he did not have all of the claimant's medical records. Rule 127.10(a)(3) provides in part that the following requirements apply to the receipt of medical records and analyses by the designated doctor: the treating doctor and insurance carrier shall ensure that the required records and analyses (if any) are received by the designated doctor no later than three working days prior to the date of the designated doctor examination.

Because we have reversed the extent-of-injury determination, we also reverse the hearing officer's determinations that the claimant has not reached MMI and because the claimant has not reached MMI, an IR is premature and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

## DISABILITY

The hearing officer found in Finding of Fact No. 9 that due to the compensable injury of [date of injury], the claimant was unable to obtain or retain employment at wages equivalent to his preinjury wage for the period beginning April 18 through June 21, 2013, but not thereafter through June 24, 2013. However, the hearing officer failed to make a conclusion of law or decision on the disability issue.

As previously noted, we have reversed the extent-of-injury conditions in dispute determined to be part of the compensable injury by the hearing officer. Accordingly, we reverse the hearing officer's decision as being incomplete and remand the disability issue for the period in dispute, April 18 through June 24, 2013, for reconsideration.

## SUMMARY

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy and render a new decision that the compensable injury of [date of injury], does not extend to stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy.

We reverse the hearing officer's determinations that the claimant has not reached MMI and because the claimant has not reached MMI, an IR is premature and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's decision as being incomplete and remand the disability issue for the period in dispute for further action consistent with this decision.

## REMAND INSTRUCTIONS

On remand the hearing officer is to make a determination of the disability period at issue, April 18 through June 24, 2013, considering that a new decision has been rendered that the compensable injury of [date of injury], does not include stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy.

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 MMI/IR for the compensable injury of [date of injury].

On remand the hearing officer is to ensure that the required medical records are sent to the designated doctor pursuant to Rule 127.10(a)(3) and inform the designated doctor that the compensable injury does not extend to stenosis at L4-S1, disc protrusion at L5-S1 on the left, facet hypertrophy at L4-5, and S1 radiculopathy.

The designated doctor is then to be requested to give a certification of MMI/IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date, which can be no later than the date of statutory MMI, considering the claimant's medical record and the certifying examination.

The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI/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 **HARTFORD INSURANCE COMPANY OF THE MIDWEST** and the name and address of its registered agent for service of process is

**C T CORPORATION SYSTEM**
**350 NORTH ST. PAUL STREET, SUITE 2900**
**DALLAS, TEXAS 75201-4284**.

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge