APPEAL NO. 132305
FILED NOVEMBER 26, 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 28, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: the compensable injury of [date of injury], extends to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing; (2) the respondent (claimant) did not reach maximum medical improvement (MMI) on June 13, 2013, or March 14, 2012, as certified by the certifying physicians in this case; and (3) because the claimant was not at MMI on the dates certified by the certifying physicians, an impairment rating (IR) cannot be assigned.

The appellant (self-insured) appealed all of the hearing officer's determinations, arguing that the claimant failed to present sufficient evidence to support an affirmative finding on the disputed extent-of-injury conditions, and that the hearing officer erred in not adopting the MMI/IR certification from [Dr. H], the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor on the issues of MMI and IR. The self-insured also argues that the hearing officer erred in admitting Claimant's Exhibit No. 3, which the self-insured contends was not timely exchanged. The claimant responded, urging affirmance of all the hearing officer's 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]; the Division appointed Dr. H as the designated doctor on the issues of MMI and IR; and the statutory date of MMI in this case is August 13, 2013. The self-insured represented at the CCH that it has accepted as compensable bilateral shoulder strain/sprain, left carpal tunnel syndrome (CTS) and left wrist pain.

**EVIDENTIARY RULING**

At the CCH the claimant sought to admit a medical report from [Dr. M] dated August 18, 2013. The self-insured objected on the grounds that the report had not been timely exchanged. The claimant contended she exchanged the record the day she received it. The hearing officer admitted the exhibit over the self-insured's objection. To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in

the admission or exclusion of evidence, an appellant must first show the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; APD 121647, decided October 24, 2012; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We hold that the hearing officer did not abuse his discretion in admitting Claimant's Exhibit No. 3.

**EXTENT OF INJURY**

The hearing officer determined that the compensable injury extends to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing.

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. 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 extent-of-injury conditions in dispute first appear in MRIs of the left and right shoulders and wrists taken on January 17 and January 29, 2013. Under the circumstances of this case, left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing for a compensable injury sustained on [date of injury], are conditions that are a matter beyond common knowledge or experience and would require expert medical evidence.

In the Background Information section of the decision the hearing officer notes:

> [The] [c]laimant's treating surgeon is [Dr. M], who has written a letter explaining causation of the disputed conditions of her wrists, elbows and shoulders by [the] [c]laimant's work involving use of heavy power tools to torque bolts attaching items to chassis on the assembly line, which [the] [c]laimant explained involved overhead work. This letter convincingly links

> the disputed conditions to the injury, and their inclusion as part of the compensable injury is shown by the preponderance of the evidence.
>
> Dr. M's letter is dated August 18, 2013. In this letter Dr. M states that:
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> [The claimant] has work injuries involving wrists, elbows, and shoulders consistent [with] use of heavy power tools in the GM assembly line. Lifting and pulling these tools and subjection to torque generated by this tools [sic] is reasonably adequate to produce work injuries of type experienced by [the claimant].

Dr. M does not specifically mention any of the specific claimed extent-of-injury conditions in his August 18, 2013, letter; rather, his letter focuses on "injuries" in the wrists, elbows, and shoulders. We hold that Dr. M's letter is insufficient to establish causation between the [date of injury], compensable injury and the claimed extent-of-injury conditions.

The hearing officer also states in the Background Information section that Dr. H had also written a report as designated doctor on extent of injury in which he related the claimed extent-of-injury conditions to the compensable injury. Dr. H examined the claimant on April 30, 2013, and noted that the disputed conditions are left elbow repetitive stress, left shoulder labral tear, bursal and interstitial sided tear, and right shoulder impingement and possible tear. Dr. H opined that:

> The [claimant] has a significant number of structural problems in her shoulders, wrist, and elbow. . . . She has problems in her left elbow. Clinically, an MRI shows repetitive stress involving the medial aspect of the left elbow. MRI of the left shoulder shows labral tear and bursal and interstitial tear. The right shoulder MRI shows impingement and possible tear. . . . These should not be disputed conditions.

All of her reported injuries appear to be due to a 14-year history using a torque gun and of performing functions that were above head.

Dr. H does not address all of the claimed extent-of-injury conditions in dispute. Further, Dr. H's opinion that "[a]ll of [the claimant's] reported injuries appear to be due to a 14-year history using a torque gun and of performing functions that were above head" is not sufficient to establish causation between the [date of injury], compensable injury and the claimed extent-of-injury conditions.

As there is insufficient evidence in this case to establish causation between the [date of injury], compensable injury and the claimed extent-of-injury conditions, we

reverse the hearing officer's determination that the compensable injury of [date of injury], extends to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing, and we render a new decision that the compensable injury of [date of injury], does not extend to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing.

**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 found that Dr. H determined that, for the disputed conditions, the claimant was not at MMI and that an IR would not be appropriate. The hearing officer also found that although the statutory date of MMI has occurred, none of the IRs could be adopted because they did not include the disputed extent-of-injury conditions. The hearing officer determined that the claimant did not reach MMI on June 13, 2013, or March 14, 2012, as certified by the certifying physicians in this case, and that because the claimant was not at MMI on the dates certified by the certifying physicians, an IR cannot be assigned.

However, we have reversed the hearing officer's determination that the [date of injury], compensable injury extends to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing, on which the hearing officer based his MMI and IR determinations. Furthermore, we note that the parties stipulated at the CCH that the statutory date of MMI in this case is August 13, 2013. The hearing officer signed the

decision and order determining the claimant is not at MMI on August 29, 2013, which is after the date of statutory MMI. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a decision and order dated after the date of statutory MMI. *See* APD 131554, decided September 3, 2013. For these reasons, we reverse the hearing officer's determination that the claimant did not reach MMI on June 13, 2013, or March 14, 2012, as certified by the certifying physicians in this case and that because the claimant was not at MMI on the date certified by the certifying physicians, an IR cannot be assigned.

There are a number of MMI/IR certifications in evidence certifying that the claimant has not yet reached MMI. These certifications are from [Dr. Bu], a designated doctor appointed prior to Dr. H; [Dr. S], a post-designated doctor required examination doctor (RME); and Dr. H. However, because the parties have stipulated that the statutory date of MMI in this case is August 13, 2013, none of these certifications certifying that the claimant has not reached MMI can be adopted. APD 131554, *supra*.

There are two other MMI/IR certifications in evidence. The first is from [Dr. B], a post-designated doctor RME. Dr. B certified on June 13, 2013, that the claimant reached clinical MMI on March 14, 2012, with a zero percent IR based on normal range of motion (ROM) measurements of the claimant's bilateral shoulders, left wrist, and a normal neurologic examination. The second is from Dr. H, the designated doctor. Dr. H certified on July 30, 2013, that the claimant reached clinical MMI on June 13, 2013, with a five percent IR based on ROM measurements of the claimant's bilateral shoulders, left wrist, and a normal neurologic examination. As previously mentioned, the self-insured represented at the CCH that it has accepted as compensable bilateral shoulder strain/sprain, left CTS, and left wrist pain. Since there is more than one certification of MMI and IR in evidence that can be adopted, we do not consider it appropriate to render a decision on the issues of MMI and IR, and we remand to the hearing officer to make a determination on the claimant's MMI and IR consistent with this decision.

## SUMMARY

We reverse the hearing officer's determination that the compensable injury of [date of injury], extends to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing and we render a new decision that the compensable injury of [date of injury], does not extend to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing.

We reverse the hearing officer's determinations that the claimant did not reach MMI on June 13, 2013, or March 14, 2012, as certified by the certifying physicians in

this case, and that because the claimant was not at MMI on the dates certified by the certifying physicians, 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

It is undisputed that the claimant's compensable injury is a bilateral shoulder strain/sprain, left CTS, and left wrist pain, and we have rendered a new decision that the compensable injury does not extend to left elbow repetitive stress injury, right elbow repetitive stress injury, left shoulder labral tear and bursal tear, and right shoulder tendinopathy with high grade tearing. The hearing officer is to make a determination of MMI and IR based on the evidence.

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 certified self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM**
**350 NORTH ST. PAUL STREET**
**DALLAS, TEXAS 75201**.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge