APPEAL NO. 132795
FILED FEBRUARY 6, 2014

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 October 15, 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 bilateral thumb numbness, cervical stenosis C3-7, cervical radiculopathy, arthrodesis at C4-5, aggravation of degenerative disc disease and cervical nerve root irritation, and left shoulder internal derangement; (2) the compensable injury of [date of injury], does not extend to cervical herniations at C3-7; (3) the respondent (claimant) reached maximum medical improvement (MMI) on June 29, 2013; (4) the claimant's impairment rating (IR) is 22%; and (5) the compensable injury was a cause of the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage beginning on November 25, 2011, and continuing through August 15, 2013.

The appellant (carrier) appealed the hearing officer's extent-of-injury determination adverse to it, as well as the hearing officer's MMI, IR, and disability determinations. The carrier argues that the claimant failed to meet his burden of proof on those issues. The carrier also specifically argues that the MMI/IR certification adopted by the hearing officer provides a rating for cervical radiculopathy without documenting significant signs of radiculopathy. The appeal file does not contain a response from the claimant. The hearing officer's determination that the compensable injury does not extend cervical herniations at C3-7 was not appealed and has become final pursuant to Section 410.169.

## DECISION

Affirmed in part, 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], at least in the form of a cervical sprain/strain, cervical spinous process fracture at C5, lumbar sprain/strain, and a compression fracture of L1 vertebral body. We note that in an unappealed finding of fact the hearing officer found that statutory MMI is June 29, 2013. The claimant testified he was injured when he fell from a forklift cage approximately 8 feet in the air, landing on his neck and left shoulder.

## DISABILITY

The disability issue before the hearing officer was whether the claimant had disability from November 25, 2011, to August 15, 2013, resulting from an injury sustained on [date of injury]. The hearing officer states in Finding of Fact No. 9 and in the decision portion of the decision and order that "[t]he compensable injury was a cause of [the] [c]laimant's inability to obtain and retain employment at wages equivalent to his preinjury wage beginning on November 25, 2011, and continuing through August 15, 2013." However, we note that Conclusion of Law No. 7 incorrectly states: "[t]he compensable injury was a cause of [the] [c]laimant's inability to obtain and retain employment at wages equivalent to his preinjury wage beginning on November 25, 2011, and continuing through the date of the [CCH]." The hearing officer's decision and order contains no specific determination whether the claimant sustained any disability as a result of the compensable injury. We reverse the hearing officer's decision as incomplete, and render a new decision on the issue of disability from November 25, 2011, to August 15, 2013, for the reasons discussed below.

The carrier contended that the claimant did not have disability for the claimed period because he received salary continuation from his employer beginning on the date of injury to the present.

In Appeals Panel Decision (APD) 050565, decided May 2, 2005, the sole issue was disability. The carrier in that case contended that the claimant received salary continuation during the claimed disability period and therefore was not entitled to temporary income benefits (TIBs). The Appeals Panel noted that the issues of payment of TIBs or the accrual date of income benefits were not before the hearing officer or the Appeals Panel, and that the only issue before the Appeals Panel was disability. The Appeals Panel cited to APD 951736, decided December 7, 1995, and APD 941073, decided September 26, 1994, as cases where the claimant continued to receive his salary but did not work because of the compensable injury. The Appeals Panel held in those cases that the claimant had disability because the worker "was not performing personal services for the employer in exchange for the salary continuation," and that the claimant "had disability during that period" (the period that the claimant was unable to work).

In APD 050565, *supra*, the Appeals Panel held that, insofar as the hearing officer was saying that the claimant did not have disability because he "apparently received salary continuation benefits for a period of time while he was not working," the Appeals Panel reversed and rendered a new decision that the claimant had disability. The Appeals Panel acknowledged that a claimant does not have disability for a period in

which the claimant works some kind of light duty status and continues to draw his preinjury wage.

In the case on appeal, the claimant testified that there was no period of time from [date of injury], through the date of the CCH that he was not on salary continuation, and that he made the same wages after the injury as he did before the injury. The claimant also testified that he returned to work sometime "around the end of October, beginning of November 2011," working an 8-10 hour day. The evidence reflects that the claimant has worked for the employer in some capacity during the claimed period of disability. As the claimant has worked for the employer in some capacity and continued to draw his preinjury wage, we render a new decision that the claimant did not have disability from November 25, 2011, through August 15, 2013.

## EXTENT OF INJURY

The hearing officer's determinations that the compensable injury extends to cervical radiculopathy, arthrodesis at C4-5, and aggravation of cervical nerve root irritation is supported by sufficient evidence and is affirmed.

The hearing officer also determined that the compensable injury extends to bilateral thumb numbness. At the CCH the claimant testified that he has never claimed an injury to his right thumb or right thumb numbness. The claimant further testified that he has only had left thumb problems. In evidence are medical records dated as early as July 8, 2011, noting that the claimant jammed both of his thumbs when he fell on the date of injury, and that the claimant was reporting left thumb numbness. The medical records do not show that the claimant has complained of right thumb numbness. The medical records support that portion of the hearing officer's determination that the compensable injury extends to left thumb numbness. Therefore, we reverse the hearing officer's determination that the compensable injury extends to bilateral thumb numbness, and we render a new decision that the compensable injury does not extend to right thumb numbness but does extend to left thumb numbness.

The hearing officer also determined that the compensable injury extends to cervical stenosis C3-7, aggravation of degenerative disc disease, and left shoulder internal derangement.

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*.

In the case on appeal, the conditions of cervical stenosis C3-7, aggravation of degenerative disc disease, and left shoulder internal derangement are conditions that are outside the common knowledge and experience of the fact finder, and as such require expert medical evidence to establish causation.

The medical records do not contain any explanation of how the compensable injury caused aggravation of degenerative disc disease or left shoulder internal derangement. Therefore, we reverse the hearing officer's determination that the compensable injury extends to these conditions and we render a new decision that the compensable injury does not extend to aggravation of degenerative disc disease or left shoulder internal derangement.

The record contains two statements from doctors regarding cervical stenosis. The first is from [Dr. S], a doctor selected by the treating doctor to act in his place. In her July 26, 2013, narrative report, Dr. S opines only on "cervical herniation at C3 with stenosis," and determined that this condition was "not aggravated by the injury even though it shows on the MRI scan to be narrowed and stenotic."

The other statement is from [Dr. G], the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR, and return to work. In an addendum dated August 16, 2013, Dr. G stated that the diagnosis of C3 herniation with stenosis "was not directly related and not aggravated by the injury itself." Regarding herniations with stenosis at C4-7, Dr. G stated that these "were aggravated." Dr. G went on to explain that:

> . . . [C4-7] were aggravated at the point of injury to the point that they needed to have surgical intervention in order to deal with the problem that was created from the fall. Therefore, the answer is C3 alone was not aggravated. However, with [C4-7] there was stenosis, osteophytes formation, and impingement of multiple nerve roots; these were all aggravated by the injury itself. . . .

Dr. G opined that the compensable injury does not extend to cervical stenosis at C3, and although Dr. G believes cervical stenosis C4-7 was aggravated by the compensable injury, he does not provide an explanation of how the compensable injury aggravated cervical stenosis C4-7. Accordingly, we reverse the hearing officer's determination that the compensable injury extends to cervical stenosis C3-7, and we render a new decision that the compensable injury does not extend to cervical stenosis C3-7.

**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 determined that the claimant statutorily reached MMI on June 29, 2013, with a 22% IR per Dr. S.

Dr. S examined the claimant on July 26, 2013, and certified that the claimant reached MMI statutorily on June 29, 2013, with a 22% 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. S assessed 6% upper extremity impairment for the claimant's left shoulder based on loss of range of motion (ROM), which Dr. S converted to 4% whole person impairment. Dr. S placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy for 15% impairment, and also placed the claimant in DRE Lumbosacral Category II: Minor Impairment for 5% impairment for a compression fracture at L1. We note, as pointed out by the carrier in its appeal, that Dr. S did not document any significant signs of radiculopathy to rate radiculopathy under the AMA Guides. *See* APD 072220-s, decided February 5, 2008, in which the Appeals Panel held that to receive a rating for radiculopathy the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location.

Dr. S assessed 4% whole person impairment for the loss of ROM of the claimant's left shoulder. Given that we have reversed the hearing officer's

determination that the compensable injury extends to left shoulder internal derangement, Dr. S considered and rated a condition that has been determined not to be part of the compensable injury. *See* APD 110463, decided June 13, 2011, and APD 101567, decided December 20, 2010. As previously discussed, we have reversed the hearing officer's determination that the compensable injury extends to bilateral thumb numbness and rendered a new decision that the compensable injury does not extend to right thumb numbness but does extend to left thumb numbness. We have also affirmed the hearing officer's determination that the compensable injury extends to arthrodesis at C4-5. Further, the parties stipulated that the compensable injury extends to at least a cervical sprain/strain and a lumbar sprain/strain. We note that Dr. S did not discuss these conditions in her narrative report. Dr. S did not consider and rate the entire compensable injury. *See* APD 110463 and APD 101567. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on June 29, 2013, with a 22% IR.

The only other MMI/IR certification in evidence is from Dr. G, the designated doctor. Dr. G examined the claimant on March 10, 2012, and certified that the claimant reached MMI on November 24, 2011, with a 10% IR. Dr. G assessed 0% impairment for the claimant's bilateral thumbs and bilateral elbows, and placed the claimant in DRE Cervicothoracic Category II: Minor Impairment for a C5 nondisplaced fracture. Dr. G also placed the claimant in DRE Thoracolumbar Category II: Minor Impairment for a T12 fracture. There is no agreement by the parties that the compensable injury extends to a T12 fracture, nor was that specific condition litigated at the CCH. Dr. G considered and rated a condition that is not part of the compensable injury. APD 110463, *supra*, and APD 101567, *supra*. As previously discussed, we have reversed the hearing officer's determination that the compensable injury extends to bilateral thumb numbness and rendered a new decision that the compensable injury does not extend to right thumb numbness but does extend to left thumb numbness. Dr. G considered a condition determined not to be a part of the compensable injury. We have also affirmed the hearing officer's determination that the compensable injury extends to cervical radiculopathy, arthrodesis at C4-5, and aggravation of cervical nerve root irritation. Further, the parties stipulated that the compensable injury extends to at least a cervical sprain/strain, lumbar sprain/strain, and a compression fracture of L1 vertebral body. Dr. G did not discuss these conditions in his narrative report. Dr. G did not consider and rate the entire compensable injury, and as such his MMI/IR certification cannot be adopted. *See* APD 110463 and APD 101567.

Additionally, we note that Dr. G stated the following in his narrative report regarding the claimant's date of MMI:

> The claimant has reached MMI, and according to the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDG)] at a maximum of 147 days for light duty, and that was reached on [November 24, 2011].

The Appeals Panel has previously held that the MDG cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. *See* APD 130191, decided March 13, 2013, and APD 130187, decided March 18, 2013. In this case, Dr. G based his date of MMI solely on the MDG without considering the claimant's physical examination and medical records.

As there is no MMI/IR certification in evidence that can be adopted, 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 extends to cervical radiculopathy, arthrodesis at C4-5, and cervical nerve root irritation.

We reverse the hearing officer's decision as incomplete and render a new decision that the claimant did not sustain disability beginning on November 25, 2011, through August 15, 2013.

We reverse the hearing officer's determination that the compensable injury extends to bilateral thumb numbness, and we render a new decision that the compensable injury does not extend to right thumb numbness but does extend to left thumb numbness.

We reverse the hearing officer's determination that the compensable injury extends to cervical stenosis C3-7, aggravation of degenerative disc disease, and left shoulder internal derangement, and we render a new decision that the compensable injury does not extend to cervical stenosis C3-7, aggravation of degenerative disc disease, and left shoulder internal derangement.

We reverse the hearing officer's determination that the claimant statutorily reached MMI on June 29, 2013, with a 22% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

## REMAND INSTRUCTIONS

Dr. G is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. G is still qualified and available to be the designated doctor. If Dr. G 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 inform the designated doctor that the compensable injury extends to a cervical sprain/strain, cervical spinous process fracture at C5, lumbar sprain/strain, and a compression fracture of L1 vertebral body as stipulated to by the parties. The hearing officer is also to inform the designated doctor that the compensable injury extends to left thumb numbness, cervical radiculopathy, arthrodesis at C4-5, and aggravation of cervical nerve root irritation as administratively determined. The hearing officer is also to inform the designated doctor that the compensable injury does not extend to right thumb numbness, cervical stenosis C3-7, aggravation of degenerative disc disease, left shoulder internal derangement, or cervical herniations at C3-7 as administratively determined. The hearing officer is also to inform the designated doctor that the date of statutory MMI in this case is June 29, 2013.

The hearing officer is to request the hearing officer to determine the claimant's date of MMI, which cannot be after the June 29, 2013, date of statutory MMI, and rate the claimant's entire compensable injury as of the date of MMI, based on the AMA Guides. The hearing officer is to advise the designated doctor to explain how he arrived at his date of MMI, and that the date of MMI cannot be based solely on the MDG.

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 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 **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**C T CORPORATION SYSTEM**
**350 NORTH SAINT PAUL STREET, SUITE 2900**
**DALLAS, TEXAS 75201-4234**.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge