APPEAL NO. 150750
FILED MAY 28, 2015

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 February 26, 2015, in Beaumont, 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/protrusion at L4-5 and an aggravation of the degenerative disc at L4-5; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI no impairment rating (IR) may be assigned; and (4) the claimant sustained disability beginning on October 4, 2014, and continuing through the date of the CCH.

The appellant (carrier) appealed all of the hearing officer's determinations, contending that the evidence does not support those determinations. The claimant responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that included at least a lumbar sprain/strain. The claimant testified she injured her back while lifting and transferring a heavy patient to an ambulance.

DISABILITY

The hearing officer's determination that the claimant sustained disability beginning October 4, 2014, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury extends to a disc herniation/protrusion at L4-5 is supported by sufficient evidence and is affirmed.

The hearing officer also determined that the compensable injury extends to an aggravation of the degenerative disc at L4-5.

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*.

In the case on appeal, an aggravation of the degenerative disc at L4-5 is a condition that is outside the common knowledge and experience of the fact finder, and as such requires expert medical evidence to establish causation.

The medical records do not contain any explanation of how the compensable injury caused an aggravation of the degenerative disc at L4-5. Therefore, we reverse the hearing officer's determination that the compensable injury extends to an aggravation of the degenerative disc at L4-5, and we render a new decision that the compensable injury does not extend to an aggravation of the degenerative disc at L4-5.

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, and because the claimant has not reached MMI no IR may be assigned. The hearing officer explained in the Discussion portion of the decision that "[b]ecause [the] [c]laimant has not received all medically necessary treatment for the compensable injury, she has not attained [MMI]." The hearing officer found in Finding of Fact No. 5 that (Dr. N)

certification of MMI as of October 3, 2014, and five percent IR are contrary to the preponderance of the evidence.

Medical records establish that the claimant underwent physical therapy and two epidural steroid injections for her injury, which did not result in significant improvement. The claimant testified, and the evidence confirms, that (Dr. F) recommended surgery in the form of a laminectomy and discectomy procedure on the left at the L4-5 level. Dr. F noted in medical records dated September 4 and 5, 2014, that there is a left intraforaminal disc protrusion at L4-5, and that surgery would allow removal of the fragment which would provide relief of the compressed nerve root. It is undisputed that the claimant has not undergone the proposed surgery.

Dr. N was appointed by the Division as the designated doctor to determine MMI, IR, extent of the claimant's compensable injury, and the claimant's ability to return to work. Dr. N examined the claimant on October 3, 2014, and provided alternate Reports of Medical Evaluation (DWC-69).

In the first DWC-69 Dr. N certified that the claimant reached MMI on October 3, 2014, with a five percent IR based on a lumbar sprain/strain only. In an alternate DWC-69 Dr. N again certified that the claimant reached MMI on October 3, 2014, with a five percent IR based on a lumbar sprain/strain and a lumbar disc herniation at L4-5.[1] 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), Dr. N placed the claimant in Diagnosis-Related Estimate Lumbosacral Category II: Minor Impairment.

Dr. N stated in his narrative report dated October 3, 2014, that for the lumbar sprain/strain and lumbar disc herniation at L4-5 the claimant reached MMI as of October 3, 2014, because "[a]ccording to the [Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute (ODG)], all the treatment and procedures were followed, and the surgery would not be beneficial for the [claimant] at this time. . . ."

Also in evidence are DWC-69s completed by (Dr. K), the post-designated doctor required medical examination (RME) doctor. Dr. K examined the claimant on December 5, 2014, and in a certification dated December 8, 2014, certified that the claimant reached MMI on October 3, 2014, with a five percent IR based on a lumbar sprain/strain. In an alternate DWC-69, Dr. K certified that the claimant reached MMI on October 3, 2014, with a five percent IR based on a lumbar sprain/strain and a lumbar

[1] We note that Dr. N's narrative report dated October 3, 2014, mistakenly notes the herniation as being at L5-5.

disc herniation at L4-5. Dr. K indicated in his attached narrative report that he agreed with Dr. N's MMI date and IR when considering a lumbar sprain/strain only and when considering a lumbar sprain/strain and lumbar disc herniation at L4-5. Dr. K also noted that the claimant "does not meet the criteria per ODG for surgery at this time."

Section 401.011(30) defines MMI to mean the earlier of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. *See also* Rule 130.1(b). The Appeals Panel has noted that MMI does not mean there will not be a need for some further or future medical treatment, and that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. *See* APD 122627, decided February 19, 2013; APD 020834, decided May 16, 2002; APD 991932, decided October 25, 1999; and APD 941488, decided December 16, 1994.

Although there are medical records recommending the claimant undergo surgery at L4-5, there is no medical record in evidence from a doctor stating that the claimant has not reached MMI due to the proposed surgery. Dr. N, the designated doctor appointed to determine MMI and IR and therefore entitled to presumptive weight, opined that the surgery would not be beneficial for the claimant at the time of his October 3, 2014, MMI/IR certification. Dr. K, the post-designated doctor RME, also opined that the claimant did not meet the criteria per the ODG for surgery at the time of his December 8, 2014, MMI/IR certification. The hearing officer's finding that Dr. N's certification of MMI as of October 3, 2014, and five percent IR are contrary to the preponderance of the evidence is so against the great weight and preponderance of the evidence as to be clearly wrong. Accordingly, we reverse the hearing officer's determinations that the claimant has not reached MMI, and because the claimant has not reached MMI no IR may be assigned.

Dr. N's alternate certification that the claimant reached MMI on October 3, 2014, with a five percent IR based on a lumbar sprain/strain and a disc herniation at L4-5 considers and rates the entire compensable injury and is supported by the evidence. Accordingly, we render a new decision that the claimant reached MMI on October 3, 2014, with a five percent IR as certified by Dr. N, the designated doctor.

SUMMARY

We affirm the hearing officer's determination that the claimant sustained disability beginning October 4, 2014, and continuing through the date of the CCH.

We affirm the hearing officer's determination that the compensable injury of (date of injury), extends to a disc herniation/protrusion at L4-5.

We reverse the hearing officer's determination that the compensable injury of (date of injury), extends to an aggravation of the degenerative disc at L4-5, and we render a new decision that the compensable injury of (date of injury), does not extend to an aggravation of the degenerative disc at L4-5.

We reverse the hearing officer's determinations that the claimant has not reached MMI, and because the claimant has not reached MMI no IR may be assigned, and we render a new decision that the claimant reached MMI on October 3, 2014, with a five percent IR.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge