APPEAL NO. 072242
FILED FEBRUARY 13, 2008

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 October 24, 2007. With regard to the two issues before him, the hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on January 3, 2007, with a four percent impairment rating (IR).

The claimant appeals, contending that he had additional surgery after January 3, 2007, which would change the MMI date and that the MMI date should be the statutory MMI date. The respondent (self-insured) responded that there was no medical evidence to "overcome the designated doctor's opinion that the claimant did not have further material recovery from or lasting improvement to the compensable injury after January 3, 2007." The self-insured also asserts that the claimant's appeal was not timely filed.

DECISION

Reversed and remanded.

TIMELINESS OF APPEAL

Texas Department of Insurance, Division of Workers' Compensation (Division) records reflect that the hearing officer's decision was originally mailed to the claimant on November 2, 2007, at his correct address as shown in Division records. On December 3, 2007, the claimant notified the Division that he had not received the decision. The Division then mailed another copy of the hearing officer's decision to the same address after verifying the address was correct. The copy of the hearing officer's decision that was originally mailed to the claimant on November 2, 2007, was returned to the Division by the United States Postal Service with a sticker dated December 26, 2007, noting that it was being returned to sender because it was not deliverable as addressed. The claimant filed his appeal with the Division on December 19, 2007, indicating that he received a copy of the hearing officer's decision on December 8, 2007. Under these circumstances, we conclude that the claimant's appeal was timely filed with the Division under Section 410.202 and 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3).

BACKGROUND INFORMATION

It is undisputed that the claimant was employed by the self-insured as a bus driver and that he sustained a compensable injury on _____, when he hit his left knee on the bus handle. The parties stipulated that Dr. Q was appointed as the designated doctor.

The claimant was examined by Dr. Q on January 3, 2007. In his report Dr. Q noted that the claimant had left knee surgery in the form of arthroscopic partial medial and lateral meniscectomies and an arthroscopic chondroplasty on February 9, 2006. Dr. Q listed the various diagnostic studies he had reviewed and the claimant's complaints, and indicated that he had referred the claimant for a Functional Capacity Evaluation, which was performed on January 22, 2007. In a Report of Medical Evaluation (DWC-69) and narrative dated January 24, 2007, Dr. Q certified the claimant at clinical MMI on January 3, 2007, with a four percent IR for partial medial and lateral meniscectomies based on Table 64, page 85 of 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. M, the claimant's treating doctor, in a letter dated February 23, 2007, disagreed with Dr. Q's assessment, noted that the claimant is scheduled to undergo a total left knee replacement and stated that the claimant should be reevaluated for his IR after the total knee replacement. The claimant had a total left knee replacement on March 1, 2007.

The designated doctor was sent a letter of clarification (LOC) dated April 3, 2007, indicating the claimant was disputing the MMI/IR and submitting some unspecified additional information. Dr. Q replied by letter dated April 20, 2007, stating that he had reviewed the Division's LOC and that he had no changes to make in his original assessment. Dr. Q was sent a second LOC, dated June 13, 2007, forwarding medical records, the operative notes (of the March 1, 2007 surgery) and "physical therapy [PT] notes from 2/7/07 through 4/13/07," and asking if the additional information changed Dr. Q's opinion. Dr. Q replied by letter dated June 19, 2006, stating he had reviewed the "information including the following:" but no information or records reviewed are listed. Dr. Q states "I have no changes to make to my original assessment." Various PT notes dated March 26, June 11, July 12, July 17, and July 19, 2007, note that knee swelling was improving; that the claimant was responding well to exercise, had improved leg control, mild improvement in muscle control, "improved strength and control through quad and now able to perform leg raise;" and that the claimant has an improved gait pattern. A PT discharge note dated August 3, 2007, indicates the claimant is making progress and can walk on even surfaces with minimal difficulty.

The hearing officer determined that Dr. Q's certified MMI date of January 3, 2007, and assigned IR of four percent are entitled to presumptive weight and that the claimant's evidence was not sufficient to overcome the presumptive weight of the designated doctor's opinion.

MMI

Section 401.011(30) defines MMI as 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.

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 medical evidence is to the contrary. In this case we do not know what the date of statutory MMI is because we do not know when income benefits began to accrue (the eighth day of disability, Rule 124.7(b)). However, statutory MMI under Section 401.011(30)(B) would be no earlier than September 8, 2007, if the eighth day of disability was September 10, 2005.

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the hearing officer appeared to have rejected a designated doctor's later date of MMI because the claimant in that case did not undergo material recovery or lasting improvement. The Appeals Panel referenced Section 401.011(30)(A) which 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. (Emphasis added.)" The Appeals Panel commented, in that case, that the question was not whether the claimant actually recovered or improved during the period at issue, but whether, based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. In that case the designated doctor believed that even though the treatment program "actually only produced minimal to mild improvement, it was undertaken with the goal of effectuating material recovery or lasting improvement." The Appeals Panel held that "it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition, where, as here, the recovery and improvement could reasonably be anticipated according to the designated doctor."

In APD 040887, decided June 10, 2004, the evidence established significant and steady improvement of the claimant's condition after the designated doctor's certified date of MMI, which was before the statutory date of MMI. In that case, the Appeals Panel reversed the hearing officer's MMI determination because of the claimant's improved condition and rendered a new determination of a later MMI date. *See also* APD 071599-s, decided October 31, 2007.

In this case there was no assertion that the March 1, 2007, total left knee replacement was due to anything other than the compensable injury. The operative report states that the claimant has failed conservative treatment including multiple

arthroscopies. It seems self-evident that the total knee replacement surgery was done with a reasonable medical probability that further material recovery could reasonably be anticipated. Subsequent medical records and PT notes indicate steady improvement in the claimant's condition after the total knee replacement. Dr. M, in a report dated August 31, 2007 (which was after the MMI date certified by the designated doctor) states that he disagrees with the January 3, 2007, MMI date certified by the designated doctor, and that the claimant has had a total knee replacement. Dr. M states that the IR is wrong and that MMI has not been achieved because there has been new intervention with the total knee replacement. Dr. M concludes that he has sent the claimant for an MMI evaluation on August 2, 2007, however, no other MMI report is in evidence.

In the instant case, the hearing officer's determination that MMI was reached on January 3, 2007, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We reverse the hearing officer's determination that the claimant reached MMI on January 3, 2007, and remand the case as explained below.

IR

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. 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 preamble of Rule 130.1(c)(3) clarifies that the IR "must be based on the injured worker's condition as of the date of MMI." In response to public comment on Rule 130.1, the Division, in the preamble, noted that in the situations where the claimant reaches MMI clinically, rather than with the expiration of 104 weeks or the extended date in the event of spinal surgery, future changes in the injured worker's condition may cause the MMI date to change and that "[i]n the event the MMI date is changed due to a post-MMI change in the injured employee's conditions, there should be a re-evaluation of the IR as of the new MMI date." 29 Tex. Reg. 2332 (2004). *See* APD 040313-s, decided April 5, 2004.

The only IR in evidence is the report of the designated doctor certifying the January 3, 2007, MMI date with a four percent IR. In that we have reversed the hearing officer's determination that the claimant reached MMI on January 3, 2007, and another MMI date has not been established, pursuant to Rule 130.1(c)(3) an IR cannot be established. We reverse the hearing officer's determination that the claimant's IR is four percent. We remand the case to the hearing officer for further proceedings consistent with this decision. The claimant should be reexamined by the designated doctor, or by a second designated doctor if necessary, for a certification of an MMI date that is supported by the evidence and to assign an IR for the compensable injury based on the claimant's condition as of the date of MMI, in accordance with the medical records and

certifying examination. The parties are to be given an opportunity to present evidence and comment on the designated doctor's report. The hearing officer is then to issue a new decision regarding the date 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 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

GENERAL MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge