APPEAL NO. 081748
JANUARY 7, 2009

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 28, 2008. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 23%. The appellant (carrier) appealed, arguing that the hearing officer incorrectly concluded that the claimant's IR is 23% because it is based on a total knee replacement surgery that occurred after the date of the claimant's maximum medical improvement (MMI). The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant reached MMI on the statutory date, May 1, 2007. A prior CCH decision signed January 2, 2008, determined that the _____, compensable injury extends to include a cervical fracture, right knee degenerative joint disease and post-traumatic arthritis, resulting in a total knee replacement of the right knee. Texas Department of Insurance, Division of Workers' Compensation (Division) records indicate that decision was not appealed. The evidence reflects that the claimant underwent a partial medial meniscectomy on August 1, 2006, and a total knee replacement on June 18, 2007.

Dr. N was appointed as a designated doctor and examined the claimant on September 10, 2007. After examination, Dr. N certified that the claimant reached MMI on the stipulated statutory date of May 1, 2007, and assessed a 13% IR. The 13% IR was based on 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) and included 5% impairment for the cervical spine under Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment; 0% impairment for the right ankle; 0% for the right and left shoulders due to invalidated range of motion (ROM); and 20% lower extremity impairment (8% whole person impairment) based on loss of ROM of the right knee. Dr. N noted that "[u]pon review of the medical records and physical examination, [the claimant] shows no diagnosis related impairment for the right ankle, right knee or bilateral shoulders that would be ratable." The claimant testified that a letter of clarification (LOC) or request for re-examination was sent to Dr. N but that he was not able to re-examine the claimant so a second designated doctor was appointed.

Dr. P was then appointed as designated doctor and examined the claimant on March 13, 2008, and certified that the claimant reached MMI on that date with a 9% IR. The 9% IR was comprised of 5% impairment for the cervical spine under DRE Cervicothoracic Category II: Minor Impairment; 4% for the right shoulder based on loss

of ROM; and 0% for both the right ankle and right knee based on respective ROM measurements. A LOC was sent to Dr. P and he responded on April 23, 2008, including an amended Report of Medical Evaluation (DWC-69). Dr. P changed the MMI date previously assessed (March 13, 2008), to the stipulated statutory date of May 1, 2007, and changed the IR previously assessed (9%) to 10%. Dr. P noted that he could not rate the total knee replacement since the surgery occurred after the date of statutory MMI but noted that the claimant had a partial medial meniscectomy prior to the stipulated statutory date of MMI which warranted a 1% IR.

A second LOC was sent to Dr. P dated June 27, 2008, which requested that he submit a DWC-69 which includes the total knee replacement. Dr. P responded in a letter dated July 3, 2008, stating that he had no changes to make to his original assessment. A third LOC was sent to Dr. P which again requested that Dr. P "provide the alternate [DWC-69] as requested." Dr. P responded to the third LOC stating he would change the impairment assessed for the right knee to reflect the total knee replacement (15%-under Table 64, page 3/85) which would change the whole person impairment assessed to 23%. An amended DWC-69 was submitted by Dr. P, on August 26, 2008.

The hearing officer determined that the claimant's IR is 23%. The hearing officer noted in the Background Information portion of his decision that "[t]his rating is found to be correct because it rates the entire injury and because the conditions requiring the [total knee replacement] were present on the date of statutory MMI, and the [total knee replacement] was under active consideration on the date of MMI although the surgery occurred after that date."

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 preamble of Rule 130.1(c)(3) clarifies that the IR "must be based on the injured employee's condition as of the MMI date." Appeals Panel Decision (APD) 040313-s, decided April 5, 2004. A delay in the performance of the surgical procedure does not provide an exception to Rule 130.1(c)(3). APD 052652, decided January 23, 2006.

In this case, it is clear that the 23% IR assigned by Dr. P, the designated doctor, on August 26, 2008, was based on the claimant's right total knee replacement performed on June 18, 2007, which was after the undisputed MMI date of May 1, 2007. The hearing officer erred in adopting the designated doctor's 23% IR because it is based on the post-MMI right knee total knee replacement surgery. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 23%. We note that

Dr. P's initial assessment of a 9% IR was not based on the stipulated date of MMI. However, there are two remaining assessments of IR on the stipulated date of MMI: the 13% assessed by Dr. N and the 10% assessed by Dr. P. We remand this case back to the hearing officer to make a determination of IR based on the evidence in the record.

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

DONALD R. GRAY
210 SCARLET RIDGE DRIVE
BOERNE, TEXAS 78006.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge