APPEAL NO. 091039
FILED SEPTEMBER 14, 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 March 5, 2009. The issues before the hearing officer were:

(1) Has the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI), and if so, on what date?

(2) What is the claimant's impairment rating (IR)?

(3) Did the Texas Department of Insurance, Division of Workers' Compensation (Division) properly appoint (Dr. S) as the designated doctor to address the claimant's ability to return to work?

(4) Did the appellant/cross-respondent (self-insured) waive its right to dispute the IR prior to the expiration of the first quarter of supplemental income benefits (SIBs), per 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g))?

(5) Is the claimant entitled to SIBs for the first quarter and the second quarter?

(6) Does the compensable injury of _____, include the cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, bilateral knees, bilateral hips, and/or bowel/bladder dysfunction? (as amended by parties' agreement as to the bilateral wrists and as amended by the hearing officer due to parties' litigation at the CCH of bowel/bladder dysfunction).

(7) "Did the self-insured waive the right to contest compensability of the extent of injury to the cervical spine, lumbar spine, bilateral shoulders, bilateral wrists, bilateral knees and hips?" (as amended by parties' agreement as to the bilateral wrists).

The hearing officer determined that: (1) the claimant reached MMI on December 12, 2004; (2) the claimant's IR is 17%; (3) the Division properly appointed Dr. S as the designated doctor to address the claimant's ability to return to work; (4) the self-insured did not waive its right to dispute the IR prior to the expiration of the first quarter of SIBs; (5) the claimant is not entitled to SIBs for the first quarter or the second quarter; (6) the compensable injury of _____, includes bilateral knees in the form of contusions,

lumbar sprain/strain and lumbar radiculopathy,[1] but does not include the cervical spine, bilateral shoulders, bilateral hips, bilateral wrists and/or bowel/bladder dysfunction; and (7) the self-insured waived the right to contest compensability on the extent of injury to the bilateral knees and lumbar spine, but did not waive the right to contest compensability on the extent of injury to the cervical spine, bilateral shoulders, bilateral hips and bilateral wrists.

The self-insured appealed the hearing officer's determinations on the issues of MMI, IR, and the proper appointment of Dr. S as the designated doctor to address the claimant's ability to return to work. The self-insured further appealed the hearing officer's determinations that the compensable injury of _____, includes bilateral knees in the form of contusions and lumbar radiculopathy, and that the self-insured "waived the right to contest compensability on the extent of injury to the bilateral knees and lumbar spine." The self-insured agrees that the compensable injury of _____, includes a lumbar sprain/strain. Additionally, the self-insured requested a clerical correction regarding the proper name of the self-insured. The appeal file does not contain a response from the claimant to the self-insured's appeal.

The claimant cross-appealed the hearing officer's determinations that the self-insured did not waive the right to contest compensability of the cervical spine, bilateral shoulders, bilateral hips and bilateral wrists, and that the claimant's compensable injury does not extend to the cervical spine, bilateral shoulders, bilateral hips, bilateral wrists and/or bowel/bladder dysfunction. Additionally, the claimant appeals the hearing officer's determinations on the issues of SIBs entitlement, waiver under Rule 130.102(g), and the IR. The self-insured responded to the claimant's cross-appeal.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

CLERICAL CORRECTION

The self-insured states in its appeal that the hearing officer incorrectly identified the carrier in the decision and order as _____. We agree. The true corporate name of the insurance carrier in this case is (a certified self-insured), as identified in the carrier's information sheet which was admitted into evidence at the CCH. We reform the hearing officer's decision and order to properly identify the carrier in this case as (a certified self-insured).

[1] On appeal, neither party objects to the addition of lumbar radiculopathy to the extent-of-injury issue. A review of the record shows that whether or not the compensable injury extended to lumbar radiculopathy was actually litigated by the parties.

PROPERLY APPOINTED SECOND DESIGNATED DOCTOR

The hearing officer's determination that the Division properly appointed Dr. S as the designated doctor to address the claimant's ability to return to work is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The hearing officer's decision that the compensable injury of _____, includes bilateral knees in the form of contusions, lumbar sprain/strain and lumbar radiculopathy, but does not include the cervical spine, bilateral shoulders, bilateral hips, bilateral wrists and/or bowel/bladder dysfunction is supported by sufficient evidence and is affirmed.

FINALITY UNDER RULE 130.102(g)

The hearing officer's determination that the self-insured did not waive its right to dispute the IR prior to the expiration of the first quarter of SIBs, per Rule 130.102(g) is supported by sufficient evidence and is affirmed.

RES JUDICATA

Prior CCH held on November 12, 2003

In a prior CCH held on November 12, 2003, two of the issues in dispute were whether the claimant sustained a compensable injury on _____, and whether the self-insured waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with Section 409.021. The hearing officer in that case, resolved those disputed issues by determining that the self-insured waived the right to dispute compensability of the claimed injury by not contesting the injury in accordance with Section 409.021, and "[a]lthough [c]laimant did not sustain an injury in the course and scope of employment on _____, her injury is compensable because [self-insured] waived the right to contest compensability." In that case, the hearing officer states in the Background Information that the claimant's compensable injury was to her low back and right knee.

The self-insured appealed the hearing officer's decision to the Appeals Panel, which affirmed the hearing officer's decision. (*See* Appeals Panel Decision (APD) 033279, decided February 11, 2004). The self-insured appealed the Appeals Panel decision to a district court. In evidence is a final judgment from the district court, dated December 6, 2007, affirming the Appeals Panel's decision that the claimant waived the right to contest compensability.

Current CCH held on March 5, 2009

The current CCH was held on March 5, 2009, to resolve whether the "[self-insured] waived the right to contest compensability of the extent of injury" to the cervical spine, lumbar spine, bilateral shoulders, bilateral knees, bilateral wrists and hips.[2] The parties stipulated that on _____, the claimant sustained a compensable injury. On appeal the self-insured states that the prior decision "on this case dated November 19, 2003 is res judicata and [the findings of fact] indicate the claimed injury is to the low back and right knee. The left knee is accordingly not part of this compensable injury."

In Barr v. Resolution Trust Corporation, ex rel. Sunbelt Federal Savings, 837 S.W.2d 627, 628 (Tex. 1992), the Texas Supreme Court held that the doctrine of res judicata "prevents the re-litigation of a claim or cause of action that has been finally adjudicated as well as related matters that, with the use of due diligence, should have been litigated in the prior suit." Res judicata has been found applicable to administrative proceedings. *See* Bryant v. L.H. Moore Canning Company, 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi, 1974), cert. denied 419 U.S. 845; APD 040701, decided May 19, 2004. Accordingly, applying the doctrine of res judicata the compensable injury is to the low back and right knee.

WAIVER AND LAWTON

That portion of the hearing officer's waiver determination that the "[c]arrier did not waive the right to contest compensability on the extent of injury to the cervical spine, bilateral shoulder, hips and bilateral wrists" is supported by sufficient evidence and is affirmed.

In State Office of Risk Mgmt. v. Lawton,[3] 2009 Tex. LEXIS 629 (Tex. August 28, 2009), the Texas Supreme Court held that the interpretation given in APD 041738-s, decided September 8, 2004, would eliminate the distinction between compensability and extent of injury: a dispute about any injury reasonably discoverable within 60 days of the initial notice would be governed by the deadlines for compensability, while information obtained outside that time frame would fall under the deadlines for disputing extent of injury. In Lawton, the carrier agreed the claimant had a compensable injury. The Texas Supreme Court held that when the carrier later disputed the extent of that injury, it was governed by the deadline applicable to such disputes, not the 60-day deadline governing compensability.

In the instant case, a prior decision and order held that the self-insured waived the right to contest compensability of the claimed injury. As previously mentioned, the hearing officer's determination was affirmed by the Appeals Panel and district court. We find the reasoning set forth in the Lawton decision, applicable to the facts in the

[2] Rule 124.3(e) provides that the waiver provision of Section 409.021 "does not apply to disputes of extent of injury."

[3] We note that the decision in Lawton, *supra* is not yet final until opportunities for rehearing have been exhausted.

case at issue. Accordingly, we reverse the hearing officer's determination that the self-insured "waived the right to contest compensability on the extent of injury to the bilateral knees and lumbar spine and we render a new decision that the self-insured did not waive the right to contest compensability of the lumbar spine and left knee.[4]

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 other medical evidence is to the contrary.

In evidence is a letter of clarification to the designated doctor, Dr. S, dated March 17, 2009, in which the hearing officer informed Dr. S that "[t]he issue of MMI is being resolved by taking the statutory date of MMI, i.e. December 12, 2004," and the extent of the claimant's injury "is limited to her lumbar spine and bilateral knee contusions." However, there is no evidence the parties agreed that the date of MMI is December 12, 2004. Additionally, there is conflicting evidence of when income benefits began to accrue. There are no certifications which certify MMI on December 12, 2004, which can be adopted because those certifications considered conditions that are not part of the compensable injury, as explained below.

Dr. S examined the claimant on April 14, 2009, and certified that the claimant reached MMI on December 12, 2004, with a 17% IR. In a narrative report dated April 28, 2009, Dr. S lists, in part, the following diagnoses: lumbar sprain/strain, lumbar muscle spasms, lumbar pain, lumbar radiculopathy and bilateral knee contusion. Dr. S states in his narrative report that the claimant's injury has "attained statutory MMI effective December 12, 2004" without further explanation of how that date is the earliest date after which based on medical probability further material recovery from or lasting improvement to the lumbar spine and bilateral knee injuries could be expected. As previously mentioned, the designated doctor was informed by the hearing officer that the claimant's MMI was resolved to be December 12, 2004. The hearing officer found

[4] At the prior CCH held on November 12, 2003, the hearing officer determined that the self-insured waived the right to contest compensability of the claimed injury and that the claimant sustained a compensable injury on _____. In the Background Information of that prior decision, the hearing officer states that the compensable injury is to the low back and right knee.

that "[Dr. S] found [c]laimant to be at [MMI] on December 12, 2004, with an [IR] of [17%]."

We hold that the hearing officer erred in determining the claimant's MMI on the report of Dr. S because Dr. S did not certify MMI based on his medical opinion that the claimant reached MMI statutorily, but rather certified December 12, 2004, as the date of MMI following the instructions given to him by the hearing officer. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on December 12, 2004.

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.

As previously mentioned, in evidence is a letter of clarification to the designated doctor, Dr. S dated March 17, 2009, in which the hearing officer informed Dr. S that the extent of the claimant's injury is "limited to her lumbar spine and bilateral knee contusions." Additionally, the hearing officer requested that the designated doctor provide alternate ratings for non-compensable injuries if the extent-of-injury issue is resolved differently by the hearing officer.

Dr. S examined the claimant on April 14, 2009, and assigned a 17% IR, based on Diagnosis-Related Estimate Lumbosacral Category III: Radiculopathy for 10% impairment, and loss of range of motion (ROM) of the claimant's left knee for 4% impairment and of the right knee for 4% impairment, 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). With regard to the lumbar spine, Dr. S notes in his narrative report that there was evidence of unilateral muscle atrophy, however his physical examination measured a unilateral atrophy less than 2 cm.[5] Additionally, Dr. S notes in his physical examination that the "patellar reflexes were right 3+ and left 1+" which may show a loss of relevant reflexes; however, Dr. S states in his narrative report that he based the lumbar spine impairment on atrophy.

In this case the IR assigned by Dr. S cannot be adopted because as discussed above the MMI issue was reversed and remanded to the hearing officer. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 17%. Rule

[5] *See* APD 072220-s, decided February 5, 2008, regarding significant signs of radiculopathy such as loss of relevant reflexes, or measured unilateral atrophy of 2 cm or more.

130.1(c)(3) provides that the assignment of an IR for the 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 date of MMI." APD 040313-s, decided April 5, 2004

With regard to the bilateral knee contusion, Dr. S notes in his narrative report that in his physical examination of the claimant there was "[n]o crepitus, effusion or laxity was noted in either knee," "no tenderness of the right knee; there was tenderness of the medial and lateral aspects"; and "pain along the medial and lateral aspect of the left knee." However, he assigned a 4% impairment for the left knee and 4% impairment for the right knee for loss of ROM. Bilateral knee contusions were the only knee conditions diagnosed by Dr. S in his narrative report dated April 28, 2009. Dr. S did not explain how the claimant's bilateral knee contusions resulted in a loss of ROM which should be rated.

OTHER CERTIFICATION OF MMI/IR

There are two other certifications of MMI/IR from other authorized doctors in evidence; however, neither one can be adopted. (Dr. G), the claimant's treating doctor, examined the claimant on July 26, 2004, and certified on a Report of Medical Evaluation (DWC-69) that the claimant reached MMI on that same date with a 0% IR. Dr. G's narrative report is not in evidence. Dr. G's certification of MMI/IR cannot be adopted because there is no narrative report to explain how the compensable injury was rated. *See* Rule 130.1(c)(3) and (d). (Dr. K), the first designated doctor, examined the claimant on March 16, 2005, and certified that the claimant reached MMI on December 12, 2004, with a 20% IR. Dr. K's certification of MMI/IR cannot be adopted because he considered injuries to the cervical, bilateral shoulders, bilateral wrists and bilateral hips, which were not compensable injuries. There are an additional 10 certifications of MMI/IR by Dr. S because he was asked to provide alternate ratings for other injuries. However, none of those certifications of MMI/IR can be adopted because Dr. S assigned an IR for injuries that are not compensable.

Since the hearing officer's MMI and IR determinations have been reversed and there is no other certification of MMI/IR in evidence which we can adopt, we remand the MMI and IR issues to the hearing officer. The designated doctor in this case is Dr. S. The hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor, and if so, request that Dr. S determine when the claimant reached MMI and assign an IR, based on the entire compensable injury, in accordance with the AMA Guides. On remand, the hearing officer should make a finding or obtain an agreement from the parties as to the date of statutory MMI, and specifically tell the designated doctor he is to find the MMI date (which can be no later than the statutory date), and assign an IR based on the claimant's condition as of the MMI date for the compensable injury, which includes bilateral knees in form of contusions, lumbar sprain/strain and lumbar radiculopathy. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and

then make determinations regarding MMI and IR. If Dr. S is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine the claimant's MMI and IR, which includes the lumbar spine and bilateral knees.

SIBS ENTITLEMENT FOR THE FIRST AND SECOND QUARTERS

Since there has not yet been a determination regarding the claimant's IR, we reverse the hearing officer's SIBs determination for the first and second quarters and we remand this issue to the hearing officer to determine SIBs entitlement for the first and second quarters, after a determination has been made regarding the claimant's IR.

SUMMARY

We affirm the hearing officer's determination that the Division properly appointed Dr. S as the designated doctor to determine the claimant's ability to return to work. We affirm the hearing officer's determination that the claimant's compensable injury of _____, includes bilateral knees in the form of contusions, lumbar sprain/strain and lumbar radiculopathy, but does not include the cervical spine, bilateral shoulders, hips, bilateral wrists and/or bowel/bladder dysfunction. We affirm the hearing officer's determination that the self-insured did not waive the right to contest compensability on the extent of injury to the cervical spine, bilateral shoulder, hips and bilateral wrists. We affirm the hearing officer's determination that the self-insured did not waive its right to dispute the IR prior to the expiration of the first quarter of SIBs, per Rule 130.102(g).

We reverse the hearing officer's decision that the self-insured "waived the right to contest compensability on the extent of injury to the bilateral knees and lumbar spine," and we render a new decision that the self-insured did not waive the right to contest compensability of the lumbar spine and left knee.

We reverse the hearing officer's determinations that the claimant reached MMI on December 12, 2004, with a 17% IR, and we remand the MMI and IR issues to the hearing officer. We reverse the hearing officer's determination that the claimant is not entitled to SIBs for the first and second quarters, and we remand to the hearing officer the issue of whether the claimant is entitled to SIBs for the first and second quarters.

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

CSC
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge