APPEAL NO. 091960
FILED FEBRUARY 19, 2010

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 November 9, 2009. With regard to the three issues before her, the hearing officer determined that: (1) the _____, compensable injury does not include a left knee meniscus tear after March 2008; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 18, 2008, as certified by (Dr. E), the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor; and (3) the claimant's impairment rating (IR) is one percent as certified by Dr. E, the Division-selected designated doctor.

The claimant appealed all three of the determinations, contending that reports from the treating doctor and a referral surgeon constitute the preponderance of the medical evidence contrary to the designated doctor's opinion on the three issues and that the claimant is not yet at MMI. The appeal file does not contain a response from the respondent (carrier).

DECISION

Affirmed in part and reversed and remanded in part, as reformed.

CORRECTION OF A CLERICAL ERROR

The parties stipulated that the claimant sustained a compensable injury on _____. The hearing officer's Conclusion of Law No. 3 and Decision incorrectly reference a "_____" compensable injury. We reform Conclusion of Law No. 3 and the Decision to state a "_____, compensable injury."

BACKGROUND INFORMATION

The claimant testified that he stepped off a curb into a mud hole and twisted his left knee on _____. The claimant saw his family doctor on the date of injury and subsequently saw another doctor who referred the claimant to (Dr. J). An MRI of the left knee performed on February 25, 2008, found an "abnormal signal in the medial meniscus as described above likely relates to a tear . . . ." Dr. J performed an arthroscopic partial medial menisectomy on March 19, 2008. The claimant continued to have left knee complaints; however, Dr. J, as the treating doctor, in a Report of Medical Evaluation (DWC-69) dated May 12, 2008, certified MMI on that date and assessed a one percent IR based on Table 64 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) (AMA Guides). There is no dispute that the partial medial meniscus tear for which knee surgery was performed on March 19, 2008, was part of the compensable injury. As

previously noted, the extent-of-injury issue before the hearing officer was whether the compensable injury extended to a left knee meniscus tear after March 2008.

The claimant testified that he continued to have left knee pain after the March 2008 surgery and that he changed treating doctors because Dr. J said he could do nothing further for him. (Dr. P) the new treating doctor, was of the opinion that the claimant's surgery was not performed correctly leaving loose bodies in the left knee and referred the claimant to (Dr. B), an orthopedic surgeon. Dr. B, in a report dated December 15, 2008, diagnosed internal derangement of the left knee and requested another left knee MRI. An MRI of the left knee performed on January 27, 2009, showed a tear in the posterior horn of the medial meniscus. Dr. B recommended additional left knee surgery.

The hearing officer, in the Background Information states that the Division appointed Dr. E "as the designated doctor to determine, in part, the extent of the compensable injury, the date of [MMI] and Claimant's [IR]." Dr. E, in a narrative report dated November 10, 2008, discussed the claimant's treatment to that point, records he reviewed and the results of his examination. Dr. E commented on Dr. J's report and certification of the May 12, 2008, MMI date stating that a strain to the tibial collateral ligament "which is the cause of the present complaint" had not been treated and that "according to the Rules" he was changing the "MMI date from 5-12-08 to 8-12-08." Dr. E assessed a one percent IR utilizing Table 64 of the AMA Guides and opined that the extent of injury is a strain of the left knee.

EXTENT OF INJURY

The hearing officer's determination that the _____, compensable injury does not include a left knee meniscus tear after March 2008 is supported by sufficient evidence and is affirmed.

MMI

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.

The hearing officer in her determination of MMI relied on the certification of Dr. E, the designated doctor assigning an August "18," 2008, MMI date. That determination is incorrect in two respects. First, Dr. E assigned an August 12, 2008, MMI date (and no other doctor has certified an August 18, 2008, MMI date). Therefore, the hearing officer's determination of an August 18, 2008, MMI date is incorrect. More importantly, there is no DWC-69 from Dr. E in evidence. 28 TEX. ADMIN. CODE § 130.1(d)(1)

(Rule 130.1(d)(1)) requires that certification of MMI, determination of permanent impairment, and assignment of an IR (if permanent impairment exists) "requires completion, signing, and submission of the [DWC-69] and a narrative report." Rule 130.1(d)(1)(A) requires that the DWC-69 be signed by the certifying doctor. Although a narrative is in evidence, there is no DWC-69 by Dr. E; therefore, his certification of MMI and IR cannot be adopted.

Also, in evidence is a DWC-69 and narrative report dated May 12, 2008, signed by Dr. J certifying May 12, 2008, as the date of clinical MMI and assigning a one percent IR. However, Dr. E, the designated doctor in his November 10, 2008, narrative report explained why he believed the May 12, 2008, MMI date was incorrect stating the cause of the claimant's complaints is the strain of the tibial collateral ligament which had not been treated and for which Dr. E recommended "infiltration of the tibial collateral ligament with local anesthetic and steroids." In Dr. E's May 15, 2009, response to a letter of clarification, Dr. E again noted the reason for his August 12, 2008, MMI date to be the suggested treatment of the tibial collateral ligament by infiltration with local anesthesia and steroids. Although Dr. E's MMI date cannot be adopted because no signed DWC-69 is in evidence, Dr. E's comments in his narrative report regarding specific recommended treatment to improve the claimant's condition represents medical evidence that the claimant had not reached MMI on May 12, 2008, as found by Dr. J.

Dr. B, a referral surgeon from the claimant's treating doctor, in a report dated February 2, 2009, had an impression of "[p]robable loose body." Dr. B believes that, after the claimant's March 19, 2008, surgery, "meniscal fragments must have gotten loose within the knee and it is most likely causing his loose body sensation." Dr. B believes revision surgery on the claimant's left knee is required to correct the claimant's symptoms.

Because there is no MMI date that is supported by evidence which can be adopted, we reverse the hearing officer's determination that the claimant reached MMI on August 18, 2008, as certified by Dr. E and remand the case for further consideration.

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 noted previously Dr. E's one percent IR cannot be adopted because there is no signed DWC-69 from Dr. E in evidence and we have reversed the hearing officer's determination that the claimant reached MMI on August 18, 2008. Because the date of

MMI has not yet been determined, we reverse the hearing officer's determination that the claimant's IR is one percent as certified by Dr. E and remand the case for further consideration.

REMAND INSTRUCTIONS

The hearing officer is to determine if Dr. E is still qualified and available to be the designated doctor and if so, seek clarification from Dr. E regarding the MMI date and IR on a signed DWC-69 and narrative in accordance with Rule 130.1. If Dr. E is no longer qualified or available to serve as the designated doctor then another designated doctor is to be appointed pursuant to Rule 126.7(h) to determine MMI and IR for the compensable injury. The parties are to be provided with the hearing officer's letter to the designated doctor and the designated doctor's response.

SUMMARY

We reform the hearing officer's Conclusion of Law No. 3 and Decision to reflect the stipulated _____, date of injury.

We affirm the hearing officer's determination that the _____, compensable injury does not include a left knee meniscus tear after March 2008.

We reverse the hearing officer's determination that the claimant reached MMI on August 18, 2008, and that the claimant's IR is one percent as certified by Dr. E and remand the case for further consideration not inconsistent with this opinion.

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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge