APPEAL NO. 110387
FILED JULY 5, 2011

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 25, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer.

The hearing officer resolved the disputed issues by determining that: (1) the compensable injury of _____, extends to sub-acute acetabular fracture of the left hip but does not extend to chondral injury of the left hip; (2) the respondent/cross-appellant (claimant) has not reached maximum medical improvement (MMI); and (3) because the claimant has not reached MMI, his impairment rating (IR) cannot be determined. The appellant/cross-respondent (carrier) appealed the hearing officer's determinations of MMI/IR and that portion of the extent of injury (EOI) adverse to carrier. The carrier also contended that the hearing officer erred in failing to admit two carrier exhibits and erroneously stated in her decision and order that the carrier agreed to the amended EOI disputed issue. The claimant responded, urging affirmance to those determinations appealed by the carrier. The claimant also cross-appealed that portion of the EOI determination adverse to him. The appeal file does not contain a response from the carrier to the claimant's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____.[1] The claimant testified that he injured his left hip at work when he fell about five feet into a ditch while at work. It was undisputed that the carrier accepted a left hip contusion but disputed any other condition as part of the work injury.

PROCEDURAL ISSUE

The exhibits not admitted into evidence, Carrier's Exhibits I and J, were not timely exchanged within the 15-day period following the benefit review conference (BRC) held on December 15, 2010. The hearing officer considered whether there was good cause for the late exchange and determined that the carrier did not timely pursue obtaining the peer review reports, Carrier's Exhibits I and J, regarding diagnostic tests performed in 2009; therefore, the carrier failed to establish good cause.

To obtain reversal of a decision based upon error in the exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. *See* Appeals Panel Decision 051705, decided September 1, 2005. Even if the

[1] We note that the hearing officer failed to include this stipulation in her decision and order; however, the recording of the CCH reflects that the parties did so stipulate.

exclusion of these documents could be considered error under the facts of this case, any error was harmless, because the hearing officer did not render a decision based on these documents and it does not amount to reversible error.

We note that at the beginning of the CCH, the hearing officer obtained an agreement from the parties to amend the EOI disputed issue to read: "[d]oes the compensable injury of _____, extend to include sub-acute acetabular fracture, labral tear, and chondral injury to the left hip?"[2] At the conclusion of the claimant's case-in-chief, the claimant withdrew the claimed condition of labral tear to the left hip from the EOI issue and the carrier failed to object; thus, amending the EOI issue does not amount to reversible error.

EOI

Chondral Injury Of The Left Hip

The hearing officer's determination that the compensable injury of _____, does not extend to chondral injury of the left hip is supported by sufficient evidence and is affirmed.

Sub-Acute Acetabular Fracture Of The Left Hip

The parties stipulated that three different designated doctors were appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) in this case. Initially, Dr. K was appointed to determine MMI/IR; then Dr. P was appointed to determine MMI/IR, direct result, and EOI; and subsequently Dr. S was appointed to determine MMI/IR.

Section 408.0041(a) provides in pertinent part that at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about: (3) the extent of the employee's compensable injury; (4) whether the injured employee's disability is a direct result of the work-related injury; (5) the ability of the employee to return to work. 28 TEX. ADMIN. CODE § 126.7(c) (Rule 126.7(c))[3] provides that a designated doctor examination shall be used to resolve questions about the following: (1) the impairment caused by the employee's compensable injury; (2) the attainment of MMI; (3) the extent of the employee's compensable injury; (4) whether the employee's disability is a direct result of the work-related injury; (5) the ability of the employee to return to work; or (6) issues similar to those described above. Rule 126.7(d)[4] provides that the report of the

[2] We note that the EOI disputed issue certified out of the BRC is "[d]oes the compensable injury of _____, extend to include acetabular fracture?"

[3] We note that the Division has adopted new rules concerning designated doctor scheduling and examinations effective February 1, 2011. The pertinent part of Rule 126.7(c) cited above is provided in the new Rule 127.1(a).

[4] The pertinent part of Rule 126.7(d) cited above is provided in the new Rule 127.10(g).

designated doctor is given presumptive weight regarding the issue(s) in question and/or dispute, unless the preponderance of the evidence is to the contrary.

As previously mentioned, the only designated doctor appointed to determine EOI was the second designated doctor, Dr. P. Dr. P examined the claimant on December 22, 2009. In his narrative report attached to his Report of Medical Evaluation (DWC-69), Dr. P states that he considered the diagnostic testing undergone by the claimant, which included an MRI dated May 11, 2009, an MRI dated July 20, 2009, a CT scan dated July 31, 2009, and a bone scan dated September 9, 2009.

Neither of the MRIs in evidence revealed a sub-acute acetabular fracture of the claimant's left hip. The CT scan in evidence stated:

> 1. There is mild bilateral hip spurring and joint space loss. There are also subchondral cysts in the left acetabulum.
>
> 2. There is a faint, subtle cortical lucency in the posterior left acetabulum. Although equivocal, this is seen on the axial images and on the reformatted images. These would be atypical for an acetabular fracture, but it is not present in the opposite hip and the exact etiology is uncertain. This could be a left [sub-acute] to old fracture that was never displaced, but if so, it would have been expected to show more marrow edema on the recent MRI, not the case. If the patient continues to have pain, I might correlate with a bone scan. If there is abnormal uptake in the posterior/medial acetabulum on the bone scan, then that would indicate an active bony process in this area, likely posttraumatic in origin. If not, then this is likely incidental.

The bone scan in evidence revealed the following impression:

> I see no evidence of a fracture of the left hip, though there may be some stress related changes in the left femoral neck, they are mild. He does have some degenerative change in both hips as well as in the left wrist and left knee.

Dr. P, during his examination of December 22, 2009, found no abnormal range of motion (ROM) and no loss of muscle strength in the left hip or any swelling or atrophy in the left lower extremity, although he did document pain with the ROM of the left hip and a slight limp on walking on the left lower extremity, especially with prolonged walking.

Dr. P stated in his narrative report of December 22, 2009, that:

> It is my opinion that after review of the medical records presented, and a thorough examination, the extent of the employee's compensable injury would be [sub-acute] acetabular fracture, nondisplaced of the left hip and

> the contusion of the left hip . . . and is a direct result of the compensable injury to the left hip.

Although, a fact finder has the ability from common knowledge to find how a fall onto a left hip could result in a fracture of the left hip, there was no diagnostic testing that indicated the claimant had a sub-acute acetabular fracture of the left hip. Dr. P did not explain why he diagnosed an acetabular fracture when no diagnostic testing revealed a fracture and the claimant had normal ROM in his left hip on examination.

The only other doctor in this case to diagnose an acetabular fracture is Dr. R), who is the claimant's current treating doctor. We note that a review of his medical reports reflect a number of differing diagnoses for the claimant's injury. In a record dated May 4, 2009, Dr. R initially diagnosed the claimant with "[c]ontusion left hip." After the claimant underwent his first MRI in May of 2009, Dr. R stated in a record dated May 13, 2009, that the "patient has on MRI an acetabular contusion and narrowing of the superior aspect of the left hip joint" and concluded that "[t]here is not much we can do [except] allow the bone to heal and the edema to subside." After the claimant underwent his second MRI in July of 2009, in a record dated July 22, 2009, Dr. R diagnosed "[c]ontusion left hip with early osteoarthritis possibly secondary to trauma." Dr. R noted in that report that a CT scan was recommended.

Subsequent to the CT scan in July of 2009, in a record dated August 5, 2009, Dr. R noted that the CT scan of the left hip indicated a "possible fracture posterior acetabulum" and that it was suggested that the claimant "get a bone scan to see if it does light up." After the claimant underwent the bone scan in September of 2009, which revealed no evidence of fracture in the left hip, Dr. R, in a record dated September 14, 2009, diagnosed degenerative joint disease left hip and possible stress fracture. Following that date, in his records dating from October 5, 2009, through March 17, 2010, Dr. R's diagnoses include "[c]ontusion left hip and [e]arly degenerative arthritis;" "[a]cetabular fracture left hip, stress fracture left femoral neck and left femoral head flattening all secondary to trauma;" "[p]ossible chondromalacia left hip or torn labrum;" "[p]ossible internal derangement of the left hip;" "[p]ossible labral tear left hip;" and "acetabular fracture healing with possible internal derangement of hip." Other than the mere recital of the diagnosis of acetabular fracture of the left hip, Dr. R does not explain how a fracture could exist contrary to the negative diagnostic testing results.

The most recent medical report in evidence is dated January 14, 2011, by Dr. M, who was a referral doctor from the claimant's treating doctor. Dr. M stated that the claimant "has been diagnosed by MRI to have a labral tear as well as osteoarthritis pathology on his x-rays." Dr. M's diagnosis is left hip labral tear and left hip osteoarthritis. In that same report, Dr. M states:

> . . . I have explained to [the claimant] that some of his tests show the possibility that he may have even cracked his acetabulum and that chondral injury from degenerative joint disease may have occurred from this traumatic event at work in which he did not necessarily tear his labrum

but caused a chondral injury of his acetabulum and certainly even a contusion or chondral injury of the femoral head.

Nonetheless, the [claimant] does have this labral pathology and certainly this could have occurred from his traumatic event as well.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Other than the mere recital of the diagnosis of sub-acute acetabular fracture, no medical evidence was presented to indicate that the claimant had a sub-acute acetabular fracture. Given the facts of this case, the hearing officer's determination that the compensable injury of _____, extends to sub-acute acetabular fracture is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the compensable injury of _____, extends to sub-acute acetabular fracture of the left hip and render a new decision that the compensable injury of _____, does not extend to sub-acute acetabular fracture of the left hip.

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 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.

As mentioned above, there were three designated doctors to address MMI/IR. Dr. K examined the claimant on July 24, 2009, and certified that the claimant had not yet reached MMI, diagnosing a left hip contusion as the work injury. Dr. P examined the claimant on December 22, 2009, and certified that the claimant had not yet reached MMI, diagnosing a sub-acute acetabular fracture, nondisplaced of the left hip and contusion of the left hip. The hearing officer's determination that the compensable injury extends to a claimed sub-acute acetabular fracture was reversed as discussed above.

The third designated doctor appointed to address MMI/IR is Dr. S, who examined the claimant on September 16, 2010, and certified that the claimant reached MMI on that date with a zero percent IR. In his narrative report, dated that same day and attached to his DWC-69, Dr. S indicated that he had reviewed the two MRIs, the CT scan, and the bone scans previously discussed above and performed ROM measurements for the claimant's bilateral hips. Dr. S diagnosed the claimant with:

1. Contusion, left hip, with secondary left hip trochanteric bursitis.

2. Some osteoarthritis of the left hip, pre-existing, with some narrowing of the joint space and marginal spurring and subchondral cyst formation.

3. On imaging, no marrow edema or joint effusion to suggest an acute problem. The bone scan was negative for fracture and no other joint pathology was seen on the imaging studies.

Regarding MMI/IR, Dr. S stated:

> The [claimant] reached [MMI] as of today's examination, September 16, 2010. It is possible that he may benefit from injection of his lateral hip bursa, and this would be recommended, but this would not change his [IR].
>
> * * * *
>
> The [claimant] has no limp, a negative Trendelenburg, no thigh or gluteal atrophy, and he has full [ROM] of the hip joint, as well as evidence of pre-existing degenerative changes in the joint. Therefore, he has a [zero percent] whole person impairment.

As previously discussed, the report of the designated doctor has presumptive weight. The hearing officer determined that the zero percent IR is contrary to a preponderance of the evidence based on a letter by the claimant's treating doctor, Dr. R. In his October 13, 2010, letter, Dr. R states:

> I disagree with [Dr. S], the designated doctor, in his [IR] of zero percent. I do not think that [the claimant] has reached [MMI] as of this time primarily because an accurate diagnosis has not been obtained. I have suggested multiple times that the [claimant] undergo an arthroscopy of the left hip to see if he has a labral tear and of course examine the state of the articular cartilage present. He did sustain an acetabular fracture, which may have damaged the soft tissue of the femoral acetabular joint. Until that diagnosis and/or subsequent treatment for that problem [h]as been affected I do not think [the claimant] has reached [MMI].

Given that: (1) we have reversed the hearing officer's EOI determination as being against the great weight and preponderance of the evidence and rendered a new decision that the compensable injury of _____, does not extend to sub-acute acetabular fracture of the left hip; (2) the claimant withdrew from the disputed EOI issue the claimed condition of labral tear; and (3) there is no other medical evidence contrary to the certification of MMI/IR by Dr. S, the hearing officer's determination that the preponderance of the evidence is contrary to the findings of the designated doctor, Dr. S, regarding his certification of MMI and assignment of IR is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse the hearing officer's determination that the claimant has not yet reached MMI and because the claimant has not reached MMI, his IR cannot be determined. We render a new decision that the claimant has reached MMI on September 16, 2010, with a zero percent IR as certified by the designated doctor, Dr. S.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of _____, does not extend to chondral injury of the left hip.

We reverse the hearing officer's determination that the compensable injury of _____, extends to sub-acute acetabular fracture of the left hip and render a new decision that the compensable injury of _____, does not extend to sub-acute acetabular fracture of the left hip.

We reverse the hearing officer's determination that the claimant has not reached MMI, and because the claimant has not reached MMI, his IR cannot be determined. We render a new decision that the claimant reached MMI on September 16, 2010, with a zero percent IR as certified by the designated doctor, Dr. S.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE 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 78701-3218.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge