APPEAL NO. 110670
FILED JULY 8, 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 April 4, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer.

The hearing officer resolved the disputed issues by determining that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on July 21, 2009; (2) the claimant's impairment rating (IR) is 7%; and (3) the claimant had disability from July 22, 2009, through February 9, 2010. The claimant appealed the hearing officer's determination on MMI/IR. The respondent (carrier) responded, urging affirmance. The hearing officer's determination that the claimant had disability from July 22, 2009, through February 9, 2010, has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded in part and reversed and rendered in part.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable injury on _____, and that Dr. N, is the designated doctor for the issues of MMI/IR. The claimant testified that he was a drywall installer and he suffered a twisting injury to his right knee at work when he fell three feet while strapped to stilts needed to reach the ceiling.

The claimant testified that he was initially treated at "Concentra" but was later referred to an orthopedic surgeon, Dr. B, after undergoing an MRI on October 7, 2008. Dr. B recommended right knee surgery, which he performed.

In evidence is Dr. B's operative report dated January 7, 2009, in which Dr. B stated that he performed a partial lateral meniscectomy; abrasion arthroplasty of the femoral trochlea; and arthroscopic chondroplasty, lateral tibial plateau for the right knee. Dr. B listed the claimant's post-operative diagnoses as: (1) healing fracture of lateral tibial plateau; (2) lateral meniscus tear; and (3) articular cartilage injury of the femoral trochlea.

In a report dated February 16, 2009, Dr. B indicated that the claimant would unfortunately develop post-traumatic arthritis. In that same report, Dr. B noted that the claimant was receiving physical therapy. Dr. B, as treating doctor, examined the claimant on April 13, 2009, to determine MMI/IR, and provided a Report of Medical Evaluation (DWC-69) and narrative report in which Dr. B certified that the claimant reached MMI on that date with a 7% IR.

The claimant testified that he switched to Dr. V, as his treating doctor and began receiving treatment through a chronic pain management program. Dr. V also referred the claimant to Dr. M. The claimant testified that he took narcotic medication for right knee pain prior to the completion of the chronic pain management program but was currently off narcotic medicine.

Prior to the designated doctor examination, Dr. M, in a letter dated July 17, 2009, stated her concern to Dr. N that the claimant had been prematurely referred for a designated doctor examination. In that letter, Dr. M opined:

> In any case, at this moment in time, it is impossible for [the claimant] to have reached MMI, since he has only had a minimal trial of post-operative care. Furthermore, he demonstrates the clear ability to progress further with additional treatment, and he certainly has not exhausted his treatment options. There are MANY other treatment options available for this gentleman, and they are all endorsed by the [Official Disability Guides (ODG)]. Thus, he is disqualified from reaching MMI, as per the legal definition of MMI.

The designated doctor, Dr. N, examined the claimant on July 21, 2009. In evidence is his DWC-69 in which he certified that the claimant reached MMI on July 21, 2009, with an IR of 7%. In his narrative report, dated that same day, Dr. N stated:

> The [claimant] reached [MMI] as of this date, July 21, 2009. The [claimant] reports his knee is not getting better or worse since follow-up with orthopedic surgeon on last recheck.

In evidence are three carrier pre-authorizations: (1) on July 22, 2009, 6 visits for post-operative physical therapy for the right knee; (2) on November 9, 2009, 10 visits for the chronic pain management program at Millennium Chiropractic (MC); and (3) on January 25, 2010, 10 visits for the chronic pain management program at MC. The pre-authorizations documented that the services were determined to be medically necessary. The pre-authorization dated January 25, 2010, stated that the claimant had made good progress with the chronic pain management program and reduced his opiate habituation.

In evidence is a letter dated March 23, 2010, from Dr. V, who stated that:

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> **. . . it is very important to note that all of these improvements occurred *after* his certification of [MMI]**.
>
> Clearly, after comparing the [claimant's] subjective and objective findings (both physically and psychologically), [the claimant] has made significant, substantial improvement. There is no doubt that the primary reason for

> this extraordinary level of improvement came as the result of the additional therapy and the [c]hronic [p]ain [m]anagement program he attended.

In evidence are progress notes from MC documenting the claimant's objective and subjective improvements upon completion of the chronic pain management program. Additionally, in evidence are two functional capacity evaluations (FCE) dated July 21, 2009, and April 5, 2010, which document objective and subjective improvement by the claimant.

On March 23, 2010, the claimant was examined by Dr. F, a doctor selected by the treating doctor acting in place of the treating doctor to address MMI/IR. Dr. F certified that the claimant reached MMI on February 9, 2010, with a 10% IR. Regarding the date of MMI, Dr. F in his narrative report dated March 29, 2010, stated:

> [The claimant] reached MMI as of [February 9, 2010] when he was discharged from a pain management program authorized by his insurance company. Substantial improvement was well documented from a multi-disciplinary [rehabilitation] program authorized by the [c]arrier.

A letter of clarification (LOC) dated April 15, 2010, was sent to the designated doctor, Dr. N. That LOC is not in evidence. In evidence is Dr. N's response dated April 16, 2010, to the LOC in which he states:

> . . . I have reviewed my report as well as the medical records. In addition I have reviewed and appreciate the report from [Dr. F].
>
> ****
>
> Regarding his date of [MMI], I also see no reason to change [the claimant's] assigned date. I do not note any material improvement in his condition after the additional treatment. [The claimant] has life time medical as it relates to his compensable injury.

The hearing officer determined that Dr. N's opinion on MMI/IR should be given presumptive weight and that the preponderance of the other medical evidence is not contrary to the opinion of Dr. N.

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 Texas Department of Insurance, Division of Workers' Compensation (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 Appeals Panel Decision (APD) 072242, decided February 13, 2008, the Appeals Panel noted that the claimant received total knee replacement surgery that was done with a reasonable medical probability that further material recovery could reasonably be anticipated. Subsequent medical records and physical therapy notes indicate steady improvement in the claimant's condition after the total knee replacement.

In APD 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI 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. The Appeals Panel held "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." *See also* APD 101746, decided January 24, 2011; APD 101567, decided December 20, 2010.

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).

In the instant case, there was no assertion that the physical therapy and chronic pain management program following July 21, 2009, was due to anything other than the compensable injury to the right knee. In evidence are reports from Dr. V, Dr. M, as well as progress reports from the chronic pain management program, and FCEs, which document the claimant's treating doctor's proposed treatment options based on the ODG, by which the treating doctors and physical therapist reasonably anticipated further material recovery or lasting improvement to the claimant's injury. Said doctors, based on a reasonable medical probability, anticipated such recovery or improvement after the July 21, 2009, date that Dr. N certified as the date that the claimant reached MMI.

Therefore, in this case, the hearing officer's determination that MMI was reached on July 21, 2009, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

There are two other certifications of MMI in evidence. Dr. B certified that the claimant reached MMI on April 13, 2009; however, that date of MMI cannot be adopted for the same reasons discussed above that Dr. N's MMI date cannot be adopted, namely, based on the evidence admitted at the CCH, April 13, 2009, was not the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to the claimant's injury can no longer reasonably be anticipated.

The only other certification of MMI in evidence is from Dr. F, a doctor selected in place of the claimant's treating doctor to determine MMI/IR. Dr. F examined the claimant on March 29, 2010, and in his narrative report, stated that the claimant reached MMI on February 9, 2010, the date that claimant was discharged from the chronic pain management program. Dr. F notes that "[s]ubstantial improvement was well documented from a multi-disciplinary [rehabilitation] program authorized by the [c]arrier." The preponderance of the evidence supports that the claimant reached MMI on February 9, 2010, as certified by Dr. F, and his certification of MMI can be adopted.

Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on July 21, 2009, and we render a new decision that the claimant reached MMI on February 9, 2010.

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.

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.

There is only one certification of MMI/IR in evidence, that of Dr. F, with the MMI date of February 9, 2010. Dr. F assigned a 10% IR, 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). In his narrative report, Dr. F states:

> According to the [AMA Guides], [the claimant] underwent arthroplasty, which generally awards both range of motion [(ROM)] and diagnostic-related values. In this case, I found a mild extension deficit/flexion contracture of 5 to 10 degrees on multiple measurements. This awards 10% lower extremity [(LE)] for ROM.
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> The tibial plateau fracture/undisplaced yields a 5% [LE] value according to Table 64 [p]age [3/85].
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> Also per Table 64, the lateral meniscectomy is considered a total, as more than 50% was removed, and this awards 7% [LE].

> According to Table 62, he had evidence of [a]rthritis/chondromalacia, clearly aggravated by the injury, as it required surgical procedure from treatment for the injury, and is a residual of the surgery. In this case, since he continues with patellofemoral pain, has crepitus on exam, and had a direct trauma to the knee, the footnote to Table 62 [page 3/83] will apply adding a 5% [LE] value.
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> So in summary, 10% LE combined with 7% LE combined with 5% LE and another 5% LE yields a 24% [LE] total. Then 24% LE converts to 10% whole person total.

Impairment assessed for a total lateral meniscectomy and for a plateau fracture, undisplaced are from Table 64, page 3/85 of the AMA Guides and represent diagnosis-based estimates. The impairment assessed for loss of ROM represents examination based estimates.

The AMA Guides provide on page 3/84 that "[t]he evaluating physician must determine whether diagnostic or examination criteria best describe the impairment of a specific patient. *The physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part*." (Emphasis or italics are in the original.) The AMA Guides provide on page 3/75 that "[i]n general, only one evaluation method should be used to evaluate a specific impairment." On page 3/84, the AMA Guides further provide that "[f]ractures in and about joints with degenerative changes should be rated either by using this section [3.28 Diagnosis-based Estimates] and combining (Combined Values Chart, [page] 322) the rating for arthritic degeneration or by using the [ROM] section [3.2e ROM]. It is recommended that the section providing the greater impairment estimate be used."

Although the AMA Guides further state on page 3/84 that there may be instances in which elements from both diagnostic and examination approaches will apply to a specific situation, the example given in the AMA Guides on page 3/84 involves a patient with an acetabular fracture and a sciatic nerve palsy, which are impairments of different organ systems. Therefore, under the facts of this case, combining impairments under Table 64 (for the right knee plateau fracture and meniscectomy), based on the diagnostic approach, with an impairment for abnormal ROM for the right LE, based on the examination approach, is precluded.

Because Dr. F did not apply the rating criteria under the AMA Guides in assigning impairment for the right knee injury, his assigned 10% IR cannot be adopted. No other certification in evidence assesses an IR for the claimant on the date of MMI of February 9, 2010. We reverse the hearing officer's determination that the claimant's IR is 7% and remand the IR issue to the hearing officer for actions consistent with this decision.

REMAND INSTRUCTIONS

Dr. N is the designated doctor. On remand the hearing officer is to determine whether Dr. N is still qualified and available to be the designated doctor, and if so, request that Dr. N rate the entire compensable injury in accordance with the AMA Guides based on the claimant's condition as of the February 9, 2010, MMI date, considering the medical record, the certifying examination and the rating criteria in the AMA Guides.

The hearing officer is to provide the designated doctor's report to the parties, allow the parties an opportunity to respond and to present further evidence, and then determine the claimant's IR consistent with this opinion.

If Dr. N is no longer qualified or available or refuses to rate the compensable injury in accordance with the AMA Guides criteria, then another designated doctor is to be appointed pursuant to Rule 127.5 to determine the claimant's IR. If a new designated doctor is appointed he or she is to be advised that the date of MMI is February 9, 2010, and that the doctor is to rate the entire compensable injury according to the AMA Guides. The parties are to be advised of the designated doctor's appointment and to be allowed to comment and present evidence regarding the designated doctor's report.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on July 21, 2009, and render a new decision that the claimant reached MMI on February 9, 2010.

We reverse the hearing officer's determination that the claimant's IR is 7% and remand the IR issue to the hearing officer for actions 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 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE 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 78701-3232.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge