APPEAL NO. 111519
FILED DECEMBER 22, 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 September 26, 2011. With regard to the four disputed issues, the hearing officer determined that: (1) the respondent (claimant) reached maximum medical improvement (MMI) on September 6, 2007; (2) the claimant's impairment rating (IR) is 18%; (3) the compensable injury of (date of injury), extends to an injury to the right knee, post-traumatic arthritis, osteoarthritis, and chondromalacia; and (4) the claimant had disability from March 17, 2006, through July 29, 2007.

The appellant (carrier) appealed the hearing officer's determinations on all the issues. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, and reversed and remanded in part.

The claimant testified that she worked cleaning offices and that on (date of injury), she sustained a compensable injury when she fell to her knees on a concrete floor while pushing a cleaning cart. The parties stipulated that the claimant sustained a compensable injury on (date of injury). The hearing officer, in her findings of fact, states that the parties stipulated that the "correct date of statutory MMI is [September 6, 2007]." A review of the record indicates no such stipulation was made. The hearing officer also states that the parties stipulated that "[o]n [(date of injury)], the employer provided workers' compensation insurance through [carrier]." A review of the record indicates no such stipulation was made.

The hearing officer, in the Background Information, states that the carrier accepted that the compensable injury extends to bilateral knee contusions with tears of the medial and lateral menisci of the right and left knee, left knee grade III chondromalacia, left knee post-traumatic arthritis with left knee osteoarthritis. The medical records indicate that the claimant had left knee arthroplasty (replacement) on December 2, 2009, after two other failed left knee surgeries. The claimant testified that she had not had any right knee surgeries.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), extends to an injury to the right knee, post-traumatic arthritis, osteoarthritis, and chondromalacia is supported by sufficient evidence and is affirmed.

MMI AND 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 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. 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.

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).

The Division appointed (Dr. B) as the designated doctor for MMI and IR. As previously noted, there was no stipulated date of statutory MMI. The hearing officer, in her Background Information commented that Dr. B had corrected a clerical error and amended his certification so that based on his March 29, 2010, exam the claimant reached statutory MMI on September 6, 2007, with an 18% IR. The hearing officer found that Dr. B's certification of MMI on September 6, 2007, and assigned IR of 18% is not contrary to a preponderance of the evidence.

In evidence is an undated Report of Medical Evaluation (DWC-69), referencing the March 29, 2010, examination certifying statutory MMI on July 29, 2007, with an 18% IR. In a narrative report dated July 23, 2010, Dr. B explained the IR stating that he "last

examined [the claimant] on April 10, 2008, which is the closest date examination that I have to her [MMI] . . . ." For the right knee, Dr. B assigned 4% impairment for 90° flexion (Table 41, page 3/78) and 3% medial laxity grade 1 (Table 64, page 3/85) for a total right knee impairment of 7%. Dr. B's report incorrectly believed that the claimant had right knee medial and lateral meniscectomies. For the left knee, Dr. B assessed 8% impairment for 10° extension and 4% impairment for 80° flexion for 12% impairment. Dr. B combined the 7% right knee impairment with the 12% left knee impairment resulting in 18% IR. This report cannot be adopted because no statutory date of MMI has been established and the July 29, 2007, statutory MMI is clearly incorrect for a (date of injury). *See* Sections 401.011(30)(B) and 408.082(b).

Other certifications of MMI and IR from Dr. B include a DWC-69 and narrative dated June 15, 2006, certifying clinical MMI on that date with a 4% IR. This report cannot be adopted because it only rates a left knee injury and does not rate the entire compensable injury.

Another certification of MMI and IR from Dr. B includes a DWC-69 and narrative dated March 29, 2010, certifying statutory MMI on (date of injury) (later corrected to July 29, 2007) with a 24% IR. This report includes an IR for a left knee replacement which occurred on December 2, 2009, after any possible statutory MMI date. This report cannot be adopted because it included an IR for a left knee replacement after statutory MMI.

There is no DWC-69 or narrative by Dr. B that was admitted into evidence certifying a statutory MMI date of September 6, 2007, with an 18% IR. As noted previously, there was no stipulation of a September 6, 2007, statutory MMI date and no medical record in evidence certifying a September 6, 2007, statutory MMI date. The last report from Dr. B in evidence certifies a statutory MMI date of July 29, 2007. The hearing officer's determination that the claimant reached MMI on September 6, 2007, with an 18% IR is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain, *supra*.

Although not in evidence, the miscellaneous documents in the CCH file has an undated DWC-69, signed by Dr. B, referencing a March 29, 2010, date of examination. The DWC-69 does not state which edition of the American Medical Association Guides was used. This DWC-69 is not among the exhibits offered and admitted from the claimant, carrier, or hearing officer. Nor does the hearing officer note that she took official notice of this form. In fact, the DWC-69 is paginated as page 02/02 and was sent by facsimile transmission on September 29, 2011, 3 days after the CCH. This document, never having been placed into evidence, cannot be used to support the

hearing officer's determinations that the claimant reached MMI on September 6, 2007, with an 18% IR.

We reverse the hearing officer's determinations that the claimant reached MMI on September 6, 2007, with an 18% IR and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

DISABILITY

The claimant testified that she has not worked since the (date of injury). In evidence are Work Status Reports (DWC-73) either releasing the claimant to modified duty or taking the claimant off work from August 1, 2005, through June 5, 2008, due to the claimant's right and left knee injuries. The hearing officer commented that the "claimant was taken off of work for her injuries from [March 17, 2006], through [July 29, 2007]." In a report dated April 20, 2007, Dr. B, the designated doctor appointed to give an opinion on disability, stated that the claimant is unable to return to her pre-injury employment. The carrier, in its appeal contends that the hearing officer erred in finding that the claimant sustained disability from March 17, 2006, through July 29, 2007, because of degenerative conditions. However, those conditions were found compensable by the hearing officer and affirmed in this decision.

The issue at the CCH was: did the claimant have disability from a compensable injury sustained on (date of injury), and if so, for what periods? The hearing officer began disability on March 17, 2006. There is no explanation why disability began on that date rather than the date of injury or some earlier date than March 17, 2006. Because the date of statutory MMI is the expiration of 104 weeks from the date on which income benefits begin to accrue (Section 401.011(30)(B)), it is important to know when disability began. In this case, the hearing officer's determination that disability began on March 17, 2006, 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 had disability from March 17, 2006, through July 29, 2007. We remand the issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is to determine the statutory MMI date. This can be determined by agreement of the parties on the record or as otherwise determined by the hearing officer based on evidence in the record. Dr. B is the designated doctor. On remand, the hearing officer is to determine if Dr. B is still qualified and available to be the designated doctor, and if so, the hearing officer is to advise the designated doctor that the compensable injury extends to bilateral knee contusions with tears of the medial

and lateral menisci of the right and left knee, left knee grade III chondromalacia, left knee post-traumatic arthritis with left knee osteoarthritis and right knee post-traumatic arthritis, osteoarthritis, and chondromalacia. The designated doctor is then to be advised of the statutory MMI date and requested to give an opinion on MMI (which cannot be after the statutory MMI date) and IR of the entire compensable injury pursuant to 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) as of the MMI date considering the medical record and certifying examination. If Dr. B is no longer qualified or available to serve as the designated doctor, 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, the designated doctor's response, and are to be allowed an opportunity to present evidence and respond. The hearing officer is then to make determinations on the date of MMI, the IR and whether the claimant had disability, and if so, for what periods as supported by the evidence.

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

RON O. WRIGHT, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Cynthia A. Brown
Appeals Judge

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Margaret L. Turner
Appeals Judge