APPEAL NO. 120579
FILED JUNE 8, 2012

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 March 8, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the three issues before her, the hearing officer determined that: (1) the compensable injury of [date of injury], does not include bilateral chondromalacia of the patella; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on October 27, 2011; and (3) the claimant's impairment rating (IR) is five percent.

The claimant appealed the hearing officer's extent-of-injury determination. The respondent/cross-appellant (self-insured) responded, urging affirmance. The self-insured cross-appealed the MMI and IR determinations. The appeal file does not contain a response from the claimant to the self-insured's cross-appeal.

DECISION

Affirmed in part and reversed and remanded in part.

EXTENT OF INJURY

The hearing officer's determination that the [date of injury], compensable injury does not include bilateral chondromalacia of the patella is supported by sufficient evidence and is therefore affirmed.

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 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.

The parties stipulated that: (1) the Division selected [Dr. K] as its designated doctor with regard to MMI/IR; (2) Dr. K certified that the claimant reached MMI on January 18, 2011, with a zero percent IR; (3) the self-insured has accepted a [date of injury], compensable injury in the form of bilateral knee sprain/strain; and (4) [Dr. D], a treating doctor referral, certified that the claimant reached MMI on October 27, 2011, with a five percent IR.

The claimant sustained a compensable injury on [date of injury], while attempting a new procedure in climbing telephone poles during a training class. The claimant testified at the hearing that he twisted first his left knee then his right knee while performing the new procedure.

The claimant testified that he initially underwent conservative treatment for his knees, including physical therapy and large amounts of Advil, with no success. The claimant further testified that he underwent surgery for his left knee on November 18, 2010.

In evidence is an x-ray report dated May 25, 2010, of the claimant's left and right knee, revealing mild bilateral medial compartment osteoarthritis. Also in evidence are MRI reports dated June 4, 2010, of the claimant's left and right knee. The MRI reports for both knees reveal (1) [g]rade II signal in the body and posterior horn of medial meniscus; (2) [m]yxoid degeneration in both horns of lateral meniscus and anterior horn of medial meniscus (with the addition of myxoid degeneration in the posterior horn of lateral meniscus and anterior horn of medial meniscus for the right knee); (3) [s]prain of anterior cruciate and medial collateral ligaments (sprain of anterior cruciate ligament for the right knee); (4) [m]ild changes of osteoarthritis; (5) [m]inimal synovial effusion (with the addition of a small Baker's cyst on the right knee); and (6) [m]ild subcutaneous edema around the knee joint.

Also in evidence is an operative report dated November 18, 2010, revealing the procedure performed as arthroscopy of the left knee with debridement of the patellofemoral joint and plica resection of medial parapatellar area, followed by an opened Topaz treatment/microdebridement of the inferior pole of the patella and proximal half of the patellar tendon. The report noted "there was chondromalacia involving much of the medial facet of the patella . . . ."

The hearing officer determined the claimant reached MMI on October 27, 2011, with a five percent IR per Dr. D's MMI/IR certification. Dr. D, a referral doctor acting in place of the treating doctor, examined the claimant on October 27, 2011, to determine

the claimant's MMI and IR. In an amended report dated December 29, 2011, Dr. D's assessment of the claimant's condition included:

> [w]ork-related left knee injury with internal derangement of the left knee and patellar tendinitis; status post arthroscopy of the left knee with debridement of the patellofemoral joint and plica resection as well as topaz treatment of the inferior pole of the patella and proximal half the patellar tendon.

Dr. D certified the claimant reached clinical MMI on October 27, 2011, and assessed a five percent IR using Table 39, page 3/77 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). Regarding the claimant's date of MMI, Dr. D stated in his report: "[the claimant] has some continuing ongoing patellar tendinitis with some mild asymmetric weakness on the left side. At this point I agree that he has reached [MMI] . . . ."

Dr. D based his five percent IR on "asymmetric weakness in the left knee extensor musculature with his diagnosis of patellar tendinitis, turning to [T]able 39 on page [3/77] [of the AMA Guides] under 'Knee Extensor Muscle Weakness' of [G]rade IV," and assessed a zero percent impairment of the right knee. However, given that we have affirmed the hearing officer's determination that the compensable injury does not include bilateral chondromalacia of the patella, and given that the only accepted diagnosis is bilateral knee sprain/strains, Dr. D based his MMI and IR on conditions that have been determined not to be part of the compensable injury. Therefore, Dr. D's MMI/IR certification cannot be adopted. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on October 27, 2011, with a five percent IR.

There is only one other MMI/IR certification in evidence, that of Dr. K, the Division-appointed designated doctor assigned to determine the claimant's MMI and IR.

Dr. K examined the claimant on June 28, 2011, and certified the claimant reached clinical MMI on January 18, 2011, with a zero percent IR based on range of motion (ROM) measurements of the claimant's left and right knee. Dr. K took note in his report that the accepted diagnoses are bilateral knee strains and left knee patellofemoral disease.[1] Regarding the claimant's MMI, Dr. K stated "[b]ased on [Official Disability Guidelines (ODG)], even if his worst diagnosis of chondromalacia of

[1] We note that in evidence is a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) dated August 25, 2010, stating that the self-insured limited the compensable injury to bilateral knee sprain/strain only and denied internal derangement to the bilateral lower extremities.

the patella was accepted, he would be at MMI about [six] weeks after the surgery and would be back to work." Dr. K further noted "[h]is date of MMI, based on [ODG] is [six] weeks from the [November 18, 2010, surgery] . . . and adding two extra weeks, because he might have had more difficulty recovering, puts him at an MMI of January 18, 2011."

The evidence established that Dr. K based his January 18, 2011, date of MMI on the claimant's November 18, 2010, surgery to treat internal derangement and patellar tendonitis of the left knee, which are conditions beyond the stipulated accepted conditions of bilateral sprain/strains. As we have affirmed the hearing officer's determination that the claimant's compensable injury does not include bilateral chondromalacia of the patella, and as there are no other accepted conditions, Dr. K's certification of MMI cannot be adopted.

We note that the hearing officer states in the Background Information section of the decision that Dr. K only rated the claimant's left knee; however, Dr. K's narrative report reflects ROM measurements for the claimant's left and right knees and an assigned impairment of zero percent for each knee.

As there are no certifications of MMI and IR that can be adopted, we remand the issues of MMI and IR for further consideration consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not include bilateral chondromalacia of the patella.

We reverse the hearing officer's determination that the claimant reached MMI on October 27, 2011, with a five percent IR and remand the issues of MMI and IR for further consideration consistent with this decision.

REMAND INSTRUCTIONS

The designated doctor in this case is Dr. K. On remand the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor, and if so, request that Dr. K provide a Report of Medical Evaluation (DWC-69) and narrative report certifying when the claimant reached MMI and the claimant's IR based on the claimant's compensable injury, which includes bilateral knee sprain/strains but not bilateral chondromalacia of the patella, and considering the medical record and certifying examination in accordance with this decision. The hearing officer is to notify Dr. K that the claimant's MMI cannot be based on the November 18, 2010, surgery, which was for a condition that is not part of the compensable injury. The hearing officer is to provide the letter of clarification and the designated doctor's response to the parties

and allow the parties an opportunity to respond and then make a determination regarding the MMI date and the IR consistent with this decision. If Dr. K is no longer qualified and available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine the claimant's MMI and IR.

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 **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge