

APPEAL NO. 130648
FILED MAY 7, 2013

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 January 8, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to a right lateral meniscus tear, a right medial meniscus tear, and right knee effusion, but does not extend to internal derangement of the right knee; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, an impairment rating (IR) is premature; and (4) the claimant had disability from November 2, 2011, through the date of the CCH, January 8, 2013.

The appellant (carrier) appealed that portion of the hearing officer's determination that the compensable injury extends to a right lateral meniscus tear, a right medial meniscus tear, and right knee effusion. Also, the carrier appealed the hearing officer's MMI, IR and disability determinations. The appeal file does not contain a response from the claimant. That portion of the hearing officer's determination that the compensable injury of [date of injury], does not extend to internal derangement of the right knee has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, and reversed and remanded in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury, and the compensable injury includes a right knee contusion. The claimant testified that on the date of injury, he was driving an 18-wheeler truck when a fire extinguisher in the cab went off releasing chemicals, and as he attempted to throw the fire extinguisher out the window, he struck his right knee with the canister. Further, the claimant testified that he jumped out of the truck, landed on the ground and twisted his right knee in an attempt to get away from the truck that contained spilled chemicals from the fire extinguisher.

EXENT OF INJURY

The hearing officer's extent of injury determination that the compensable injury of [date of injury], extends to a right lateral meniscus tear, a right medial meniscus tear, and right knee effusion is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability from November 2, 2011, through the date of the CCH, January 8, 2013, 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 a Request for Designated Doctor Examination (DWC-32) dated May 15, 2012, the carrier requested that the designated doctor provide two alternate ratings, "one for the compensable injury (right knee contusion), the other to include the disputed diagnoses/conditions which include advancing degenerative changes within the lateral compartment of the right knee, internal derangement of the right knee, and effusion." The Division appointed [Dr. S] as the designated doctor to determine the claimant's MMI and IR. Dr. S examined the claimant on June 13, 2012, and he provided two alternate certifications of MMI/IR as requested by the carrier on the DWC-32. With regard to the accepted compensable right knee contusion injury, Dr. S certified that the claimant reached MMI on November 1, 2011, with a zero percent IR for the right knee contusion.

With regard to the disputed diagnoses/conditions, in an "amended" narrative report dated June 22, 2012, Dr. S opined that the claimant's "knee is severely degenerated and it is possible the tear is simply degenerative" and "while the knee contusion did not cause [the claimant's] degenerative joint disease and in reasonable medical probability did not cause the lateral meniscus tear, it did make them symptomatic. There is no other reasonable explanation to be derived from these

records and his history.” Further, Dr. S states in his amended narrative report that a second certification of MMI/IR “will include [the claimant’s] degenerative joint disease and lateral meniscus tear and for that certification he will not reach [MMI] until September 13, 2012, in reasonable medical probability.” A Report of Medical Evaluation (DWC-69) dated June 13, 2012, Dr. S certified that the claimant had not reached MMI, but was expected to reach MMI on or about September 13, 2012. Dr. S considered both the degenerative joint disease and lateral meniscus tear of the right knee. The hearing officer adopted this certification, although there is no stipulation or judicial determination regarding “degenerative joint disease” of the right knee. Further, Dr. S’s certification does not take into consideration the other compensable injuries of right knee contusion, right knee effusion and right knee medial meniscus tear in certifying MMI/IR. See Appeals Panel Decision (APD) 122580, decided February 22, 2013; and APD 110267, decided April 19, 2011. Because Dr. S considered degenerative joint disease of the right knee, which has not been determined to be part of the compensable injury and did not consider the entire compensable injury, Dr. S’s certification that the claimant has not reached MMI cannot be adopted. We reverse the hearing officer’s determination that the claimant has not reached MMI, and because the claimant has not reached MMI, an IR was premature.

There are two other certifications of MMI in evidence. See Section 408.125(c). First, Dr. S certified that the claimant reached MMI November 1, 2011, with a zero percent IR, however, that certification of MMI/IR cannot be adopted because it only rates the right knee contusion, and not the entire compensable injury. See APD 122580, *supra*. Second, the other certification of MMI/IR is from [Dr. G], the doctor selected by the treating doctor acting in place of the treating doctor. Dr. G examined the claimant on September 26, 2012, and certified that the claimant reached MMI on September 11, 2012, with a four percent IR. Dr. G’s certification of MMI/IR cannot be adopted because it only rates the right knee lateral meniscus tear, and not the entire compensable injury. Therefore, there are no certifications of MMI/IR in evidence that can be adopted.

In APD 002675, decided December 21, 2000, the Appeals Panel held that “[w]henver the issue is an IR, by necessity the extent of injury is subsumed in that issue.” Further, the Appeals Panel held that “[w]hile a designated doctor can state an opinion whether a certain condition is or is not part of the injury,” it is the Division “that determines what the injury is and the extent of the injury, not the doctor.” As previously noted, in the DWC-32 dated May 15, 2012, the carrier requested alternate ratings, including consideration of the degenerative joint disease of the right knee. Dr. S, the designated doctor appointed for MMI/IR, based his determination that the claimant had not reached MMI in part on the condition of degenerative joint disease of the right knee.

Whether or not the compensable injury extends to degenerative joint disease of the right knee has not been accepted by the carrier or administratively determined.

Accordingly, we remand the case to the hearing officer to add the issue of whether the compensable injury of [date of injury], extends to degenerative joint disease of the right knee and to make determinations on extent of injury, MMI, and IR consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to a right lateral meniscus tear, a right medial meniscus tear, and right knee effusion.

We affirm the hearing officer's determination that the claimant had disability from November 2, 2011, through the date of the CCH, January 8, 2013.

We reverse the hearing officer's determination that the claimant has not reached MMI, and because the claimant has not reached MMI, an IR is premature, and we remand the case to the hearing officer to add the issue of whether the compensable injury of [date of injury], extends to degenerative joint disease of the right knee and to make determinations on extent of injury, MMI, and IR consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to add the issue of whether the compensable injury of [date of injury], extends to degenerative joint disease of the right knee. Dr. S is the designated doctor. The hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine extent of injury, MMI, which cannot be later than the statutory date of MMI (see Section 401.011(30)) and the IR.

The hearing officer is to inform the designated doctor that the compensable injury includes a right knee contusion, right knee effusion, right lateral meniscus tear and right medial meniscus tear, and that the compensable injury does not extend to right knee internal derangement.

The hearing officer is to request from the designated doctor a certification of MMI/IR on the compensable injury and an alternate certification of MMI/IR on the compensable injury and the extent of injury condition. First, the hearing officer is to request from the designated doctor a certification of MMI/IR of the compensable injury which includes a right knee contusion, right knee effusion, right lateral meniscus tear

and right medial meniscus tear. Second, the hearing officer is to request from the designated doctor an alternate certification of MMI/IR on the compensable injury which includes a right knee contusion, right knee effusion, right lateral meniscus tear, right medial meniscus tear and degenerative joint disease of the right knee.

The hearing officer is to ensure that the designated doctor has all the pertinent medical records. The parties are to be provided with the hearing officer's letter to the designated doctor, the designated doctor's response, and to be allowed an opportunity to respond. The hearing officer is to make determinations on extent of injury, MMI, and IR consistent with this decision which are 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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge