

APPEAL NO. 131552
FILED AUGUST 29, 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 was held on May 20, 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 non-displaced patellar fracture of the right knee and lumbar radiculopathy; and (2) the respondent's (claimant) impairment rating (IR) is 22%. The appellant (carrier) appeals the hearing officer's determination of the extent of the compensable injury as well as the IR. The carrier additionally contends that the hearing officer erred by adding the issue of whether the compensable injury extends to lumbar radiculopathy. The claimant responded, urging affirmance of the disputed issues. The claimant states in his response that the issue of whether the compensable injury extends to lumbar radiculopathy was properly added and was actually litigated.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury at least in the form of a low back injury, L4-5 disc protrusion, bilateral meniscus tears, and right shoulder impingement; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, [Dr. I] certified that the claimant reached statutory maximum medical improvement (MMI) on November 24, 2011, and assigned a 22% IR; (3) the carrier-selected doctor, [Dr. M] certified that the claimant reached statutory MMI on November 24, 2011, and assigned a 10% IR; and (4) statutory MMI is November 24, 2011. The benefit review conference report in evidence reflects that the parties agreed the claimant reached statutory MMI on November 24, 2011.

The claimant was injured when he was shopping for supplies for the employer. The claimant was kneeling down on his right knee when two to three boxes of tiles fell from a shelf above hitting the claimant on his right shoulder and neck area. The claimant underwent a partial medial meniscectomy of the left knee on September 20, 2010. On December 15, 2011, the claimant underwent a partial medial meniscectomy and a chondroplasty of the patella of the right knee.

TIMELINESS

The claimant contends in his response that the carrier's appeal was untimely. The carrier states in its appeal that it received a copy of the hearing officer's decision

and order on May 31, 2013. However, Division records reflect that the hearing officer's decision and order was not distributed to the parties until June 5, 2013. The carrier was deemed to have received the decision and order on June 6, 2013. See 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)). The carrier's appeal was timely filed. See Section 410.202.

EXTENT OF INJURY

The hearing officer's determination that the [date of injury], compensable injury extends to a non-displaced patellar fracture of the right knee and lumbar radiculopathy is supported by sufficient evidence and is affirmed. We find no error in the hearing officer adding the issue of whether the compensable injury extends to lumbar radiculopathy.

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. 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 hearing officer found that the 22% IR assigned by Dr. I is supported by a preponderance of the evidence. Dr. I examined the claimant on April 4, 2012, and certified the claimant reached MMI on the statutory date of November 24, 2011, with a 22% 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). Dr. I placed the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category III: Radiculopathy, assessing 10% impairment, and noting the claimant's right thigh showed 2 cm of atrophy and that reflexes of the ankle and plantar are absent. Dr. I assessed 8% whole person impairment for loss of range of motion (ROM) of the right shoulder. Dr. I assessed 1% impairment for the claimant's left knee under Table 64, page 3/85 for a partial medial meniscectomy. Dr. I assessed 4% impairment for the right knee combining 3% impairment for a undisplaced, healed patellar fracture under Table 64, page 3/85, with 1% impairment for a partial medial meniscectomy of the right knee.

As previously noted, the claimant's surgery for right knee partial medial meniscectomy occurred on December 15, 2011, which was after the claimant reached

statutory MMI. Rule 130.1(c)(3) provides that the “[a]ssignment 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.” That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. See Appeals Panel Decision (APD) 042518, decided November 24, 2004. Dr. I assessed impairment for a surgical procedure which took place after the date of statutory MMI. The IR assessed by Dr. I includes a surgery which occurred after the claimant reached MMI statutorily. Accordingly, we reverse the hearing officer’s determination that the claimant’s IR is 22%.

Three other certifications are in evidence with the MMI date of November 24, 2011. All three certifications were from Dr. M. Dr. M examined the claimant on June 14, 2012. Dr. M initially certified that the claimant reached MMI on November 24, 2011, with a 10% IR. Dr. M assessed 5%, for the lumbar spine, placing the claimant in Lumbosacral DRE Category II: Minor Impairment; 3% impairment for loss of ROM of the right shoulder; 1% impairment for the left knee for partial medial meniscectomy; and 1% for a right knee partial medial meniscectomy from Table 64, page 3/85. This certification cannot be adopted because it does not consider the non-displaced patellar fracture of the right knee; has an error in the calculation of the right shoulder ROM which will be discussed below; and rates a surgical procedure that took place after the date of statutory MMI.

In an addendum dated January 15, 2013, Dr. M provided two alternative certifications based on the same examination date of June 14, 2012. In one of the alternative ratings, Dr. M stated the right knee would have no impairment based on disallowing the 1% impairment for the right knee given for the post-statutory partial medial meniscectomy. This certification cannot be adopted because it does not consider the non-displaced patellar fracture of the right knee and has an error in the calculation of the right shoulder ROM which will be discussed below.

Dr. M also provided an alternative certification in which he certified the claimant reached MMI on November 24, 2011, with a 12% IR. In the addendum to his narrative dated January 15, 2013, Dr. M stated “[i]f an individual was found to have a patella fracture, a non-displaced patellar fracture under Table 64 is a 3% whole person impairment for his right knee. The 1% impairment to the right knee for partial meniscectomy would be disallowed due to the fact that it took place after the statutory MMI date. Therefore his impairment for his right knee with a non-displaced patella fracture is 3% with the left knee being 1%. This would add an additional 2% to his whole person impairment resulting in a 12% whole person impairment.”

Based on the information contained in the original narrative from Dr. M, the alternative 12% rating assessed by Dr. M includes: 5% impairment for the lumbar spine; 3% impairment for the right shoulder; 3% impairment for the right knee; and 1% impairment for the left knee. Dr. M provided the following measurements for the claimant's right shoulder: (1) flexion of 160°; (2) abduction of 160°; (3) external rotation of 60°; (4) internal rotation of 50°; (5) extension of 30°; and (6) adduction of 20°. Dr. M's narrative stated, "[b]ased on the [claimant's] [ROM] in his right shoulder, this results in a 5% upper extremity impairment. This is outlined in the upper extremity [ROM] evaluation. From Table 3 [on page 3/20] of the [AMA Guides], the 5% upper extremity impairment results in a 3% whole person impairment." Dr. M did not specifically show the values he assigned using the applicable figures in the AMA Guides to assess impairment for loss of ROM in the narrative admitted into evidence. However, applying the numbers for loss of ROM recorded in Dr. M's narrative does not equal the impairment assessed by Dr. M. Figure 38 on page 3/43 of the AMA Guides provides that 160° of flexion would result in 1% impairment and 30° of extension would result in 1% impairment; Figure 41 on page 3/44 provides that abduction of 160° results in 1% impairment and adduction of 20° results in 1% impairment; Figure 44 on page 3/45 provides that external rotation of 60° results in 0% impairment and internal rotation of 50° results in 2% impairment. Adding the impairment assessed for the ROM measurements taken results in 6% upper extremity impairment which converts to 4% whole person using Table 3 on page 3/20 of the AMA Guides. As mentioned above, Dr. M assessed a 3% whole person impairment for the claimant's right shoulder. The alternative certification of 12% given by Dr. M cannot be adopted because the impairment assessed for the right shoulder is incorrect based on the information contained in Dr. M's narrative.

Since there is no IR that can be adopted we remand the IR issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. I is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. I is still qualified and available to be the designated doctor. If Dr. I is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's IR for the compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a low back injury, L4-5 disc protrusion, bilateral meniscus tears, right shoulder impingement, lumbar radiculopathy, and a non-displaced patellar fracture of the right knee. The assignment of an IR is required to be based on

the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issue of IR 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 **CONTINENTAL WESTERN INSURANCE COMPANY** 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge