

APPEAL NO. 140842
FILED JUNE 23, 2014

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 February 4, 2014, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the [date of injury], compensable injury extends to a left knee tear of the posterior horn of the medial meniscus, a tear of the posterior root of the lateral meniscus, a right knee tear of the medial meniscus with degenerative changes, and a parrot beak tear of the lateral meniscus; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, an impairment rating (IR) would be premature; (4) the claimant did not have disability from July 13, 2012, through July 27, 2012; and (5) the claimant's average weekly wage (AWW) is \$1,006.00.

The appellant (carrier) appeals the hearing officer's determinations of the extent of the compensable injury, the MMI date, and the IR. The carrier argues that there was not sufficient causation to establish that the disputed conditions were part of the compensable injury. Additionally, the carrier argues that the date of MMI should be September 9, 2012, and that the correct IR is zero percent. The appeal file does not contain a response from the claimant. The hearing officer's determination that the claimant did not have disability from July 13, 2012, through July 27, 2012, and that the claimant's AWW is \$1,006.00 were not appealed and have become final pursuant to Section 410.169.

DECISION

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

It was undisputed that on [date of injury], the claimant sustained a compensable injury, and the compensable injury includes bilateral knee contusions. The claimant did not attend the February 4, 2014, CCH, or respond to the 10-day letter sent to the claimant by the hearing officer after the CCH.

EXTENT OF INJURY

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. Appeals Panel Decision (APD) 022301, decided October 23, 2002. See also *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007). To be probative, expert testimony

must be based on reasonable medical probability. *City of Laredo v. Garza*, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing *Insurance Company of North America v. Meyers*, 411 S.W.2d 710, 713 (Tex. 1966). Section 408.0041(a)(3) provides that at the request of the insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about the extent of the employee's compensable injury. Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary.

The evidence reflects that [Dr. T] was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to opine on the extent of the claimant's compensable injury as well as the issues of MMI, IR, and return to work. Dr. T examined the claimant on November 5, 2012, and in his narrative report stated the following:

I believe the [claimant's] extent of injury includes bilateral meniscal tears directly related to injury and mechanism of knees **hyperextending** (emphasis added) prior to tear while at work. Causation is based on AMA Guide to the Evaluation of Disease and Injury Causation, Chapter 10 on conclusions on non-occupational/occupational risk factors that would have otherwise contributed to meniscal tears.

In the same narrative report, Dr. T described the injury as follows:

The [claimant] stated that he was on a cabinet platform working in the open sun. After an hour of pulling cable, he collapsed from exhaustion. He collapsed straight down, bending his knees up under his body and sustaining injury to left and right knee.

In his narrative report, Dr. T discusses the MRI of both the right and left knee performed on August 1, 2012. Dr. T reports that the MRI of the right knee noted a thinning of the body of medial meniscus with a small focus of increased signal in the posterior horn of the medial meniscus extending to the articular margins, suggestive of tear and noted the possibility of parrot beak tear. Dr. T also discussed the MRI of the left knee which noted a thinning of the body of medial meniscus, likely to be due to degeneration and an increased signal in the posterior horn of medial meniscus involving the articular margins, compatible with a tear as well as an increased signal in the posterior root of the lateral meniscus, possibility of tear.

Dr. T opined that the compensable injury extended to meniscal tears but did not describe the specific tears in dispute. Further, Dr. T described the mechanism of injury inconsistently and did not explain how the claimant's collapse could cause the disputed meniscal tears.

In evidence was a report dated August 17, 2012, from [Dr. O] who gave a second opinion on the MRIs of the left and right knees. Dr. O concluded that the findings of the medial meniscus of the right and left knees are most likely degenerative and possibly due to superimposed chronic post-traumatic change. Dr. O went on to state that there are no bone contusions or joint effusion to suggest an acute injury and that there is no definite finding on the MRI to suggest an acute post-traumatic process.

Additionally, in evidence was a report dated January 10, 2013, from [Dr. M] a carrier-selected post-designated doctor, required medical examination (RME) doctor. Dr. M opined in part that the claimant had no objective documentation of an acute meniscal tear.

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 applying this standard to the facts of this case, the hearing officer’s determination that the compensable injury of [date of injury], extends to a left knee tear of the posterior horn of the medial meniscus, a tear of the posterior root of the lateral meniscus, a right knee tear of the medial meniscus with degenerative changes, and a parrot beak tear of the lateral meniscus 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 compensable injury of [date of injury], extends to a left knee tear of the posterior horn of the medial meniscus, a tear of the posterior root of the lateral meniscus, a right knee tear of the medial meniscus with degenerative changes, and a parrot beak tear of the lateral meniscus and render a new decision that the compensable injury of [date of injury], does not extend to a left knee tear of the posterior horn of the medial meniscus, a tear of the posterior root of the lateral meniscus, a right knee tear of the medial meniscus with degenerative changes, and a parrot beak tear of the lateral meniscus.

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 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 hearing officer determined that the claimant has not reached MMI and because the claimant has not reached MMI, an IR would be premature per the certification of Dr. T. Dr. T based his certification that the claimant was not at MMI on the meniscal tears which have been determined not to be part of the compensable injury. Accordingly, the hearing officer's determination that the claimant is not at MMI and that an IR is premature is reversed.

There are four other certifications of MMI/IR in evidence. First, Dr. T provided an alternative certification certifying the claimant reached MMI on September 9, 2012, with a zero percent IR. However, Dr. T stated that his rationale for the MMI date was "[Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute] recommend up to sixty days for knee sprains and strains." As previously noted, the claimant's compensable injury includes bilateral knee contusions. Bilateral knee sprains and strains were not part of the extent issue before the hearing officer nor was that condition litigated and there was no evidence that bilateral knee sprain/strains have been accepted as part of the compensable injury. Accordingly, Dr. T's alternative certification that the claimant reached MMI on September 9, 2012, with a zero percent IR cannot be adopted. See APD 130961, decided June 3, 2013.

Second, in evidence is a certification of MMI/IR from the first Division-appointed designated doctor, [Dr. R]. Dr. R examined the claimant on April 25, 2013, and certified that the claimant reached MMI on February 1, 2013, with a four percent 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. R assessed four percent impairment for loss or range of motion (ROM) of the right knee and zero percent impairment for loss of ROM of the left knee for a whole person IR of four percent. Dr. R listed the following "[a]ssessments" in his narrative report: pain in joint, lower leg; contracture of lower leg joint; and derangement of meniscus, not elsewhere classified. Dr. R did not consider bilateral knee contusions. Dr. R did not consider the entire compensable injury and accordingly, his certification of MMI/IR cannot be adopted.

Third, in evidence is a second certification of MMI/IR from Dr. R. Dr. R subsequently examined the claimant on August 30, 2013, and again certified that the claimant reached MMI on February 1, 2013, with a four percent IR using the AMA Guides. Dr. R listed the following “[a]ssessments” in his narrative report: unspecified internal derangement of the knee; sprain and strain of unspecified site of the knee and leg; pain in joint, lower leg; and derangement of meniscus, not elsewhere classified. Dr. R did not consider bilateral knee contusions and considered other conditions to the claimant’s knee that have not been determined to be part of the compensable injury. Accordingly, Dr. R’s subsequent certification based on his examination date of August 30, 2013, that the claimant reached MMI on February 1, 2013, with a four percent IR cannot be adopted.

Fourth, Dr. M, the carrier-selected RME, examined the claimant on January 10, 2013, and certified that the claimant reached MMI on September 9, 2012, with a zero percent IR. However, in his narrative report, Dr. M stated that the claimant had bilateral knee strains rather than contusions. Dr. M did not consider the entire compensable injury but rather considered conditions that have not been determined to be part of the compensable injury. Accordingly, the certification from Dr. M cannot be adopted. See APD 130961, *supra*.

There are no other certifications of MMI/IR in evidence. Therefore, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer’s determination that the compensable injury of [date of injury], extends to a left knee tear of the posterior horn of the medial meniscus, a tear of the posterior root of the lateral meniscus, a right knee tear of the medial meniscus with degenerative changes, and a parrot beak tear of the lateral meniscus and render a new decision that the compensable injury of [date of injury], does not extend to a left knee tear of the posterior horn of the medial meniscus, a tear of the posterior root of the lateral meniscus, a right knee tear of the medial meniscus with degenerative changes, and a parrot beak tear of the lateral meniscus.

We reverse the hearing officer’s determinations that the claimant has not reached MMI and because the claimant has not reached MMI, an IR would be premature and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T 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 MMI and IR for the [date of injury], compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes bilateral knee contusions. Further, the hearing officer is also to advise the designated doctor that the compensable injury does not extend to a left knee tear of the posterior horn of the medial meniscus, a tear of the posterior root of the lateral meniscus, a right knee tear of the medial meniscus with degenerative changes, and a parrot beak tear of the lateral meniscus as administratively determined.

The certification of MMI should be 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 considering the physical examination and the claimant's medical records.

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 issues of MMI and 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 **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

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

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge