

APPEAL NO. 141626
FILED SEPTEMBER 24, 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 June 26, 2014, in San Angelo, 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 an aggravation to a right knee medial meniscus tear and an aggravation to an osteochondral lesion of the medial femoral condyle of the right leg, but does not extend to a right knee medial meniscus tear, osteochondral lesion of the medial femoral condyle of the right leg, left elbow medial epicondylitis, degenerative joint disease of the medial femoral condyle, aggravation to left elbow medial epicondylitis, and an aggravation to the degenerative joint disease of the medial femoral condyle; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 11, 2012; and (3) the impairment rating (IR) is four percent.

The claimant appealed that portion of the hearing officer's extent-of-injury determination that was not favorable to her based on sufficiency of the evidence. Also, the claimant appealed the hearing officer's MMI and IR determinations. The respondent (carrier) responded, urging affirmance.

The hearing officer's determination that the compensable injury of [Date of Injury], extends to an aggravation to a right knee medial meniscus tear and an aggravation to an osteochondral lesion of the medial femoral condyle of the right leg was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant was working as a stocker when she fell on her right knee on [Date of Injury]. The parties stipulated that on [Date of Injury], the claimant sustained a compensable injury. At the CCH held on June 26, 2014, the carrier stated on the record that it has accepted a right knee contusion. The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. K) as the designated doctor for purposes of MMI, IR, return to work, and extent of injury.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [Date of Injury], does not extend to a left elbow medial epicondylitis, degenerative joint disease of the medial femoral condyle, aggravation to a left elbow medial epicondylitis, and an

aggravation to the degenerative joint disease of the medial femoral condyle is supported by sufficient evidence and is affirmed.

Section 401.011(26) defines “injury” in pertinent part to mean “damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm.” An injury includes the aggravation of a pre-existing condition or injury. See *Peterson v. Continental Cas. Co.*, 997 S.W.2d 893 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Section 401.011(10) defines “[c]ompensable injury” to mean “an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle [the 1989 Act].”

The hearing officer specifically found in an unappealed finding of fact that the claimant’s right knee had a medial meniscus tear and an osteochondral lesion on the date of her compensable injury, [Date of Injury], but those conditions were enhanced, accelerated or worsened by the work injury. However, the hearing officer determined that the compensable injury of [Date of Injury], does not extend to right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg. By definition the aggravation of the right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg, is an injury to the right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg.

In this case, given that the hearing officer determined that these pre-existing conditions were aggravated by the compensable injury of [Date of Injury], and that determination became final pursuant to Section 410.169, the compensable injury of [Date of Injury], includes a right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg. Accordingly, we reverse the hearing officer’s determination that the compensable injury of [Date of Injury], does not extend to a right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg and we render a new decision that the compensable injury of [Date of Injury], extends to a right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg.

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 reached MMI on October 11, 2012, with a four percent IR per Dr. K, the designated doctor. In evidence are two certifications of MMI/IR from Dr. K that certify that the claimant reached MMI on October 11, 2012, with a four percent IR. First, Dr. K examined the claimant July 17, 2013, and certified on that same date that the claimant reached MMI on October 11, 2012, and assessed a four percent IR based on range of motion (ROM) for the right knee. This certification of MMI/IR cannot be adopted because it only rates the right knee contusion injury. This certification does not consider or rate the entire injury which includes a right knee contusion, a right knee medial meniscus tear, an aggravation of a right knee medial meniscus tear, an osteochondral lesion of the medial femoral condyle of the right leg, and an aggravation to an osteochondral lesion of the medial femoral condyle of the right leg.

Second, Dr. K re-examined the claimant on February 10, 2014, and certified that the claimant reached MMI on October 11, 2012, with a four percent impairment based on ROM for the right knee. This certification of MMI/IR cannot be adopted because it only rates the right knee contusion. Again, this certification of MMI/IR does not rate the entire compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on October 11, 2012, with a four percent IR.

There are two other certifications of MMI/IR in evidence. One from (Dr. S), the post-designated doctor required medical evaluation (RME) doctor, and the other from Dr. K, the designated doctor.

Dr. S, the RME doctor, examined the claimant on October 4, 2013, and certified that the claimant reached MMI on October 11, 2012, with a zero percent IR. As the hearing officer correctly states in the Discussion portion of the Decision and Order, Dr. S's certification of MMI/IR cannot be adopted because it does not rate the entire compensable injury, it only rates a right knee contusion.

Dr. K re-examined the claimant on February 10, 2014, and provided an alternate certification of MMI/IR for the disputed extent-of-injury conditions. Dr. K certified on February 10, 2014, that the claimant reached MMI on September 3, 2013, with a one 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. K assessed a one percent whole person impairment (partial meniscectomy, Table 64, page 3/85) for the right meniscus tear. Dr. K assessed "no impairment" for the osteochondral lesion injury and determined that the left elbow epicondylitis injury had resolved. This

certification of MMI/IR cannot be adopted because it does not rate the entire compensable injury which includes a right knee contusion.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [Date of Injury], does not extend to a left elbow medial epicondylitis, degenerative joint disease of the medial femoral condyle, aggravation to a left elbow medial epicondylitis and an aggravation to the degenerative joint disease of the medial femoral condyle.

We reverse the hearing officer's determination that the compensable injury of [Date of Injury], does not extend to a right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg and we render a new decision that the compensable injury of [Date of Injury], extends to a right knee medial meniscus tear and osteochondral lesion of the medial femoral condyle of the right leg.

We reverse the hearing officer's determination that the claimant reached MMI on October 11, 2012, with a four percent IR and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K 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], extends to a right knee contusion, a right knee medial meniscus tear, an aggravation of a right knee medial meniscus tear, an osteochondral lesion of the medial femoral condyle of the right leg, and an aggravation to an osteochondral lesion of the medial femoral condyle of the right leg.

The hearing officer is to advise the designated doctor that the compensable injury of [Date of Injury], does not extend to a left elbow medial epicondylitis, degenerative joint disease of the medial femoral condyle, aggravation to a left elbow medial epicondylitis and an aggravation to the degenerative joint disease of the medial femoral condyle.

The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination.

The parties are to be provided the correspondence to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. The

hearing officer is then to make a determination on 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge