APPEAL NO. 141917
FILED NOVEMBER 4, 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 was held on July 21, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on July 1, 2013, and (2) the claimant's impairment rating (IR) is 10%. The claimant appealed the hearing officer's determinations on a sufficiency of the evidence point of error. The respondent (self-insured) responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on [Date of Injury], at least in the form of a left knee lateral and medial meniscus tear, left knee ACL tear, right knee medial meniscus tear, left wrist sprain/strain, and left rotator cuff tear. The claimant testified that she was injured while moving two 50-pound bags of sugar in a bucket. The bucket flipped over causing the claimant to fall to the floor and injure her left wrist, left rotator cuff, and both knees.

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 hearing officer rejected the MMI/IR certification of (Dr. N), the designated doctor appointed by the Division to determine MMI and IR, and adopted the MMI/IR certification of (Dr. K), the post-designated doctor required medical examination doctor. The hearing officer explained her rejection of Dr. N's MMI/IR certification in the Discussion portion of the decision as follows:

> On the [range of motion (ROM)] of the left and right knees, [Dr. N's] results were 10% and 35% [lower extremity (LE)] impairment, respectively. Although corrected through a letter of clarification [Dr. N] removed the valgus deformity ROM for the left knee but used the same ROM for the right knee that included the valgus deformity. . . . In summary, [Dr. N] assigned 20% [whole person impairment (WPI)]. [Dr. N's] certification is contrary to the preponderance of the evidence.

Dr. N initially examined the claimant on September 3, 2013, and certified that the claimant reached MMI on that same date with a 29% IR. Dr. N noted diagnoses of a right knee medial meniscus tear, left knee lateral and medial meniscus tear, left knee ACL tear, and left rotator cuff tear. 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. N assigned a 29% WPI. Dr. N assessed 4% WPI for the claimant's left shoulder based on ROM deficits of the left shoulder. Dr. N noted in her physican examination findings that the claimant's left knee angulated inward with 20° of valgus deformity, and that the right leg has 5° of valgus deformity. Using Table 41 Knee Impairments on page 3/78 of the AMA Guides, Dr. N assessed 35% LE impairment, which converts to 14% WPI, for the claimant's right knee "based on ROM deficits" of the right knee. Dr. N noted that for the left knee, "impairment is based on the valgus deformity of 20°, which puts the knee impairment into the severe category, based on alteration of motion," which results in 35% LE impairment under Table 41, and converts to 14% WPI.[1]

On January 9, 2014, a letter of clarification was sent to Dr. N requesting Dr. N to provide an amended report because: (1) the self-insured has not accepted a valgus deformity, and (2) the self-insured has accepted a left wrist sprain/strain as part of the compensable injury. Dr. N responded on January 13, 2014, and requested a re-examination to clarify the IR. Dr. N also stated that "[t]he valgus deformity is not a new diagnosis, but a physical finding that is occasionally used to determine IR in knees if it produces a problem with gait."

[1] We note that Dr. N inconsistently discusses both valgus deformity and varus deformity in the narrative report. However, using Dr. N's figures and Table 41, 20° of valgus deformity, not varus deformity, results in 35% LE impairment.

Dr. N re-examined the claimant on March 24, 2014, and certified that the claimant reached MMI on March 24, 2014, with a 20% IR. Dr. N noted diagnoses of a right knee medial meniscus tear, left knee lateral and medial meniscus tear, left knee ACL tear, left rotator cuff tear, and a left wrist injury accepted as sprain/strain.

Dr. N assessed 2% WPI[2] based on ROM deficits of the claimant's left wrist, and assessed 5% WPI based on ROM deficits of the claimant's left shoulder, for a combined upper extremity impairment of 7%.

Regarding the claimant's LE, Dr. N "observed [ROM] of the left knee and right knee that was performed with a goniometer by a certified technician. Based on these results, the [claimant] is assigned a 10% [and] 35% [LE] impairment, respectively." Dr. N assessed 10% LE for the claimant's **left knee** using Table 41 based on 89° of maximum flexion and 0° of maximum flexion contracture, which converts to 4% WPI. Although Dr. N noted that the claimant had 20° of valgus deformity in the left knee, Dr. N did not include valgus deformity in assessing the claimant's left knee impairment; rather, Dr. N based the 10% LE impairment on maximum flexion and maximum flexion contracture of the claimant's left knee. Dr. N also assessed 35% LE impairment for the claimant's **right knee** using Table 41 based on maximum flexion of 55° and 0° of maximum flexion contracture, which converts to 14% WPI. Although Dr. N noted that the claimant had 5° of valgus deformity in the right knee, Dr. N did not include valgus deformity in assessing the claimant's right knee impairment; rather, Dr. N based the 35% LE impairment on maximum flexion and maximum flexion contracture of the claimant's right knee.

Dr. N also noted that the AMA Guides do not allow an evaluator to combine ROM deficit with any disorder listed in Table 64 Impairment Estimates for Certain Lower Extremity Impairments on page 3/85, and therefore Dr. N did not award any impairment for the right and left knee meniscus tears because the impairment for ROM deficit of the right and left knee awarded the claimant with a higher impairment.

The self-insured argued that it has not accepted a valgus deformity, and Dr. N's amended MMI/IR certification could not be adopted because, although Dr. N correctly removed the valgus deformity ROM for the left knee, Dr. N used the same ROM for the right knee that included the valgus deformity. As noted above, Dr. N stated in both the September 3, 2013, and March 24, 2014, reports that the claimant's right knee had 5° of valgus deformity. However, it is clear from both reports that Dr. N based the 35% LE assessment of the claimant's right knee on 55° of maximum flexion under Table 41,

[2] We note that Dr. N mistakenly states in her narrative report that the ROM of the left wrist resulted in 5% impairment; however, Dr. N correctly notes later in the supplementation information portion of the report that the ROM measurements of the claimant's left wrist resulted in 2% WPI.

which converts to 14% WPI, and 0° of maximum flexion contracture under Table 41, which converts to 0% LE and WPI. Dr. N did not assess impairment based on valgus deformity of the claimant's right knee under Table 41. Furthermore, we note Table 41 states that ". . . 3° to 10° valgus is considered normal." Therefore, 5° valgus deformity does not result in any impairment under Table 41. Additionally, as discussed above Dr. N explained in the response to the letter for clarification that valgus deformity is not a diagnosis but a physical finding that is occasionally used to determine IR in knees if it produces a problem with gait.

By finding Dr. N's MMI/IR certification contrary to the preponderance of the evidence because she found that Dr. N included valgus deformity in the ROM of the claimant's right knee, the hearing officer has misread Dr. N's MMI/IR opinion. In Appeals Panel Decision (APD) 132062, decided November 8, 2013, the Appeals Panel reversed the hearing officer's MMI and IR determinations and remanded the issues of MMI and IR because he had misread the designated doctor's MMI/IR opinion. Although the hearing officer in this case could accept or reject in whole or in part the opinion of Dr. N, or any other evidence, the hearing officer misread Dr. N's MMI/IR opinion. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on July 1, 2013, with a 10% IR.

Including Dr. N's MMI/IR certification, there is more than one MMI/IR certification in evidence that can potentially be adopted. Since there is more than one certification of MMI and IR in evidence that can be adopted, we do not consider it appropriate to render a decision on the issues of MMI and IR, and we remand the issues of MMI and IR to the hearing officer to make a determination on the claimant's MMI and IR consistent with this decision.

REMAND INSTRUCTIONS

As discussed above, the parties have stipulated that the compensable injury includes a left knee lateral and medial meniscus tear, left knee ACL tear, right knee medial meniscus tear, left wrist sprain/strain, and left rotator cuff tear. On remand the hearing officer is to fully consider Dr. N's March 24, 2014, MMI/IR certification and give it proper weight. The hearing officer is to make a determination of MMI and IR based on 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 **HOUSTON INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

TERRY B. GRIER, SUPERINTENDENT
4400 WEST 18TH STREET
HOUSTON, TEXAS 77092.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge