APPEAL NO. 150224
FILED APRIL 9, 2015

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 October 8, 2014, with the record closing on January 9, 2015, in Austin, 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 bilateral knee medial meniscus tears, bilateral chondromalacia of patellofemoral joints, right knee chondromalacia of medial femoral condyle, and a right knee medial collateral ligament (MCL) tear; (2) the respondent (claimant) reached maximum medical improvement (MMI) on December 18, 2013; and (3) the claimant's impairment rating (IR) is 9%.

The appellant (carrier) appealed all of the hearing officer's determinations. The carrier contended that the claimant did not meet his burden of proof to establish causation between the compensable injury and the disputed conditions, and because the compensable injury does not extend to the disputed conditions, the hearing officer's MMI and IR determinations must be reversed. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on [Date of Injury]; (2) the carrier has accepted as compensable soft tissue injuries to the lumbar spine and the bilateral knees; and (3) the date of statutory MMI is December 31, 2013. The claimant testified that he was unloading his truck and had one foot on the bed of his truck and the other foot at the top of a four-foot dirt embankment. While the claimant was unloading his truck, another truck hit his truck. The claimant testified that he was thrown from his truck and fell approximately four feet to the ground, landing on his knees. The claimant testified that he has had three surgeries to his knees. In evidence are operative reports for all three surgeries. The first surgery, a partial medial meniscectomy to his left knee, was performed on June 13, 2012. The second surgery, a partial medial meniscectomy to his right knee, was performed on September 12, 2012. The third surgery, a chondroplasty to his right knee, was performed on May 22, 2013. We note that the hearing officer's discussion cites incorrect dates for the first two surgeries.

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. *See* 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).

The hearing officer determined that the compensable injury extends to bilateral knee medial meniscus tears, bilateral chondromalacia of patellofemoral joints, right knee chondromalacia of medial femoral condyle, and a right knee MCL tear. The hearing officer indicated in the Discussion portion of the decision and order that she relied upon an opinion by (Dr. R), the claimant's treating doctor.

In evidence is an undated letter from Dr. R in which he stated the following:

> It is my opinion that [the claimant's] ongoing symptoms are related to an aggravation of his underlying degenerative condition. He did have bilateral medial meniscus tears, and after surgical treatment he gradually has had some ongoing problems. Therefore, it would appear that the compensable injury did cause an aggravation or primary worsening of his condition.

Dr. R did not offer any explanation of how the compensable injury actually caused bilateral medial meniscus tears; rather, Dr. R merely stated that the claimant had bilateral medial meniscus tears. Although Dr. R stated that the claimant's ongoing symptoms are related to an aggravation of an underlying degenerative condition, and that surgical treatment resulted in gradual ongoing problems, Dr. R did not specify the degenerative conditions to which he was referring, did not refer to an MRI listing those conditions, or offer any explanation of how the compensable injury aggravated those conditions. Dr. R's opinion is insufficient to establish causation between the compensable injury and the disputed conditions.

Also, in evidence is a progress note from Dr. R dated January 27, 2012. Dr. R noted an impression of lumbar strain with evidence of pre-existing congenital spinal stenosis and torn medial menisci, right and left knee, with underlying unspecified degenerative changes in both knees. Dr. R did not explain how the compensable injury caused bilateral torn medial menisci, nor did Dr. R specify the degenerative changes in the knee or explain how the degenerative changes were aggravated by the compensable injury.

The record does not contain any other expert explanation of how the compensable injury caused bilateral knee medial meniscus tears, bilateral chondromalacia of patellofemoral joints, right knee chondromalacia of medial femoral condyle, and a right knee MCL tear.

However, there is a medical record in evidence from (Dr. A), a peer review doctor, who offers an opinion on the extent of the claimant's compensable injury. When asked to opine whether the compensable injury extends to the disputed conditions, Dr. A opined that the most medically probable compensable diagnoses are only bilateral knee contusions. Dr. A noted that there was insufficient objective evidence of an acute process leading to bilateral medial meniscus tears, and that the tears were likely degenerative. Dr. A also noted that the other conditions were degenerative in nature that were pre-existing and not caused by, temporarily exacerbated by, or permanently aggravated by the mechanism of injury.

Because the record does not contain any adequate expert causation explanation of how the compensable injury caused the disputed conditions, the hearing officer's determination that the compensable injury of [Date of Injury], extends to bilateral knee medial meniscus tears, bilateral chondromalacia of patellofemoral joints, right knee chondromalacia of medial femoral condyle, and a right knee MCL tear 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, and we render a new decision that the compensable injury of [Date of Injury], does not extend to bilateral knee medial meniscus tears, bilateral chondromalacia of patellofemoral joints, right knee chondromalacia of medial femoral condyle, and a right knee MCL tear.

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 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 determined that the claimant reached MMI on December 18, 2013, with a 9% IR as certified by (Dr. C), the designated doctor appointed by the Division to determine MMI and IR.

Dr. C initially examined the claimant on January 9, 2014, and certified that the claimant reached MMI on April 10, 2013, with a 13% IR. Dr. C noted in his narrative report diagnoses of a lumbar sprain/strain and bilateral knee sprain/strain. Regarding MMI, Dr. C opined that the claimant reached MMI on April 10, 2013, "[u]tilizing the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDG)]."

Dr. C subsequently examined the claimant on December 3, 2014, and certified that the claimant reached MMI on December 18, 2013, with a 9% IR. Dr. C noted in his narrative report diagnoses of a lumbar sprain/strain, bilateral knee sprain/strain, derangement of medial meniscus bilaterally, and contusion of bilateral knees. Regarding MMI, Dr. C opined that the claimant reached MMI on December 18, 2013, "[u]tilizing the [MDG]."

Dr. C based his determination of MMI solely on the MDG. The Appeals Panel has previously held that the MDG cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. *See* APD 130187, decided March 18, 2013, and APD 130191, decided March 13, 2013. Accordingly, the hearing officer's determination of MMI is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We therefore reverse the hearing officer's determination that the claimant reached MMI on December 18, 2013, with a 9% IR.

There are four other MMI/IR certifications in evidence. As noted above, Dr. C's initial certification that the claimant reached MMI on April 10, 2013, with a 13% IR is also based solely on the MDG. Therefore, Dr. C's initial certification cannot be adopted.

(Dr. F) examined the claimant on January 28, 2014, and certified that the claimant reached MMI statutorily on December 25, 2013, with a 13% IR. As mentioned above, the parties stipulated that the date of statutory MMI is December 31, 2013. We note that the Report of Medical Evaluation (DWC-69) indicates that Dr. F is the claimant's treating doctor, while the hearing officer noted in the Discussion portion of the decision and order that Dr. F is a doctor selected by the treating doctor. Dr. F noted diagnoses of right and left knee medial meniscus tears and a lumbar sprain/strain.

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. F placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category II: Minor Impairment for 5% impairment of the claimant's lumbar spine. Dr. F also assessed 8% whole person impairment (WPI) based on range of motion measurements taken of the claimant's left and right knees. Given that we have reversed the hearing officer's determination that the compensable injury does not extend to bilateral knee medial meniscus tear, bilateral chondromalacia of patellofemoral joints, right knee chondromalacia of medial femoral condyle, and a right knee MCL tear, Dr. F's MMI/IR certification considers and rates conditions that have been determined to not be part of the compensable injury. Accordingly, his MMI/IR certification cannot be adopted.

(Dr. D), the post-designated doctor required medical examination doctor, examined the claimant on July 31, 2014, and provided alternate certifications. In the first certification Dr. D certified that the claimant reached MMI on December 17, 2012, with a 2% IR based on diagnoses of a lumbar sprain, knee contusions, right and left knee medial meniscus tears, right and left knee chondromalacia patellofemoral joints, right knee chondromalacia of the medial femoral condyle, and right MCL tear. Dr. D placed the claimant in DRE Lumbosacral Category I: Complaints or Symptoms for 0% impairment of the claimant's lumbar spine, and assessed 0% impairment for bilateral knee contusions. Using Table 64, Impairment Estimates for Certain Lower Extremity Impairments, on page 3/85 of the AMA Guides, Dr. D assessed 2% impairment WPI based on right and left partial medial meniscectomies. However, given that we have reversed the hearing officer's determination that the compensable injury does not extend to bilateral knee medial meniscus tears, bilateral chondromalacia of patellofemoral joints, right knee chondromalacia of medial femoral condyle, and a right knee MCL tear, Dr. D's MMI/IR certification considers and rates conditions that have been determined to not be part of the compensable injury. Accordingly, his first MMI/IR certification cannot be adopted.

Dr. D also provided an alternate certification in which he certified that the claimant reached MMI on January 7, 2012, with a 0% IR. Dr. D noted that this certification is based on diagnoses of a lumbar sprain and soft tissue knee contusions. Dr. D placed the claimant in DRE Lumbosacral Category I: Complaints or Symptoms for 0% impairment of the claimant's lumbar spine, and assessed 0% impairment for soft tissue knee contusions. As noted above, the carrier has accepted soft tissue injuries to the lumbar spine and the bilateral knees. Dr. D's certification that the claimant reached MMI on January 7, 2012, with a 0% IR is the only certification in evidence that considers and rates the entire compensable injury, and the 0% IR assigned by Dr. D was made in

accordance with the AMA Guides. Accordingly, we render a new decision that the claimant reached MMI on January 7, 2012, with a 0% IR.

SUMMARY

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

We reverse the hearing officer's determinations that the claimant reached MMI on December 18, 2013, with a 9% IR, and we render a new decision that the claimant reached MMI on January 7, 2012, with a 0% IR.

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

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge