APPEAL NO. 150703
FILED MAY 18, 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 March 12, 2015, in Amarillo, 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 right knee horizontal tear of the medial meniscus; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); and (3) an impairment rating (IR) is not appropriate until the claimant reaches MMI. The appellant (carrier) appealed the hearing officer's extent of injury, MMI, and IR determinations based on sufficiency of the evidence. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

It is undisputed that the claimant sustained a compensable injury on [date of injury]. The claimant was employed as a hoof cutter at a slaughtering facility. The claimant testified that he sustained an injury to his right knee when a carcass on the assembly line struck him on the right knee twice. The claimant underwent arthroscopic surgery to his right knee on November 8, 2013. The operative report dated November 8, 2013, shows the post-operative diagnoses as an inflamed hypertrophied lateral plica and hemosiderin deposits laterally in the area of the lateral collateral ligament. The operative report also detailed that the medial compartment revealed no significant evidence of degenerative changes, minimal fraying was noted of the posterior horn of the medial meniscus, and that the anterior and posterior cruciate ligaments and lateral meniscus were intact.

The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. ER) as designated doctor to determine MMI and IR. Dr. ER examined the claimant on December 11, 2013, and certified on that same date that the claimant had not reached MMI, but would be expected to reach MMI on March 1, 2014. Dr. ER explained that the claimant was not at MMI because the claimant had just begun post-operative rehabilitation and his examination showed that the claimant's right knee had limited range of motion (ROM) and swelling secondary to his surgical procedure. The medical reports indicate that the claimant continued to complain of knee pain and a post-operative MRI of the right knee was requested. The medical reports in evidence indicate that a post-operative MRI of the right knee was performed on March 19, 2014,

which gave an impression of an incomplete horizontal tear along the inferior articular surface in the posterior horn of the medial meniscus.

In a medical report dated April 17, 2014, (Dr. B), a peer review doctor, stated that he reviewed the post-operative MRI on March 19, 2014, indicating the possibility of a new condition of a horizontal tear of the posterior horn of the medial meniscus. Dr. B opined that it is not credible that the claimant's surgeon would have found a meniscus tear at the time of arthroscopy and not documented and treated it. Dr. B opined that the diagnosis of meniscus tear is more likely than not to have occurred after his knee surgery in early November 2013, and before his knee MRI in March 19, 2014.

The Division appointed (Dr. JR) as the second designated doctor to determine MMI and IR. Dr. JR examined the claimant on July 3, 2014, and certified that the claimant reached MMI on January 29, 2014, with a two percent IR.

(Dr. RH), the post-designated doctor required medical examination doctor, examined the claimant on September 19, 2014. Specifically, Dr. RH was asked to opine whether there were any temporary or permanent restrictions for the claimant, and what further care, if any, would be reasonable and necessary per the Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute (ODG).

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 hearing officer determined that the claimant's compensable injury of [date of injury], extends to a right knee horizontal tear of the medial meniscus. The hearing officer's Finding of Fact No. 9 states:

> [Dr. RH] evaluated [the] [c]laimant on September 19, 2014, and found that [the] [c]laimant more likely than not sustained a right knee horizontal tear of the medial meniscus as shown on the March, 2014 MRI and that [the] [c]laimant would benefit from further treatment for his condition.

The hearing officer discusses in his decision that "[i]f [the] [c]laimant's injury was limited to a contusion of the right knee, then conservative care should have resulted in improvement of that condition. Yet, [the] [c]laimant very credibly testified that his right knee condition has not improved. This supports [Dr. RH's] opinion that the medial meniscus tear has been there all along and was overlooked during the arthroscopic examination."

In evidence is Dr. RH's letter dated September 19, 2014, in which he responds to the questions of whether there were any temporary or permanent restrictions for the claimant, and what further care, if any, would be reasonable and necessary per the ODG. Dr. RH responds in his letter that:

> Further care is reasonable, appropriate, and related to the [claimant's] injury of [date of injury]. In addition, the arthroscopic surgery has not been of benefit to the [claimant].
>
> With regard to the meniscal tear finding on the [post-operative] MRI of March 19, 2014, this incomplete tear may have been missed by [the surgeon] (even the very best arthroscopist available can occasionally miss an incomplete tear). . . . Similarly, even the best radiologist can over read an MRI occasionally such that an incomplete tear may not be present. It is more likely that an MRI in my opinion would be under read than over read, however.
>
> Therefore, to clear up this issue I would recommend another arthroscopic evaluation on [the claimant's] right knee.

Under the facts of this case, right knee horizontal tear of the medial meniscus is a condition that is a matter beyond common knowledge or experience and requires expert medical evidence. Dr. RH did not explain how the compensable injury of [date of injury], extends to a right knee horizontal tear of the medial meniscus tear. Dr. RH did not explain how the mechanism of injury caused a right knee horizontal tear of the medial meniscus tear. Rather Dr. RH opined that the surgeon and radiologist may have missed identifying a medial meniscus tear during surgery and diagnostic studies and recommended another arthroscopic evaluation on the claimant's right knee. The hearing officer's Finding of Fact No. 9 and decision is not supported by the evidence.

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 right knee horizontal tear of the medial 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 right knee horizontal tear of the medial meniscus and render a new decision that the compensable injury of [date of injury], does not extend to a right knee horizontal tear of the medial 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 an IR is not appropriate until the claimant reached MMI. The hearing officer's Finding of Fact No. 10 states:

> The preponderance of the evidence supports [Dr. RH's] opinion reflecting that [the] [c]laimant has not reached [MMI] due to the need for further treatment for his compensable injury.

The hearing officer based his MMI and IR determination on Dr. RH's letter dated September 19, 2014. However, as previously discussed above, Dr. RH recommended further care would be reasonable and necessary for the meniscal tear. Dr. RH did not opine on whether the claimant reached MMI or not. The hearing officer's Finding of Fact No. 10 and decision is not supported by the evidence.

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*, *supra*.

In applying this standard to the facts of this case, the hearing officer's determination that the claimant has not reached MMI, and an IR is not appropriate until

the claimant reaches MMI, based on Dr. RH's letter dated September 19, 2014, 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 claimant has not reached MMI, and an IR is not appropriate until the claimant reaches MMI.

There is one certification in evidence that certifies that the claimant has not reached MMI, and two other certifications that certify an MMI date of January 29, 2014. First, Dr. ER examined the claimant on December 11, 2013, and certified that the claimant had not reached MMI. Dr. ER opined that the claimant was not at MMI because the claimant had just begun rehabilitation, has limited ROM, and swelling secondary to his surgical procedure. Dr. ER's certification cannot be adopted because the medical evidence indicates that the claimant received treatment and had good ROM after Dr. ER's examination.

There are two other certifications in evidence with an MMI date of January 29, 2014. Dr. JR examined the claimant on July 3, 2014, and certified that the claimant reached MMI on January 29, 2014, with a two percent IR. Dr. JR states that January 29, 2014, was the last date of his physical therapy session, and had not progressed following medications, scoping of the knee, or physical therapy. (Dr. MH), the referral doctor, examined the claimant on August 18, 2014, and certified that the claimant reached MMI on January 29, 2014, with a zero percent. Dr. MH states that the physical therapy notes were not available to him, but he concurred with Dr. JR's notes.

The hearing officer states in the Discussion portion of his decision that the date of MMI of January 29, 2014, is incorrect, because the medical evidence shows that the claimant had physical therapy sessions and epidural steroid injections for his compensable injury, after January 29, 2014. *See* Section 401.011(30). Both Dr. JR's and Dr. MH's certifications that the claimant reached MMI on January 29, 2014, cannot be adopted because there is evidence of further material recovery from or lasting improvement to the claimant's injury, after January 29, 2014.

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 right knee horizontal tear of the medial meniscus and render a new decision that the compensable injury of [date of injury], does not extend to a right knee horizontal tear of the medial meniscus

We reverse the hearing officer's determination that the claimant has not reached MMI, and an IR is not appropriate until the claimant reaches MMI, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. JR is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. JR is still qualified and available to be the designated doctor. If Dr. JR 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 ensure that the designated doctor be forwarded the claimant's medical records that were not provided to the designated doctor, which include reports of physical therapy sessions and epidural steroid injections.

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], does not extend to a right knee horizontal tear of the medial meniscus, as administratively determined. The hearing officer is to request the designated doctor to rate the entire compensable injury in accordance with 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) considering the medical record and the certifying examination.

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 provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on the claimant's MMI and IR for the [date of injury], compensable injury.

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 **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 78701-3218.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge