

APPEAL NO. 161877
FILED NOVEMBER 2, 2016

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 April 18, 2016, with the record closing on August 3, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the (date of injury), compensable injury does not extend to right knee chondromalacia, arthritis or osteoarthritis, depression or anxiety and that the appellant (claimant) reached maximum medical improvement (MMI) on January 2, 2014, with an impairment rating (IR) of 1% as determined by (Dr. Eg), the Texas Department of Insurance, Division of Workers' Compensation (Division)-designated doctor.

The claimant appealed contending that the hearing officer's determinations are contrary to the preponderance of the evidence.

The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), in the form of at least a right knee strain, a right knee anterior cruciate ligament (ACL) tear and a right knee medial meniscus tear and that the statutory date of MMI is January 2, 2014.

The claimant testified that he was injured when he stepped into a hole causing him to fall onto his right knee. He has undergone three surgical procedures: a right knee arthroscopy with shaving chondroplasty of the patella on October 30, 2013; a partial medial meniscectomy of the right knee on September 9, 2014; and a right knee allograft transplant of patellar chondral defect on November 26, 2014.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to right knee chondromalacia, arthritis or osteoarthritis, depression or anxiety is supported by sufficient evidence and is affirmed.

MMI

The hearing officer's determination that the claimant reached MMI on January 2, 2014, as certified by Dr. Eg is supported by sufficient evidence and is affirmed.

IR

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.

Dr. Eg, the second designated doctor in the case, examined the claimant on October 1, 2015. In his Report of Medical Evaluation (DWC-69) dated November 24, 2015, Dr. Eg determined that the claimant reached MMI on January 2, 2014, and, using Table 64 on page 85 of 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. Eg assigned a lower extremity IR of 2% for the claimant's partial right medial meniscectomy for a whole person IR of 1%.

Following the CCH, the hearing officer issued a letter of clarification to Dr. Eg dated May 24, 2016, asking whether the doctor had considered the entire compensable injury of a right knee strain, a right knee anterior cruciate ligament tear and a right knee medial meniscus tear and requesting that Dr. Eg provide an explanation of his selection of January 2, 2014, as the MMI date. Dr. Eg responded to the hearing officer's request on June 6, 2016, explaining that the claimant's condition was not stable and continued to change subsequent to the date of statutory MMI, and it was for such reason that Dr. Eg found the claimant to have reached MMI on the statutory MMI date of January 2, 2014. With his response, Dr. Eg provided a DWC-69 dated June 6, 2016, certifying that the claimant reached MMI on January 2, 2014, and assigning a whole person IR of 2% comprised of a 2% lower extremity IR under Table 64 on page 85 of the AMA Guides for a partial medial meniscectomy together with a 3% lower extremity IR under Table 37, page 77 of the AMA Guides for leg muscle atrophy.

A second request for clarification was issued by the hearing officer on July 8, 2016, pointing out to Dr. Eg that the AMA Guides, on page 3/84, provide that:

[t]he evaluating physician must determine whether diagnostic or examination criteria best describe the impairment of a specific patient. The physician, in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part.

The hearing officer then requested that Dr. Eg “provide an [IR] that complies with the AMA Guides using only one method.” Dr. Eg responded to the hearing officer’s second request for clarification on July 26, 2016. In his response, Dr. Eg stated that:

on page 3/75 [of the AMA Guides] it clearly states “that in some instances a combination of two or three methods may be required.”

Dr. Eg further indicated that to rate the meniscectomy only using the diagnostic method does not accurately reflect the patient’s condition or impairment and that the combination of rating methods using diagnostic and examination criteria provides a more accurate IR for all the compensable conditions. Dr. Eg provided alternate DWC-69s dated July 26, 2016, one assigning a whole person IR of 1% comprised of a 2% lower extremity IR under Table 64 on page 85 of the AMA Guides for a partial medial meniscectomy, and the second assigning a whole person IR of 2% comprised of a 2% lower extremity IR under Table 64 on page 85 of the AMA Guides for a partial medial meniscectomy together with a 3% lower extremity IR under Table 37, page 77 of the AMA Guides for one centimeter of right calf atrophy. The hearing officer adopted the 1% IR assigned by Dr. Eg under Table 64 for the partial medial meniscectomy only.

The hearing officer erred in adopting Dr. Eg’s certification because the claimant’s partial medial meniscectomy was performed after the date of statutory MMI and therefore the assigned 1% IR under Table 64 on page 85 of the AMA Guides was not an assignment of IR based upon the claimant’s condition as of the MMI date as required by Rule 130.1(c)(3). For such reason, we reverse the hearing officer’s determination that the claimant’s IR is 1%.

There are numerous certifications of MMI/IR in evidence other than the certification adopted by the hearing officer, as discussed below.

(Dr. EI), the first designated doctor in the case, certified on June 18, 2012, that the claimant had not reached MMI on such date. We are unable to render a decision adopting this certification because the claimant reached MMI on January 2, 2014, the statutory date of MMI.

Dr. EI certified on March 10, 2014, that the claimant reached MMI on January 2, 2014, with a 5% IR comprised of a 1% IR for partial meniscectomy, a 3% IR for anxiety and depression and a 1% IR for chondroplasty. We are unable to render a decision

adopting this certification because Dr. El rated the claimant's post-MMI partial meniscectomy as well as conditions determined by the hearing officer not to be compensable.

(Dr. T), the claimant's treating doctor, certified on May 4, 2014, that the claimant had not reached MMI. We are unable to render a decision adopting this certification because Dr. T determined that the claimant was not at MMI on a date subsequent to the January 2, 2014, statutory date of MMI which we have affirmed as the correct date of MMI.

Dr. El certified on September 29, 2014, that the claimant reached MMI on January 2, 2014, with a 4% IR comprised of a 1% IR for a meniscal tear and a 3% IR for mild cruciate ligament laxity under Table 64 of the AMA Guides. We are unable to render a decision adopting this certification because Dr. El failed to include range of motion measurements which would support his assignment of a 1% IR for the claimant's torn meniscus or otherwise describe how 1% is the correct IR pursuant to the AMA Guides for a torn meniscus.

(Dr. Es), the carrier's choice of physician, certified on November 17, 2014, that the claimant had not reached MMI. We are unable to render a decision adopting this certification because Dr. Es determined that the claimant was not at MMI on a date subsequent to the January 2, 2014, statutory date of MMI which we have affirmed as the correct date of MMI.

Dr. El submitted three alternate certifications dated February 24, 2015. In the first, Dr. El certified that the claimant reached MMI on February 18, 2015, with a 2% IR for the right knee sprain/torn medical (sic) meniscus and torn ACL. We are unable to render a decision adopting this certification because Dr. El certified that the claimant reached MMI on a date subsequent to the statutory date of MMI. In his remaining two certifications, Dr. El determined that the claimant was not at MMI. We are unable to render a decision adopting either of these certifications because in each Dr. El determined that the claimant was not at MMI on a date subsequent to the January 2, 2014, statutory date of MMI which we have affirmed as the correct date of MMI.

In addition to the November 24, 2015, certification discussed above, Dr. Eg submitted two additional alternate certifications dated November 24, 2015. In each of these two additional certifications, Dr. Eg assigned IRs of 17%. We are unable to render a decision adopting either of these certifications because Dr. Eg rated conditions determined by the hearing officer not to be compensable. Neither are we able to adopt Dr. Eg's remaining certification dated November 24, 2015, because Dr. Eg rated the claimant's partial meniscectomy which was performed subsequent to the January 2, 2014, date of statutory MMI which we have affirmed as the correct date of MMI.

We are unable to render a decision adopting Dr. Eg's above described certification dated June 6, 2016, assigning an IR of 2% comprised of a 2% lower extremity IR under Table 64 on page 85 of the AMA Guides for a partial medial meniscectomy together with a 3% lower extremity IR under Table 37, page 77 of the AMA Guides for leg muscle atrophy because Dr. Eg rated the claimant's partial meniscectomy which was performed subsequent to the January 2, 2014, date of statutory MMI which we have affirmed as the correct date of MMI.

Finally, we are also unable to render a decision adopting Dr. Eg's above described certification dated July 26, 2016, and assigning an IR of 2% comprised of a 2% lower extremity IR under Table 64 on page 85 of the AMA Guides for a partial medial meniscectomy together with a 3% lower extremity IR under Table 37, page 77 of the AMA Guides for leg muscle atrophy because Dr. Eg rated the claimant's partial meniscectomy which was performed subsequent to the January 2, 2014, date of statutory MMI which we have affirmed as the correct date of MMI. Accordingly, because we are unable to render a decision adopting another IR in evidence, the issue of IR is remanded 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 right knee chondromalacia, arthritis or osteoarthritis, depression or anxiety.

We affirm the hearing officer's determination that the claimant reached MMI on January 2, 2014.

We reverse the hearing officer's determination that the claimant's IR is 1% and remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. Eg is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. Eg is still qualified and available to be the designated doctor. If Dr. Eg is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's IR for the (date of injury), compensable injury.

In either case, the hearing officer is to advise the designated doctor that the date of MMI is January 2, 2014, and request that the designated doctor assign an IR as of the date of MMI in accordance with Rule 130.1(c)(3) and the AMA Guides for the

accepted conditions of a right knee strain, a right knee anterior cruciate ligament tear and a right knee medial meniscus tear. The hearing officer should further instruct the designated doctor that assignment of an IR for the claimant's partial medial meniscectomy is not appropriate as that surgical procedure was performed subsequent to the date of MMI.

The parties are to be provided with the designated doctor's new IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on IR consistent with the evidence and 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 **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** 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.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge