APPEAL NO. 100760
FILED AUGUST 20, 2010

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 May 12, 2010. The hearing officer resolved the disputed issues by determining that: (1) the compensable injury sustained on _____, extends to a right shoulder rotator cuff tear and the initial and recurrent medial and lateral meniscal tears to the left knee; (2) the respondent (claimant) reached maximum medical improvement (MMI) on May 3, 2010; and (3) the claimant's impairment rating (IR) is 12%. The hearing officer adopted the certification of MMI/IR of the claimant's treating surgeon, (Dr. K).

The appellant (carrier) appealed the hearing officer's extent of injury, MMI, and IR determinations, arguing that the designated doctor's opinion on extent of injury, MMI, and IR should have been given presumptive weight and adopted by the hearing officer. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that the claimant sustained a right shoulder and left knee injury after tripping and falling to the ground. It is undisputed that the claimant had right shoulder surgery on April 22, 2009, and two surgeries on her left knee, the first on November 12, 2008, and the second on November 18, 2009.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury sustained on _____, extends to a right shoulder rotator cuff tear and the initial and recurrent medial and lateral meniscal tears to the left knee is supported by sufficient evidence and is affirmed.

MMI AND IR

The Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. D) as the designated doctor to determine the extent of injury, MMI, and IR. Dr. D initially examined the claimant on September 9, 2009. Dr. D provided alternative ratings and Reports of Medical Evaluation (DWC-69) on the compensable injury and the disputed extent-of-injury conditions.

Based on the diagnoses of right shoulder sprain/strain and left knee contusion/strain, Dr. D certified that the claimant reached MMI on July 15, 2008, with no permanent impairment as a result of the compensable injury.

In the alternative, based on the compensable injury including the diagnoses of right shoulder rotator cuff tear and left knee medial and lateral meniscal tears, Dr. D certified that the claimant reached MMI on September 9, 2009, with a 7% 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), Dr. D assigned a 7% IR based on combining a 3% whole person impairment for abnormal range of motion of the right shoulder with a 4% whole person impairment for the left knee (referencing Table 64, Impairment Estimates for Certain Lower Extremity Impairments, page 3/85 for a medial and lateral partial meniscectomy).

The Division sent a letter of clarification dated January 7, 2010, to Dr. D, advising him of the claimant's second surgery to her left knee, attaching the operative report and requesting an opinion as to any changes to his prior opinion determined on September 9, 2009.

Dr. D re-examined the claimant on January 12, 2010. In a narrative report dated the same date and with alternative DWC-69s, Dr. D opined that the compensable injury only extends to a right shoulder sprain/strain and left knee contusion/strain; however, Dr. D provided alternate ratings based on whether or not the compensable injury included the claimed extent-of-injury diagnoses of right shoulder rotator cuff tear and left knee medial and lateral meniscal tears. Dr. D maintained his opinion that the claimant reached MMI on July 15, 2008, with no permanent impairment resulting from the compensable injury if the compensable injury did not include the claimed extent-of-injury conditions or that the claimant reached MMI on September 9, 2009, with a 7% IR if the compensable injury included a right shoulder rotator cuff tear and left knee medial and lateral meniscal tears.

28 TEX. ADMIN. CODE § 130.6(b)(5) (Rule 130.6(b)(5)) provides that:

> When the extent of the injury may not be agreed upon by the parties (based upon documentation provided by the treating doctor and/or insurance carrier or the comments of the employee regarding his/her injury), the designated doctor shall provide multiple certifications of MMI and [IRs] that take into account the various interpretations of the extent of the injury so that when the Division resolves the dispute, there is already an applicable certification of MMI and [IR] from which to pay benefits as required by the Act.

The Appeals Panel has held that the resolution of a dispute over an IR cannot proceed unless the "threshold" issue of extent of injury is resolved either by the parties or by the hearing officer. *See* Appeals Panel Decision 090639, decided July 3, 2009.

In the instant case, the designated doctor based his opinion on the extent of the compensable injury on a description of mechanism of injury, tripping and slamming the body onto the pavement. The hearing officer determined a different version of

mechanism of injury that was consistent with her determination on extent of injury to include the right shoulder rotator cuff tear and the initial and recurrent lateral and medial meniscal tears of the left knee, stating in her Background Information that the claimant "tripped over a nail and as she was falling, her left knee twisted . . . as she was falling forward, she put her right arm out . . . ." *See* Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995), stating that expert evidence based upon inaccurate underlying facts cannot support a determination.

Pursuant to Rule 130.6(b)(5) although the extent of injury had not yet been resolved by agreement or determination of the hearing officer, the designated doctor provided alternative ratings that both included and excluded the claimed extent-of-injury conditions of right shoulder rotator cuff tear and lateral and meniscal tears to the left knee.

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. 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.

Although the determination of the extent of the compensable injury by the hearing officer and conflicting medical evidence linking the claimed conditions to the compensable injury constitutes a preponderance of the other medical evidence contrary to Dr. D's initial rating, it does not constitute a preponderance of the other medical evidence contrary to Dr. D's alternative rating, in which he rated the entire compensable injury including the disputed extent-of-injury conditions, and in which he considered the second left knee surgery performed after his initial certifying exam.

Therefore, the hearing officer erred in failing to give presumptive weight to the designated doctor's alternative certification of MMI on September 9, 2009, with a 7% IR and in adopting the certification of MMI and assigned rating of the treating surgeon, Dr. K. Additionally, we further note that the IR assigned by Dr. K cannot be adopted because Dr. K failed to correctly rate the impairment for abnormal flexion of the right shoulder (for a flexion of 98º he assigned 6% rather than 5% as shown in Figure 38, page 3/43) and failed to provide any analysis or explanation of the criteria for assigning a 2% whole person impairment for the left knee. *See* Rule 130.1(c)(3).

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). Accordingly, we hold the hearing officer's determination that the claimant reached MMI on May 3, 2010, with a 12% IR as certified by Dr. K to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

We reverse the hearing officer's determination that the claimant reached MMI on May 3, 2010, as certified by Dr. K, and we render a new decision that the claimant reached MMI on September 9, 2009, as certified by the designated doctor. We reverse the hearing officer's determination that the claimant's IR is 12%, as assigned by Dr. K and we render a new decision that the claimant's IR is 7% as assigned by the designated doctor.

SUMMARY

We affirm the hearing officer's decision that the compensable injury sustained on _____, extends to a right shoulder rotator cuff tear and the initial and recurrent medial and lateral meniscal tears to the left knee.

We reverse the hearing officer's decision that the claimant reached MMI on May 3, 2010, and we render a new decision that the claimant reached MMI on September 9, 2009.

We reverse the hearing officer's decision that the claimant's IR is 12% and we render a new decision that the claimant's IR is 7%.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE 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.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge