APPEAL NO. 130191
FILED MARCH 13, 2013

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 December 4, 2012, in [City], 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], does not extend to a right knee injury; (2) the appellant (claimant) reached maximum medical improvement (MMI) on May 16, 2011; and (3) the claimant's impairment rating (IR) is three percent. The claimant appealed, disputing the hearing officer's determination that the compensable injury does not extend to the right knee injury as well as the date of MMI and IR. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that she was injured when carrying items through a door when she collided with a coworker. The claimant initially reported a left ankle and left knee pain.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to an injury to the right knee is supported by sufficient evidence and is affirmed.

MMI/IR

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) (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. M] was initially appointed as the designated doctor by the Division for the purpose of MMI/IR. Dr. M examined the claimant on August 31, 2011, and certified that the claimant reached MMI on May 16, 2011, with a three percent 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) (AMA Guides). Dr. M determined the date of MMI using the Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the [MDA]. Dr. M stated in his opinion that the claimant's job classification was heavy-duty and he looked at the maximum duration in days for a knee and ankle sprain for the claimant to return to work in determining the date of MMI. The medical records reflect that the claimant was referred for additional physical therapy for her left knee on June 29, 2011, and had injections in her left knee on August 10, 2011, and September 27, 2011. The IR was based on loss of range of motion (ROM) of the left ankle, noting no loss of ROM for the left knee. Dr. M opined that the claimant should have been off work until March 10, 2011.

The claimant had arthroscopic surgery to her left knee on January 5, 2012. An order for designated doctor examination was sent on March 1, 2012, noting the surgery of January 5, 2012. [Dr. R] was then appointed as the designated doctor for MMI/IR. Dr. R examined the claimant on April 2, 2012, and using the AMA Guides certified that the claimant reached MMI on May 16, 2011, with a three percent IR. Dr. R noted that the claimant sustained a sprain of the left knee and ankle and "because of that the [MMI] date that Dr. [M] assigned of May 16, 2011, is satisfactory, and I cannot refute that." Dr. R took ROM measurements for the left ankle and left knee. Dr. R assessed zero percent impairment for the left knee and three percent for the left ankle. Dr. R gave the following measurements for the left ankle: dorsiflexion 5 degrees; plantar flexion 40 degrees, inversion 20 degrees, and eversion 10 degrees. In his narrative report Dr. R notes zero percent impairment for these measurements citing Tables 42 and 43, on page 3/78 of the AMA Guides but then concludes that "[a] full physical examination with [ROM] was performed and resulted in [three percent] impairment. Dr. [M] assigned an [IR] of [three percent] whole person [(WP)] impairment on August 31, 2011, for the lack of [ROM] performed on that date. It is my opinion that [three percent] impairment is the proper rating for this [claimant]."

Using Table 42 of the AMA Guides 5 degrees of dorsiflexion would result in three percent WP impairment. Using Table 43 of the AMA Guides, 20 degrees of inversion would result in one percent WP impairment and 10 degrees of eversion would result in

one percent WP impairment. We note that the ROM measurements Dr. R took during his certifying examination would not result in three or zero percent IR.

We note that there are no specific directions in the AMA Guides which prohibit addressing loss of motion in the different directions of motions or vectors of motion in assessing impairment for a single joint. There is no specific provision in the AMA Guides in the Lower Extremity section that restricts ROM deficits in multiple directions increasing the impairment for a single joint. *See* Appeals Panel Decision (APD) 110741, decided July 25, 2011.

MMI is defined in Section 401.011(30) as follows: MMI means the earlier of (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104 (MMI after spinal surgery). Dr. R specifically relied on the date of MMI determined by Dr. M. Dr. M determined the date of MMI not by specifically considering the claimant's physical examination and medical records but simply applied based on his opinion of the claimant's job classification the maximum number of days which someone with a knee and ankle sprain should have been able to return to work as provided in the MDA. Neither Dr. M nor Dr. R based the certified date of MMI on the claimant's physical examination and medical records. 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 reverse the hearing officer's determination that the claimant reached MMI on May 16, 2011.

As previously noted, Dr. R documented his ROM measurements of the claimant's left knee and ankle. Dr. R's narrative was inconsistent because Dr. R noted that zero percent impairment would result from each of the measurements taken, but then concluded that a full physical examination with ROM was performed as resulted in three percent impairment. Further, the MMI date as previously noted was reversed. Accordingly, the hearing officer's determination of IR is 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's IR is three percent.

The only other certification in evidence was from [Dr. H], a doctor selected by the treating doctor to act in his place. Dr. H examined the claimant on July 17, 2012, and certified that the claimant was not at MMI. However, Dr. H considered the right knee which the hearing officer determined was not part of the compensable injury. The hearing officer's determination that the compensable injury did not extend to an injury of

the right knee was affirmed. Accordingly, the certification of MMI and IR from Dr. H cannot be adopted.

Because there is no certification of MMI/IR in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to a right knee injury.

We reverse the hearing officer's determinations that the claimant reached MMI on May 16, 2011, with a three percent IR and remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. R is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. R is still qualified and available to be the designated doctor. If Dr. R 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 compensable injury of [date of injury].

The hearing officer is to advise the designated doctor that the compensable injury of [date of injury], includes a left ankle sprain and a left knee sprain. Further, the hearing officer is to advise the designated doctor that it has also been administratively determined that the compensable injury of [date of injury], does not include a right knee injury.

The certification of MMI can be no later than the statutory date of MMI. 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 and not solely on the date the MDA states the claimant could return to work.

The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical record 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 allowed an opportunity to respond. The hearing officer is to determine the issues of MMI and IR consistent with 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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Carisa Space-Beam
Appeals Judge