APPEAL NO. 131087
FILED JULY 3, 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 January 30, 2013, and concluded on April 2, 2013, 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 left lateral meniscus tear; disc bulges at L3-4, L4-5, and L5-S1; or lumbar radiculopathy (added by the agreement of the parties); (2) the appellant (claimant) reached maximum medical improvement (MMI) on May 3, 2012; and (3) the claimant's impairment rating (IR) is zero percent. The claimant appealed all of the hearing officer's determinations. The respondent (self-insured) 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], that includes a lumbar sprain/strain and a left knee sprain/strain, and that [Dr. H] is the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for MMI and IR.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of [date of injury], does not extend to a left lateral meniscus tear; disc bulges at L3-4, L4-5, and L5-S1; or lumbar radiculopathy is supported by sufficient evidence and is affirmed.

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 the claimant reached MMI on May 3, 2012, with a zero percent IR per [Dr. O], the post-designated doctor required medical examination doctor.

Dr. O examined the claimant on August 31, 2012. In a Report of Medical Evaluation (DWC-69) and narrative report dated September 4, 2012, Dr. O certified that the claimant reached clinical MMI on May 3, 2012, with a zero percent IR. Regarding the claimant's MMI, Dr. O stated that:

Based on the [Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDA)], page 1315, the duration of days for a lumbar sprain which would be her diagnosis on a medium job classification would be 56 days maximum. . . . That would put [the claimant] at MMI as of [May 3, 2012]. . . . In the [MDA] for knee sprain, her other diagnosis, shows on page 2027 that duration of days maximum for a medium job classification for a knee sprain is 21 days.

Dr. O placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms, for zero percent impairment, and assigned a zero percent IR for the left knee based on range of motion measurements.

Dr. O's certification that the claimant reached MMI on May 3, 2012, with a zero percent IR cannot be adopted. The Appeals Panel has previously held that the MDA cannot be used alone, without considering the claimant's physical examination and medical records, in determining a claimant's date of MMI. *See* Appeals Panel Decision (APD) 130191, decided March 13, 2013, and APD 130187, decided March 18, 2013. As Dr. O based his date of MMI on the MDA without considering the claimant's physical examination and medical records, his MMI/IR certification cannot be adopted. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on May 3, 2012, with a zero percent IR.

There are two other certifications in evidence. The first is from Dr. H, the designated doctor appointed to determine MMI and IR. Dr. H examined the claimant on May 25, 2012, and in a DWC-69 and narrative report dated June 6, 2012, certified that the claimant reached clinical MMI on April 12, 2012, with a six percent IR. Dr. H placed

the claimant in DRE Thoracolumbar Category I: Complaints or Symptoms for zero percent, and DRE Lumbosacral Category II: Minor Impairment for five percent.

Dr. H also assigned a three percent lower extremity impairment for a medial or lateral meniscectomy under Table 64, page 3/85 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), which converts to a one percent whole person impairment. However, the claimant testified that she has never received surgery for the [date of injury], compensable injury. In Finding of Fact No. 5 the hearing officer found "[i]n assigning his [IR] [Dr. H] assigned a [one percent] for a left knee meniscectomy. The claimant, however, did not have a left knee meniscectomy for the compensable injury." The hearing officer's finding is supported by the evidence. Accordingly, Dr. H's MMI/IR certification cannot be adopted because Dr. H rated a condition that the claimant did not have.

The other certification in evidence is from [Dr. S], the claimant's treating doctor. Dr. S examined the claimant on July 3, 2012, and in a DWC-69 and narrative report dated that same date certified that the claimant has not yet reached MMI but is expected to do so on or about October 3, 2012. However, as noted in his narrative report, Dr. S considered a left knee medial meniscal tear in his MMI determination. As previously noted, the extent-of-injury issue added by the hearing officer, as agreed to by the parties, reads "[d]oes the compensable injury of [date of injury], include a left lateral meniscus tear; disc bulges at L3-4, L4-5, and L5-S1; and lumbar radiculopathy?" After clarification by the hearing officer regarding the meniscus tear, the parties agreed that the extent-of-injury issue should include a left lateral meniscus tear, not a left medial meniscus tear. The parties did not litigate a left medial meniscus tear at the hearing. Dr. S's certification that the claimant has not reached MMI is based on a condition not considered part of the compensable injury, and as such it cannot be adopted. *See* APD 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

Since there are no other MMI/IR certifications 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 of [date of injury], does not extend to a left lateral meniscus tear; disc bulges at L3-4, L4-5, and L5-S1; or lumbar radiculopathy.

We reverse the hearing officer's determinations that the claimant reached MMI on May 3, 2012, with a zero percent IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H 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 advise the designated doctor that the compensable injury of [date of injury], includes a lumbar sprain/strain and a left knee sprain/strain. The hearing officer is also to advise the designated doctor that the [date of injury], compensable injury does not extend to a left lateral meniscus tear; disc bulges at L3-4, L4-5, and L5-S1; or lumbar radiculopathy. The hearing officer is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination.

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 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 **(a certified self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
[ADDRESS]
[CITY], TEXAS [ZIP CODE].

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge