APPEAL NO. 131674
FILED SEPTEMBER 11, 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 (CCH) was held on June 10, 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 post-traumatic arthritis of the left knee; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) does not have jurisdiction to again consider whether the compensable injury of [date of injury], extends to post-traumatic arthritis of the left knee; (3) the date of maximum medical improvement (MMI) is June 23, 2011; and (4) the appellant's (claimant) impairment rating (IR) is 4%.

The claimant appealed all of the hearing officer's determinations. The claimant contends in his appeal that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The claimant also specifically contends that the hearing officer erred in basing his determination that the claimant reached MMI on June 23, 2011, with a 4% IR on [Dr. F] MMI/IR certification because the hearing officer previously decided in a Decision and Order dated December 1, 2011, that the claimant had not reached MMI. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated at the CCH that the claimant sustained a compensable injury on [date of injury]. There was no stipulation by the parties as to what conditions comprise the compensable injury, although in evidence is a Request for Designated Doctor Examination (DWC-32) dated April 2, 2012, submitted by the carrier that states the injuries determined to be compensable by the Division or accepted as compensable by the carrier is a "left knee strain/sprain/contusion." The claimant testified he was struck on the left knee and back by an unsecured steel concrete chute.

EXTENT OF INJURY AND JURISDICTION OVER THE EXTENT-OF-INJURY DETERMINATION

The hearing officer's determinations that the compensable injury does not extend to post-traumatic arthritis of the left knee and that the Division does not have jurisdiction to again consider whether the compensable injury extends to post-traumatic arthritis of the left knee are supported by sufficient evidence and are 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.

The hearing officer determined that the claimant reached MMI on June 23, 2011, with a 4% IR based on the certification of Dr. F, the post-designated doctor required medical examination doctor.

In a previous CCH held on November 29, 2011, the issues to be decided were MMI, IR, and disability. In a Decision and Order dated December 1, 2011, the hearing officer found in Finding of Fact No. 5 that "[o]n July 7, 2011 [the] [c]laimant's treating doctor [Dr. B], MD, stated that [the] [c]laimant has not reached [MMI] because he is a surgical candidate." The hearing officer determined that the claimant had not reached MMI and therefore IR could not yet be determined, and that the claimant had disability from June 23, 2011, to the date of the November 29, 2011, CCH resulting from the [date of injury], compensable injury. We note that there was no extent-of-injury dispute before the hearing officer at the November 29, 2011, CCH, and that the decision and order does not contain a stipulation from the parties regarding what conditions comprise the [date of injury], compensable injury. The carrier appealed the hearing officer's determinations; however, the Appeals Panel did not issue a written decision after the response was filed with the Division; therefore, the hearing officer's decision of December 1, 2011, constitutes the decision of the Appeals Panel. *See* 28 TEX. ADMIN. CODE § 143.5(b) (Rule 143.5(b)).

The claimant contended at the CCH and on appeal that the June 23, 2011, date of MMI cannot be adopted because the hearing officer previously determined in the decision dated December 1, 2011, referenced above that the claimant had not reached MMI. Under the facts of this case we agree. The issue of MMI was previously litigated on November 29, 2011, and a decision was rendered on December 1, 2011, that the claimant has not reached MMI. The hearing officer specifically found in Finding of Fact

No. 5 in that decision that on July 7, 2011, Dr. B stated the claimant has not reached MMI because he is a surgical candidate, and as discussed above that finding of fact has become final. Any date prior to July 7, 2011, is included in the December 1, 2011, determination that the claimant had not reached MMI. Therefore, a date of MMI that is prior to July 7, 2011, cannot be adopted. Accordingly, we reverse the hearing officer's determinations that the date of MMI is June 23, 2011, and that the claimant's IR is 4%.

The record contains multiple MMI/IR certifications. The first is from [Dr. S], the designated doctor appointed by the Division to determine in part MMI and IR. Dr. S initially examined the claimant on March 29, 2011, and certified that the claimant had not reached MMI but was expected to do so on or about September 11, 2012. Dr. S next examined the claimant on June 23, 2011, and certified that the claimant reached MMI on June 23, 2011, with a 17% IR based on 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). However, this certification cannot be adopted for the same reason Dr. F's MMI/IR certification could not be adopted; that is, Dr. S certified that the claimant reached MMI on a date prior to July 7, 2011.

Dr. S examined the claimant a third time on May 11, 2012, and certified that the claimant reached MMI on May 11, 2012, with a 30% IR. The hearing officer found the following in his decision:

Finding of Fact No. 4: [Dr. S'] determination of [the] [c]laimant's [IR] was based upon a total knee replacement and the results of that surgery.

Finding of Fact No. 5: [The] [c]laimant underwent the total knee replacement for the treatment of osteoarthritis of the left knee.

Finding of Fact No. 6: In a Decision and Order dated March 23, 2012, the Division held that [the] [c]laimant's osteoarthritis of the left knee was not part of the compensable injury.

Finding of Fact No. 7: The Decision and Order of March 23, 2012, was not appealed and that decision became final by operation of law.

The hearing officer's Findings of Fact Nos. 4, 5, 6, and 7 are supported by sufficient evidence. Accordingly, Dr. S' MMI/IR certification that the claimant reached MMI on May 5, 2012, with a 30% IR considers and rates a condition determined not to be a part of the compensable injury; that is, osteoarthritis of the left knee, and as such it cannot be adopted. *See* Appeals Panel Decision (APD) 110463, decided June 13, 2011; and APD 101567, decided December 20, 2010.

The final MMI/IR certification in evidence is from [Dr. M], a doctor selected by the treating doctor to act in place of the treating doctor. Dr. M examined the claimant on April 3, 2012, and certified that the claimant reached MMI on April 3, 2012, with a 20% IR. However, Dr. M explains in his narrative report that his 20% IR includes a 50% impairment for a "[t]otal knee replacement including unicondylar replacement, [f]air result, 50 to 84 points yielding a 50% impairment." Dr. M's MMI/IR certification considers and rates a condition determined not to be a part of the compensable injury and as such it cannot be adopted. APD 110463, *supra*; and APD 101567, *supra*.

As there is no MMI/IR certification 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 post-traumatic arthritis of the left knee.

We affirm the hearing officer's determination that the Division does not have jurisdiction to again consider whether the compensable injury of [date of injury], extends to post-traumatic arthritis of the left knee.

We reverse the hearing officer's determinations that the date of MMI is June 23, 2011, and that the claimant's IR is 4%, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S 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 take stipulations from the parties as to what conditions comprise the [date of injury], compensable injury. If the parties are not willing to make stipulations regarding the extent of the compensable injury, the hearing officer is to make a determination on the extent of the [date of injury], compensable injury, considering the evidence, including the April 2, 2012, DWC-32 submitted by the carrier. The hearing officer is also to take a stipulation from the parties on the date of statutory MMI.

Once the hearing officer makes a determination of the extent of the [date of injury], compensable injury, the hearing officer is to advise the designated doctor what conditions are included in the [date of injury], compensable injury. The hearing officer is also to advise the designated doctor that the compensable injury does not extend to osteoarthritis or post-traumatic arthritis of the left knee as administratively determined. The hearing officer is further to advise the designated doctor the date of statutory MMI.

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 date of MMI cannot be prior to July 7, 2011, or after the date of statutory MMI.

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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge