APPEAL NO. 132288
FILED NOVEMBER 27, 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 May 22, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the [date of injury], compensable injury does not extend to a right knee partially torn ACL, partially torn PCL, partially torn lateral meniscus, complete 3 compartment synovitis, and adhesions; (2) the [date of injury], compensable injury does extend to Grade III chondromalacia of the medial femoral condyle and a partially torn medial meniscus of the right knee; (3) the appellant (claimant) reached maximum medical improvement (MMI) on November 4, 2011; and (4) the claimant's impairment rating (IR) is 6%.

The claimant appealed, disputing the hearing officer's determinations regarding MMI and IR. The claimant contended on appeal that he had not reached MMI because he had another surgery on July 17, 2012, to his right knee. The respondent (carrier) responded, urging affirmance of the determinations. The hearing officer's determination that the [date of injury], compensable injury does not extend to a right knee partially torn ACL, partially torn PCL, partially torn lateral meniscus, complete 3 compartment synovitis, and adhesions, but does extend to Grade III chondromalacia of the medial femoral condyle and a partially torn medial meniscus of the right knee were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that: the Texas Department of Insurance, Division of Workers' Compensation (Division) selected [Dr. A] as its designated doctor with regard to MMI and IR; Dr. A certified that the claimant reached MMI on November 4, 2011, with a 3% IR; and the compensable injury of [date of injury], extends to a partially torn medial meniscus of the right knee. The claimant testified that he injured his right knee when he slipped off a ladder at work. He jumped off the ladder, landed on his feet, and felt a pop and pain in his knee. The claimant underwent surgery on August 4, 2011, in the form of a right knee arthroscopy with major synovectomy and partial medial meniscectomy. He had a second surgery on July 17, 2012, consisting of an ACL repair, PCL repair, partial medial and lateral meniscectomy, complete synovectomy, abrasion arthroplasty of the medial femoral condyle, removal of adhesions, and instillation of platelet-rich plasma. As noted above, the hearing officer's determination that the [date of injury], compensable injury does not extend to a right knee partially torn ACL, partially torn

PCL, partially torn lateral meniscus, complete 3 compartment synovitis, and adhesions has become final.

MMI

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.

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held "it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition, where, as here, the recovery and improvement could reasonably be anticipated according to the designated doctor." *See also* APD 101746, decided January 24, 2011; APD 101567, decided December 20, 2010.

Dr. A first examined the claimant on October 27, 2011, and determined that the claimant had not reached MMI. In a narrative report of the same date, Dr. A explained that the claimant was not yet better and needed to finish therapy. He additionally speculated that there may be something more wrong with his right knee. Dr. A re-examined the claimant on April 9, 2012, and determined that he reached MMI on November 4, 2011, with a 3% IR. When discussing the MMI date, Dr. A states that the claimant reached MMI three months post-surgically, however, he fails to discuss the claimant's second surgery on July 17, 2012. As noted in the operative report, one of the procedures that the claimant underwent on this date was a partial medial meniscectomy, and as discussed above, the parties stipulated at the hearing that the compensable injury extends to a partially torn medial meniscus of the right knee. Therefore, we reverse the hearing officer's determination that the claimant reached MMI on November 4, 2011, and remand the issue back to the hearing officer for further action consistent with this decision.

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.

Regarding IR, Dr. A initially determined in his April 9, 2012, report that the claimant had a 3% IR. The IR was based on a 0% impairment for range of motion (ROM) of the right knee, a 2% lower extremity impairment for the partial meniscectomy of the right medial meniscus, and a 5% lower extremity impairment for joint crepitation, based on the footnote on Table 62, page 3/83 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).

The hearing officer sent Dr. A a letter of clarification (LOC) on June 3, 2013, informing him that the compensable injury includes Grade III chondromalacia of the medial femoral condyle and does not include a right knee partially torn ACL, partially torn PCL, partially torn lateral meniscus, complete 3 compartment synovitis, and adhesions. The hearing officer asked Dr. A to provide alternate certifications based on these conditions. In his response dated June 11, 2013, Dr. A explained that he ordered x-rays of the bilateral knees to determine the IR for the chondromalacia. Based on Table 62, page 3/83 of the AMA Guides, he assigned a lower extremity impairment of 0% based on this condition. Combined with the right medial meniscus tear with crepitation, he again assigned a 3% IR for the compensable injury.

Dr. A also included an alternate certification based on the non-compensable conditions. He assigned a 0% for the partially torn ACL and PCL, a 0% for the complete 3 compartment synovitis and adhesions, and rated the partial lateral meniscectomy. Including the compensable conditions of the right knee medial meniscus tear and the Grade III chondromalacia of the medial femoral condyle, Dr A. assigned a whole person (WP) IR of 4%.

The hearing officer sent Dr. A another LOC on June 26, 2013, asking him to specify how he arrived at the 4% IR and to provide the methodology used in calculating the IR. Dr. A responded on June 26, 2013, and he specified his calculations as follows:

Calculations:

1. Partially torn right ACL & PCL (0% WP [IR] as he had normal [ROM] and no detected laxity) Page [3/85] Table 64.

2. Partial lateral/medial meniscus tear (partial lateral & medial meniscectomy on [July 17, 2012], 4% WP [IR]) Page [3/85] Table 64.

3. Complete 3 compartment synovitis and adhesions (0% WP [IR] as he had normal [ROM]) Page [3/78] Table 40.

4. Joint crepitation (2% WP [IR]) Page [3/83] Table 62.

Dr. A then combined the 4% and 2% for a 6% IR. The hearing officer adopted this certification and determined that the claimant's IR is 6%. However, since the IR is based on conditions that were determined not to be part of the compensable injury, we reverse the hearing officer's determination that the claimant's IR is 6%.

There are three other certifications in evidence. [Dr. F], a doctor selected by the treating doctor to act in his place, examined the claimant on January 23, 2013, and certified that the claimant reached MMI on January 3, 2013, with a 10% IR. Dr. F based his rating on a 4% IR for the partial medial and lateral meniscectomies, 2% for patellofemoral pain with joint crepitation, and 4% for moderate muscular atrophy of the right quadriceps musculature compared to the left side. As this calculation includes conditions that are not part of the compensable injury, it cannot be adopted.

As discussed previously, Dr. A had two other certifications. Regarding his first report in which he determined the IR to be 3%, this certification does not rate or take into consideration the Grade III chondromalacia of the medial femoral condyle which was administratively determined to be part of the compensable injury, and therefore, cannot be adopted.

Dr. A's second certification of 3% IR rated the entire compensable injury. However, as we are reversing and remanding the issue of MMI back to the hearing officer, and the assignment of an IR for the compensable injury must be based on the claimant's condition as of the MMI date considering the medical record and the certifying examination, we must also remand the issue of IR back to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant reached MMI on November 4, 2011, and remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is 6%, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. A is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A 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], extends to Grade III chondromalacia of the medial femoral condyle and a partially torn medial meniscus of the right knee. Further, the hearing officer is to advise the designated doctor that the [date of injury], compensable injury does not extend to a right knee partially torn ACL, partially torn PCL, partially torn lateral meniscus, complete 3 compartment synovitis, and adhesions as administratively determined.

The hearing officer is to request the designated doctor to reconsider the claimant's MMI date and, in doing so, address the July 17, 2012, surgery for the compensable condition of the partially torn medial meniscus of the right knee. The hearing officer should further ask the designated doctor to rate the entire compensable injury based on the claimant's condition as of the MMI date, 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 **THE TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge