

APPEAL NO. 180714
FILED MAY 1, 2018

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 February 1, 2018, with the record closing on February 16, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to an aggravation of the left knee chondromalacia or left knee osteoarthritis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 24, 2017; (3) the claimant's impairment rating (IR) is four percent; and (4) the claimant has disability resulting from the compensable injury sustained on (date of injury), from July 25, 2017, through the date of the CCH. The claimant appealed, disputing the ALJ's determinations of the extent of the compensable injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, MMI, and IR determinations.

The ALJ's determination that the claimant had disability from July 25, 2017, through the date of the CCH was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of a left knee medial meniscus tear and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. P) as designated doctor to determine MMI and IR. The claimant testified that she was injured when she stepped back and twisted her leg in an attempt to avoid a passenger coming down the aisle of an airplane.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to an aggravation of the left knee chondromalacia or left knee osteoarthritis is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on July 24, 2017, is supported by sufficient evidence and is affirmed.

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. 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 ALJ found that the preponderance of the other medical evidence is not contrary to the designated doctor's certification that the claimant reached MMI on July 24, 2017, with a four percent IR.

Dr. P, the designated doctor, examined the claimant on July 24, 2017, and certified that the claimant reached MMI on that date and assessed an IR of six percent for the left knee medial meniscus tear 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. P assessed three percent impairment using Table 64 for a total meniscectomy. Dr. P then combined the three percent impairment assessed using Table 64 with three percent impairment assessed for adjustments for effects of treatment or lack of treatment, page 2/9 of the AMA Guides. After the CCH, the ALJ wrote a letter of clarification (LOC) to Dr. P, asking Dr. P to clarify why she assessed three percent impairment for the medial meniscectomy when the operative report reflects that a partial meniscectomy was performed rather than a total meniscectomy. Dr. P responded to the LOC in correspondence dated February 6, 2018. Dr. P stated that based on the operative report a partial medial meniscectomy was performed and she previously rated for a total meniscectomy at three percent in error. Dr. P then stated that the impairment assessed for the claimant's medial meniscal tear is one percent. Dr. P provided two Reports of Medical Evaluation (DWC-69) with alternate ratings. One DWC-69 assessed one percent IR. The other DWC-69 combined one percent IR from the medial meniscal tear with three percent impairment for adjustments for the effects or lack of treatment based on page 2/9 of the AMA Guides, for a total impairment of four percent.

The AMA Guides provide, in part, on page 2/9, as follows:

Adjustments for Effects of Treatment or Lack of Treatment

In certain instances, the treatment of an illness may result in apparently total remission of the patient's signs and symptoms. Examples include the treatment of hypothyroidism with levothyroxine and the treatment of type I diabetes mellitus with insulin. Yet it is debatable as to whether the patient has regained the previous status of normal good health. In these instances, the physician may choose to increase the impairment estimate by a small percentage (eg, 1% to 3%), combining that percent with any other impairment percent by means of the Combined Values Chart (p. 322).

In some instances, as with the recipients of transplanted organs who are treated with immunity-suppressing pharmaceuticals or persons treated with anticoagulants, the pharmaceuticals themselves may lead to impairments. In such an instance, the physician should use the appropriate parts of the *Guides* to evaluate the impairment related to the pharmaceutical. If information in the *Guides* is lacking, the physician may combine an estimated impairment percent, the magnitude of which would depend on the severity of the effect, with the primary organ system impairment, by means of the Combined Values Chart.

A patient may decline treatment of an impairment with a surgical procedure, a pharmacologic agent, or other therapeutic approach. The view of the *Guides* contributors is that if a patient declines therapy for a permanent impairment, that decision should neither decrease nor increase the estimated percentage of the patient's impairment. However, the physician may wish to make a written comment in the medical evaluation report about the suitability of the therapeutic approach and describe the basis of the patient's refusal.

In summary, adjustments under page 2/9 of the AMA Guides provide for additional impairment in cases where: (1) treatment of an illness results in apparent remission of symptoms but the patient has not regained his or her prior good health; and (2) pharmaceuticals themselves may lead to impairment. The Appeals Panel has previously addressed this particular provision of the AMA Guides in Appeals Panel Decision (APD) 090692-s, decided July 14, 2009; APD 121157, decided August 9, 2012; and APD 122485, decided January 14, 2013.

The portion of the AMA Guides relied upon by Dr. P to assess three percent impairment for "lack of treatment" is not applicable in the claimant's circumstances. There was no evidence that claimant's treatment resulted in apparent total remission of her condition or that medication she took for the injury may have led to impairment. Dr.

P stated in her narrative that she assessed three percent impairment for lack of treatment given the claimant's significantly impaired functional status compared to her pre-injury baseline. Dr. P noted in the same narrative that the claimant had no impairment based on range of motion, atrophy, loss of muscle strength, or nerve injury. However, having an impaired functional status compared to a pre-injury baseline is not contemplated by the AMA Guides for assessing additional impairment under the section relied upon by Dr. P. Dr. P clearly believed that the claimant had reached MMI clinically for the compensable injury. Dr. P did assess an impairment for the claimant's left knee partial medial meniscectomy. We hold that the AMA Guides do not allow for assessment of additional impairment under the facts presented. The ALJ erred in adopting Dr. P's assessment of a four percent IR. Accordingly, we reverse the ALJ's determination that the claimant's IR is four percent.

As previously mentioned, the ALJ's determination that the claimant reached MMI on July 24, 2017, is affirmed. There were two other certifications in evidence from Dr. P that certified an MMI date of July 24, 2017. One certification assessed six percent impairment based in error on a total medial meniscectomy combined with impairment assessed for lack of treatment and cannot be adopted. The remaining certification from Dr. P properly assessed one percent impairment using Table 64 of the AMA Guides for a partial medial meniscectomy. Accordingly, we render a new decision that the claimant's IR is one percent.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to an aggravation of the left knee chondromalacia or left knee osteoarthritis.

We affirm the ALJ's determination that the claimant reached MMI on July 24, 2017.

We reverse the ALJ's determination that the claimant's IR is four percent and render a new decision that the claimant's IR is one percent.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge