APPEAL NO. 180998
FILED JUNE 5, 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 was held on March 26, 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 aggravation of a right knee medial meniscus tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 1, 2017; and (3) the claimant's impairment rating (IR) is zero percent.

The claimant appealed the ALJ's MMI, IR and extent-of-injury determinations. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that he was struck in his right knee by a trailer hose on (date of injury). The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury; the accepted compensable injury is a right knee contusion, right knee sprain, and right knee effusion; and the accepted compensable injury does not include joint disease of the right knee. Also, the parties stipulated that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. H) as the designated doctor to address MMI, IR, extent of injury and return to work.

**EXTENT OF INJURY**

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

The ALJ's determination that the compensable injury of (date of injury), does not extend to aggravation of a right knee medial meniscus tear is supported by sufficient evidence and is affirmed.

## MMI AND 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.

Dr. H, the designated doctor, examined the claimant on June 2, 2017, and certified on June 23, 2017, that the claimant reached MMI on May 3, 2017, with a zero percent IR for the compensable injury 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. H states in his narrative report that the claimant reached MMI because "[t]his was at the conclusion of physical therapy and where it appears the [claimant's] condition had become static. Therefore, no further significant improvement is anticipated." Dr. H considered and rated the entire compensable injury, which includes a right knee contusion, right knee sprain, and right knee effusion.

Dr. H provided two other alternate certifications which consider both compensable and non-compensable injuries. Both of these alternate certifications certify that the claimant reached MMI on June 1, 2017, with a zero percent IR; however, these alternate certifications consider the right knee medial meniscus tear, which is not a compensable injury. Dr. H states in his narrative report that "[i]ncluding the right medial meniscus tear, the [claimant] underwent physical therapy and cortisone injection with minimal to no improvement. On [June 1, 2017], the treating physician indicated he was not a surgical candidate and had no further recommendations for treatment. It appears the [claimant's] condition has become static with no further anticipation of significant improvement."

Although the ALJ states in his discussion that Dr. H certified MMI on May 3, 2017, with a zero percent IR for the accepted compensable injuries, he makes a finding of fact that the June 1, 2017, date of MMI and zero percent IR certified by Dr. H is not contrary to the preponderance of the other medical evidence. Dr. H's certifications that certify that the claimant reached MMI on June 1, 2017, with a zero percent IR, consider and rate the non-compensable right knee medial meniscus tear, and as such they cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on June 1, 2017, with a zero percent IR.

There are two other certifications of MMI and IR that consider and rate the compensable injury. (Dr. B), the post-designated doctor required medical examination doctor, examined the claimant on February 12, 2017, and he certified on that date that the claimant reached MMI on June 1, 2017, with a zero percent IR for the compensable injury. (Dr. VB), a referral doctor, examined the claimant on June 27, 2017, and certified on that date that the claimant reached MMI on June 15, 2017, with no impairment for the compensable injury. In contrast, Dr. VB states in his narrative report that the claimant's IR is zero percent. The ALJ discussed the inconsistency between Dr. VB's narrative report and the Report of Medical Evaluation (DWC-69) in his decision, and he stated that Dr. VB's certification is not adoptable.

There are three other certifications of MMI and IR in evidence from Dr. B, Dr. VB, and (Dr. F), another referral doctor. These certifications consider the right knee medial meniscus tear which the ALJ determined, and we have affirmed, is not part of the compensable injury. These certifications cannot be adopted.

Since there are certifications of MMI and IR in evidence that consider and rate the entire compensable injury that may be adopted, we do not deem it appropriate to render a decision concerning the date of MMI and IR. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

## SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to aggravation of a right knee medial meniscus tear.

We reverse the ALJ's determination that the claimant reached MMI on June 1, 2017, and remand the MMI issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is zero percent and we remand the IR issue to the ALJ for further action consistent with this decision.

## REMAND INSTRUCTIONS

On remand the ALJ is to consider all of the evidence, including the certifications of MMI and IR that consider and rate the right knee contusion, right knee sprain, and right knee effusion. The ALJ is then to make a determination on MMI and IR consistent with this decision and supported by the evidence.

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 ALJ, 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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM**
**1999 BRYAN STREET, SUITE 900**
**DALLAS, TEXAS 75201**.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge