

APPEAL NO. 190715
FILED JUNE 4, 2019

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 November 29, 2018, with the record closing on March 14, 2019, 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), extends to loose bodies due to osteochondral defects in the right knee, type III and type IV chondromalacia in the right knee, bilateral proximal tibial motor lesion/neuropathy, abductor magnus tear of the right lower extremity, lumbar disc bulge at L3-4, lumbar disc bulge at L4-5, and right L5-S1 radiculopathy; (2) the compensable injury of (date of injury), does not extend to 3 cm anterior femoral trochlea and medial patellar facet, lumbar disc space narrowing, or facet arthropathy; (3) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on September 25, 2017; and (4) the claimant's impairment rating (IR) is nine percent.

The claimant appealed the ALJ's extent-of-injury determination that was not favorable to her as well as the IR determination. The respondent/cross-appellant (carrier) responded, urging affirmance of the issues appealed by the claimant subject to its own request for review. The carrier cross-appealed, disputing the extent-of-injury determinations favorable to the claimant as well as MMI and the IR. Additionally, the carrier requests that the case be remanded and reset for argument because the ALJ issued a decision prior to the deadline she gave the parties to submit additional evidence and written closing arguments.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); that the carrier has accepted a lumbar strain, a right knee strain, and a left ankle strain as the compensable injury; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. S) as designated doctor for the issues of extent of injury, MMI, IR, and return to work. The claimant testified that she was injured while coming down a staircase/ladder.

The CCH was held on November 29, 2018. On December 10, 2018, the ALJ sent a letter of clarification (LOC) to Dr. S requesting that he provide a Report of Medical Evaluation (DWC-69) that rates all of the compensable injuries. Dr. S responded in a letter dated December 12, 2018, and requested a re-examination of the claimant.

On January 11, 2019, a Presiding Officer's Directive to Order Designated Doctor Exam (POD) was issued. The POD stated that the claimant's (date of injury), compensable injury is comprised of the following: "loose bodies due to osteochondral defects in the right knee, type III and type IV chondromalacia in the right knee, bilateral proximal tibial motor lesion/neuropathy, abductor magnus tear of the right lower extremity, lumbar disc bulge at L3-4, lumbar disc bulge at L4-5, and right L5-S1 radiculopathy." We note that this description of the compensable injury left out the accepted conditions of lumbar strain, right knee strain, and left ankle strain.

On February 11, 2019, Dr. S re-examined the claimant and certified that the claimant reached MMI on September 25, 2017, and assessed a nine percent IR 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. S placed the claimant in Lumbar Sacral Diagnosis-Related Estimate (DRE) Category II: Minor Impairment and assessed five percent for the lumbar spine. Additionally, Dr. S assessed four percent whole person impairment for the right lower extremity for abnormal motion of the right knee. Dr. S submitted a DWC-69 which certified the claimant reached MMI on September 25, 2017, and assessed a nine percent IR. However, on the DWC-69 Dr. S noted that the date of exam was January 30, 2018, rather than the actual date of exam, February 11, 2019, the date of the re-examination. On March 11, 2019, another LOC was sent to Dr. S which noted the incorrect date of examination on the DWC-69, indicating that the incorrect date was likely a clerical error. The ALJ asked Dr. S to submit a new DWC-69 with the correct date of examination. On March 13, 2019, Dr. S responded acknowledging a typographical error on the DWC-69 and submitted another DWC-69 with a corrected examination date.

The appeal file contained a letter from the ALJ to the parties dated March 15, 2019, which stated she had received a response from Dr. S and indicated it would be admitted into evidence as an ALJ exhibit. The ALJ asked the parties to review the report from Dr. S and respond with any additional evidence they would like the ALJ to consider. The ALJ stated the parties had until March 25, 2019, to submit additional documentary evidence and stated that if either party wished to submit written closing argument, it must be received by the Division no later than March 25, 2019.

The carrier in its cross-appeal points out that the Decision and Order was signed by the ALJ on March 14, 2019, and was mailed to the parties on March 22, 2019. As noted above the ALJ gave the parties until March 25, 2019, to submit additional evidence and written closing arguments. We have previously held that it is reversible error to solicit a response from a designated doctor and write an opinion based thereon without having afforded the parties the opportunity to comment on the additional

evidence. Appeals Panel Decision (APD) 011128, decided June 25, 2001. *See also* APD 93323, decided June 9, 1993; APD 010902, decided June 6, 2001; and APD 100201, decided April 23, 2010. The ALJ in the instant case provided the parties with a deadline to submit additional evidence and closing arguments, but issued the decision and order prior to the expiration of the stated deadline. Accordingly, we reverse the ALJ's determination that the compensable injury of (date of injury), extends to loose bodies due to osteochondral defects in the right knee, type III and type IV chondromalacia in the right knee, bilateral proximal tibial motor lesion/neuropathy, abductor magnus tear of the right lower extremity, lumbar disc bulge at L3-4, lumbar disc bulge at L4-5, and right L5-S1 radiculopathy, but does not extend to 3 cm anterior femoral trochlea and medial patellar facet, lumbar disc space narrowing, and facet arthropathy; the claimant reached MMI on September 25, 2017; and the claimant's IR is nine percent and remand this case to the ALJ for further action consistent with this decision.

Pursuant to Section 410.203(c), the Appeals Panel may not remand a case more than once. Given that we are remanding this case for the ALJ to allow the parties an opportunity to respond to the report from Dr. S and submit written closing arguments, we note that in the certification from Dr. S dated March 13, 2019, based on an examination conducted on February 11, 2019, Dr. S did not rate or consider a lumbar strain, right knee strain, or left ankle strain, which were conditions that were stipulated to be part of the compensable injury.

SUMMARY

We reverse the ALJ's determination that the compensable injury of (date of injury), extends to loose bodies due to osteochondral defects in the right knee, type III and type IV chondromalacia in the right knee, bilateral proximal tibial motor lesion/neuropathy, abductor magnus tear of the right lower extremity, lumbar disc bulge at L3-4, lumbar disc bulge at L4-5, and right L5-S1 radiculopathy but does not extend to 3 cm anterior femoral trochlea and medial patellar facet, lumbar disc space narrowing, or facet arthropathy and remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant reached MMI on September 25, 2017, and remand this issue to the ALJ for further action consistent with this decision.

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

REMAND INSTRUCTIONS

On remand, the ALJ is to give the parties time to submit additional documentary evidence and submit written closing arguments. Additionally, the ALJ is to ensure that the certification of MMI/IR she adopts considers and rates the entire compensable injury including the conditions the parties stipulated were part of the compensable injury as well as the conditions, if any, found to be part of the compensable injury by the ALJ in the disputed extent-of-injury issue.

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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge