

APPEAL NO. 220150
FILED MARCH 24,2022

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 December 8, 2021, 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 right knee conditions: posterior cruciate ligament tear, complex tears of the medial and lateral meniscus, tricompartmental osteoarthritic degenerative joint findings with full-thickness hyaline cartilage loss greatest within the medial compartment and faint linear oblique marrow signal changes within the patella suggesting overlying healing patellar distress fracture, degenerative changes, degenerative joint disease, or popliteal artery aneurysms; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 2, 2020; and (3) the claimant's impairment rating (IR) is four percent.

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

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury; the compensable injury extends to a right knee contusion; and (Dr. D) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address the issues of MMI and IR. The claimant testified that he was injured when he stumbled over a "trailer tongue" and hit his right knee on the "trailer tongue" and then the pavement.

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).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to right knee conditions: posterior cruciate ligament tear, complex tears of the medial and lateral meniscus, tricompartmental osteoarthritic degenerative joint findings with full-thickness hyaline cartilage loss greatest within the medial compartment and faint linear oblique marrow signal changes within the patella suggesting overlying healing patellar distress fracture, degenerative changes, degenerative joint disease, or popliteal artery aneurysms is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on December 2, 2020, 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, in part, 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 determined that the claimant reached MMI on December 2, 2020, with a four percent IR as certified by the Division-appointed designated doctor, Dr. D. Dr. D examined the claimant on February 3, 2021, and certified that the claimant reached MMI on December 2, 2020, with a four 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. D based the claimant's IR on loss of range of motion (ROM) of the claimant's right knee. Dr. D noted in his narrative report that the claimant had 75° of flexion and had -05° (extension lag) of extension. Dr. D referenced Table 41, page 3/78 of the AMA Guides stating that "[k]nee flexion less than 110 degrees or flexion contracture 5-9 degrees = 4% whole person impairment which is consistent with the records reviewed."

In Section 3.2, titled "The Lower Extremity," page 3/75, the AMA Guides provides, in part, that:

If the patient has several impairments of the same lower extremity part, such as the leg, or impairments of different parts, such as the ankle and a toe, the [whole person (WP)] estimates for the impairments are *combined* (Combined Values Chart, p. 322). If both extremities are impaired, the impairment of each should be evaluated and expressed in terms of the [WP], and the two percents should be *combined* (Combined Values Chart, p. 322).

In Section 3.2e, titled “[ROM],” page 3/77, the AMA Guides provides, in part, that “[e]valuating permanent impairment of the lower extremity according to its [ROM] is a suitable method.” Section 3.2e does not require that a certifying doctor must only use the most severe impairment for an individual direction of motion within the same table [Tables 40 through 43]. See *also* Appeals Panel Decision (APD) 110741, decided July 25, 2011.

The Appeals Panel has held that there is no specific provision in the AMA Guides in the Lower Extremity section that requires ROM deficits be utilized to increase the impairment for a single joint, and it is within the certifying doctor’s discretion as a matter of medical judgment to use or not use the different angles of loss of ROM in a single joint. See APD 132734, decided January 9, 2014. However, Dr. D in his narrative report documented the claimant’s loss of ROM for flexion as 75°. Table 41, page 3/78 of the AMA Guides, provides that loss of ROM of flexion of the knee of less than 80° results in eight percent impairment rather than the four percent impairment he referenced in his narrative. Dr. D did not state in his narrative report whether he intended to use all ROM deficits for the claimant’s right knee or, if the impairments differed, he would assign the higher impairment in his IR assignment. Although Dr. D was not required to use all ROM deficits of the claimant’s right knee, he did not accurately reflect the impairment assessed for the flexion ROM he measured. Accordingly, we reverse the ALJ’s determination that the claimant’s IR is four percent and remand the IR issue to the ALJ for further action consistent with this decision.

The only other certification of MMI/IR in evidence is from (Dr. E), a referral doctor acting in place of the treating doctor. Dr. E examined the claimant on September 13, 2021, and certified that the claimant reached MMI on April 5, 2021, with an eight percent IR. As previously noted, the ALJ’s determination that the claimant reached MMI on December 2, 2020, was affirmed. Accordingly, Dr. E’s certification that the claimant reached MMI on April 5, 2021, with an eight percent IR cannot be adopted.

Because there is not a certification of MMI/IR that can be adopted we remand the issue of 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 right knee conditions: posterior cruciate ligament tear, complex tears of the medial and lateral meniscus, tricompartmental osteoarthritic degenerative joint findings with full-thickness hyaline cartilage loss greatest within the medial compartment and faint linear oblique marrow signal changes within the patella suggesting overlying healing patellar distress fracture, degenerative changes, degenerative joint disease, or popliteal artery aneurysms.

We affirm the ALJ's determination that the claimant reached MMI on December 2, 2020.

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

REMAND INSTRUCTIONS

Dr. D is the designated doctor in this case. On remand the ALJ is to determine whether Dr. D is still qualified and available to be the designated doctor. The ALJ is to advise Dr. D of his error in calculating four percent impairment for 75° of flexion based on Table 41. The ALJ is to request that Dr. D rate the entire compensable injury based on the claimant's condition as of December 2, 2020, the date of MMI, in accordance with Rule 130.1(c)(3) and considering the medical records, the certifying examination, and rating criteria in the AMA Guides. The ALJ should inform the designated doctor that the compensable injury extends to a right knee contusion but does not extend to right knee conditions: posterior cruciate ligament tear, complex tears of the medial and lateral meniscus, tricompartmental osteoarthritic degenerative joint findings with full-thickness hyaline cartilage loss greatest within the medial compartment and faint linear oblique marrow signal changes within the patella suggesting overlying healing patellar distress fracture, degenerative changes, degenerative joint disease, and popliteal artery aneurysms.

If Dr. D 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 IR for the (date of injury), compensable injury. The ALJ is to advise the designated doctor that the compensable injury is a right knee contusion. The ALJ is to inform the designated doctor that the date of MMI is December 2, 2020, and request the designated doctor assign an IR as of the date of MMI in accordance with Rule 130.1(c)(3) and the AMA Guides.

The parties are to be provided with the designated doctor's new MMI/IR certification and allowed an opportunity to respond. The ALJ is then to make a determination of the claimant's 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 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 **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 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge