APPEAL NO. 231830
FILED FEBRUARY 1, 2024

This appeal arises pursuant to the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 *et seq*. (1989 Act). Contested case hearings were held on June 1, 2022, and October 30, 2023, with the record closing on October 30, 2023, 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 right knee sprain, sprain of the right medial collateral ligament, right knee partial-thickness tear of the anterior cruciate ligament, right knee bucket-handle tear of the lateral meniscus, and gait derangement; (2) the compensable injury of (date of injury), does not extend to severe cartilage erosion in the medial compartment of the left knee, spurring of the lateral compartment of the left knee, cartilage erosion of the patellofemoral joint of the left knee, or unilateral primary osteoarthritis of the left knee; (3) the respondent (claimant) reached maximum medical improvement (MMI) on November 14, 2020; and (4) the claimant's impairment rating (IR) is 20%.

The appellant (carrier) appealed, disputing the ALJ's determinations of MMI, IR, and that portion of the extent-of-injury determination in favor of the claimant. The claimant responded, urging affirmance of the appealed determinations. That portion of the ALJ's determination that the compensable injury does not extend to severe cartilage erosion in the medial compartment of the left knee, spurring of the lateral compartment of the left knee, cartilage erosion of the patellofemoral joint of the left knee, or unilateral primary osteoarthritis of the left knee was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to at least a right knee medial meniscus tear; and the statutory date of MMI is November 14, 2020. The claimant, a nurse for the employer, injured his right knee on (date of injury), when he planted his right foot to quickly change direction to respond to a coworker behind him.

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 extends to right knee sprain, sprain of the right medial collateral ligament, right knee partial-thickness tear of the anterior cruciate ligament, right knee bucket-handle tear of the lateral meniscus, and gait derangement is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on November 14, 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 Texas Department of Insurance, Division of Workers' Compensation (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 the claimant reached MMI on November 14, 2020, with a 20% IR as certified by (Dr. U), the most recently appointed designated doctor. Dr. U examined the claimant on April 5, 2023, for purposes of MMI and IR. Considering a right knee medial meniscus tear, right knee sprain, sprain of the right medial collateral ligament, right knee partial thickness tear of the anterior cruciate ligament, right knee bucket-handle tear of the lateral meniscus, and gait derangement, which is the compensable injury in this case, Dr. U certified the claimant reached MMI on the statutory date of MMI of November 14, 2020. Dr. U noted under his examination findings in his accompanying narrative report that the claimant "no longer requires a cane or any handheld assistive devices or knee orthotics." However, Dr. U stated his assigned IR "is based on the [previously assigned designated doctor (Dr. F)'s] exam on [March 1, 2021], which is the exam closest to the chosen MMI date – Statutory date, [November 14, 2020]." 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), and Dr. F's March 1, 2021, examination, Dr. U assigned a 20% IR by placing the claimant in Category e of Table 36 on page 3/76 for "requiring routine use of cane."

Table 36, Lower Limb Impairment from Gait Derangement, on page 3/76 of the AMA Guides provides that 20% impairment assessed under Category e "[r]equires routine use of cane, crutch, or long leg brace (knee-ankle-foot orthosis [KAFO])."

However, Dr. F stated in his March 1, 2021, narrative report that during his examination the claimant has "complaints of pain in the low back and in the right hand when he utilizes a cane," but also that the claimant "is independent with ambulation activities without the need of an assistive device or orthosis." Dr. F's March 1, 2021, examination, which was used by Dr. U in assigning a 20% IR, established the claimant did not require routine use of a cane, crutch, or KAFO. Therefore, the 20% IR assigned by Dr. U under Table 36 on page 3/76 is not in accordance with the AMA Guides. Accordingly, we reverse the ALJ's determination that the claimant's IR is 20%.

There are several other certifications in evidence, which are from Dr. F, (Dr. B), a carrier-selected required medical examination (RME) doctor, and (Dr. VH), a subsequent carrier-selected RME. However, only three of these certifications certify an MMI date of November 14, 2020, which is the MMI date in this case. These certifications were made by Dr. F and Dr. VH.

Dr. F examined the claimant on March 1, 2021, and issued alternate certifications, one of which certified an MMI date of November 14, 2020, and assigned a 36% IR. However, Dr. F's narrative report reflects he considered severe osteoarthritis of the left leg, among other conditions. Severe osteoarthritis of the left leg has not been determined to be part of the compensable injury; accordingly, Dr. F's certification cannot be adopted.

Dr. VH issued alternate certifications that the claimant reached MMI on November 14, 2020. Both certifications consider the compensable injury in this case, which is a right knee medial meniscus tear, right knee sprain, sprain of the right medial collateral ligament, right knee partial thickness tear of the anterior cruciate ligament, right knee bucket-handle tear of the lateral meniscus, and gait derangement.

In the first certification Dr. VH assigned a 7% IR using Table 36 on page 3/76 of the AMA Guides. Dr. VH noted in his accompanying narrative report that the claimant had no significant antalgic gait and did not require routine use of a short leg brace or cane. Dr. VH pointed out that Dr. U stated in his April 5, 2023, report that the claimant did not need a cane or assistive device, and Dr. VH "confirmed this by my own

observation" on June 15, 2023, which was the date scheduled for the RME. Dr. VH stated that "it clearly cannot be said it can reasonably be presumed to be permanent that the use of a cane is required when [the claimant] has presented twice without the need for a cane at all." Dr. VH opined that the claimant's IR would, at most, be a 7% IR.

Regarding the second certification, Dr. VH noted the claimant did not permit a physical examination so range of motion (ROM) measurements could not be taken. Dr. VH stated that the claimant had undergone a medial meniscus repair and "could qualify under Table 65 for a 3% [IR]. . . . This [IR] is based upon the diagnosis, not clinical findings, and does not require a hands-on evaluation of the knee." Dr. VH also stated that "this 3% [IR] for the right knee meniscectomy would cover all of the compensable conditions in the right knee as the sprain and ligament injuries do not have any other method for rating them. . . ." We note Table 65, Rating Hip Replacement Results, is on page 3/87 of the AMA Guides, and provides a methodology to rate hip impairments. There has been neither a determination nor an agreement by the parties that the compensable injury extends to any hip injury.

Dr. VH's narrative report reflects the claimant neither consented to an examination by Dr. VH on June 15, 2023, nor completed necessary paperwork regarding the examination. Dr. VH noted that the claimant stated his intent to record the examination and to have his own "expert witness" observe the examination. Dr. VH also noted that when the claimant was informed he would not be allowed to record the examination, and that only the treating doctor could accompany the claimant, the claimant "left the office and went to his car." Dr. VH further noted that he went to the claimant's car and "advised him he needed to come back inside and we could finish this evaluation. However, despite my encouragement, he did not return to the office." Dr. VH also noted that he returned to his office and the claimant drove off a few minutes later, and did not return. Dr. VH completed his certifications based on his observations of the claimant while he was in and out of the office.

Rule 130.1(b)(4) provides, in pertinent part, that to certify MMI the certifying doctor shall review medical records and perform a complete medical examination of the injured employee for the explicit purpose of determining MMI. As previously noted, Rule 130.1(c)(3) provides, in part, that an assignment of IR for the current compensable injury shall be based on the injured employee's condition on the MMI date considering the medical record and the certifying examination.

The evidence in this case reflects the claimant refused to undergo Dr. VH's certifying examination, and for this reason Dr. VH assigned IRs based on his observations of the claimant while in and outside the office. The carrier contends on appeal that Dr. VH did not actually have to physically touch the claimant to assess an IR

in this case, and argues a certifying examination with Dr. VH did occur. The carrier cites Appeals Panel Decision (APD) 93870, decided November 10, 1993, in support of its assertion.

In APD 93870, *supra*, the claimant contended the designated doctor did not perform a personal evaluation, which is required to assign MMI and IR, "because the doctor never personally applied any tests, but remained always five or six feet away directing her assistant to perform various physical testing." The Appeals Panel disagreed with the claimant's contention that the designated doctor did not perform the required examination, explaining as follows:

> [t]he Appeals Panel has held that the designated doctor must personally examine and evaluate a claimant. In [APD] 93095, decided March 19, 1993, the Appeals Panel noted that the designated doctor is not precluded from referring the patient for additional consultations and from relying on tests performed by others, provided "he does not just review records and totally rely on examinations by others." However, the critical determination (in this case, [IR]) "must ultimately (be) based on his own professional opinion." [APD] 92627, decided January 7, 1993. We have never held, nor do we do so now, that, absent demonstrated medical necessity, the designated doctor must physically touch the patient and personally manipulate medical instruments applied to the claimant. A doctor may employ the sense of sight in performing an examination just as the sense of touch. What is required is personal involvement in the examination process so that the certification is in fact the professional, medical opinion of the designated doctor, and not merely a rubber stamp approval of the findings and conclusions of other health care personnel. In this case, it is evident that [the designated doctor] was physically present for the claimant's examination and that she committed two hours to her evaluation of claimant including a personal review of previous tests done. Her finding of an [IR] was clearly her own based on her "sound medical judgment."

The Appeals Panel has cited this case in various cases involving an assertion that the certifying doctor failed to conduct an examination in assigning an IR. The Appeals Panel has held that while a certifying doctor must examine the claimant, the certifying doctor may rely on tests, exams, data, and medical reports performed by others in arriving at the doctor's final evaluation, and that a certifying doctor is not required, absent demonstrated medical necessity, to physically touch an employee or personally manipulate the claimant's ROM and other IR testing devices. *See* APD 951414, decided October 4, 1995, and cases cited therein; APD 950331, decided April

18, 1995, and cases cited therein; and APD 962591, decided February 6, 1997, and cases cited therein.

We cannot agree that, under the facts of the case on appeal, Dr. VH conducted a certifying examination of the claimant on June 15, 2023.[1] The record reflects that the claimant refused to complete necessary paperwork regarding the examination on that date, refused to be examined if he could not record the examination and have his own "expert witness" observe the examination, which he was told would not be allowed, and as noted by Dr. VH in his narrative report "the claimant did not permit a physical examination so ROM measurements could not be taken." The claimant ultimately left the office and drove away prior to any actual examination by Dr. VH occurring. The facts in this case are distinguishable from the cases cited above, and we hold that under these facts Dr. VH's certification was not based on a certifying examination as required under Rule 130.1.

There are no other certifications in evidence that can be adopted. Accordingly, we remand the IR issue to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury extends to right knee sprain, sprain of the right medial collateral ligament, right knee partial-thickness tear of the anterior cruciate ligament, right knee bucket-handle tear of the lateral meniscus, and gait derangement.

We affirm the ALJ's determination that the claimant reached MMI on November 14, 2020.

We reverse the ALJ's determination that the claimant's IR is 20%, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. U is the designated doctor in this case. On remand the ALJ is to determine whether Dr. U is still available and qualified to be the designated doctor. If Dr. U is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed.

The ALJ is to advise the designated doctor that the compensable injury extends to right knee medial meniscus tear, right knee sprain, sprain of the right medial collateral

[1] We note the issue of the claimant's failure to be examined by Dr. VH under Rule 126.6(j) was not presented in this case.

ligament, right knee partial-thickness tear of the anterior cruciate ligament, right knee bucket-handle tear of the lateral meniscus, and gait derangement, but does not extend to severe cartilage erosion in the medial compartment of the left knee, spurring of the lateral compartment of the left knee, cartilage erosion of the patellofemoral joint of the left knee, or unilateral primary osteoarthritis of the left knee. The ALJ is also to advise the designated doctor that the date of MMI in this case is November 14, 2020.

If Dr. U is still qualified and available, the ALJ is to notify Dr. U that Category e in Table 36 on page 3/76 of the AMA Guides provides that a 20% impairment assigned under that category requires routine use of cane, crutch or long leg brace KAFO. The ALJ is to clarify with Dr. U why he assigned a 20% IR under Category e in Table 36 using Dr. F's March 1, 2021, examination when Dr. F noted in that examination the claimant was independent with ambulation activities without the need of an assistive device or orthosis.

The ALJ is to request the designated doctor to rate the entire compensable injury 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 certification and to be 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 **SENTRY CASUALTY 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge