APPEAL NO. 180442
FILED APRIL 23, 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 January 10, 2018 (we note that the decision and order mistakenly states the CCH was held on January 10, 2017), 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 shoulder impingement and tendinopathy of the right supraspinatus and infraspinatus tendons, rib contusion, and cervical radiculitis; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); and (3) because the claimant has not reached MMI an impairment rating (IR) cannot be assigned. The appellant (carrier) appealed, disputing the ALJ's determinations. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained an injury on (date of injury), in the form of at least the carrier-accepted conditions of concussion with loss of consciousness and cervical and lumbar strain. The claimant testified that she was injured when the plane on which she was working encountered turbulence, which caused her to strike her head on the ceiling of the cabin and fall onto a drink cart.

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

That part of the ALJ's determination that the compensable injury of (date of injury), extends to right shoulder impingement and rib contusion is supported by sufficient evidence and is affirmed.

The ALJ also determined that the compensable injury of (date of injury), extends to cervical radiculitis. The ALJ based his determination regarding that condition on a letter by (Dr. N), the treating doctor, and an EMG said to be consistent with "possible cervical radiculitis," which was diagnosed by (Dr. B), an orthopedic surgeon.

In evidence is the letter from Dr. N discussed by the ALJ, which is dated July 8, 2017. Dr. N noted the mechanism of injury and stated that the claimant "never had any problem before this incident although she had some osteophyte and degenerative changes which makes [me] believe the injury created enough impact on the neck to cause her symptoms and have the underlying changes aggravated." Nowhere in this letter does Dr. N identify the diagnoses to which she is referring. Although the records in evidence established Dr. N diagnosed the claimant with cervical radiculopathy, they do not reflect that Dr. N has diagnosed the claimant with cervical radiculitis. The Appeals Panel has previously noted that according to Dorland's Illustrated Medical Dictionary (28th edition), radiculitis and radiculopathy are defined differently.[1] *See* Appeals Panel Decision (APD) 042744, decided December 20, 2004, and APD 090639, decided July 3, 2009. Dr. N's letter is insufficient to establish causation between the compensable injury and cervical radiculitis.

As correctly noted by the ALJ, Dr. B did diagnose the claimant with cervical radiculitis. However, Dr. B did not provide a statement of causation for that condition. In evidence is a record from Dr. B dated August 28, 2017. Regarding cervical radiculitis Dr. B stated only that he had recommended the claimant follow up with (Dr. G) for cervical facet joint injections to help with her right-sided neck pain, and that there did not appear to be neurologic compression to account for radicular symptoms. Dr. B's letter is insufficient to establish causation between the compensable injury and cervical radiculitis.

In evidence is an EMG report and summary from (Dr. Gn) dated December 23, 2016, which lists an impression of "[p]ossible cervical radiculitis." Neither the EMG report nor summary give any causal connection between the compensable injury and cervical radiculitis.

There is nothing in evidence that explained how the compensable injury caused or aggravated cervical radiculitis. Accordingly, we reverse the ALJ's determination that the compensable injury of (date of injury), extends to cervical radiculitis, and we render a new decision that the compensable injury of (date of injury), does not extend to cervical radiculitis.

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[1] Radiculopathy is defined in Dorland's Illustrated Medical Dictionary (28th edition) as "a disease of the nerve roots." Radiculitis is defined in Dorland's Illustrated Medical Dictionary (28th edition) as "inflammation of the spinal nerve roots."

The ALJ additionally determined that the compensable injury of (date of injury), extends to tendinopathy of the right supraspinatus and infraspinatus tendons. Although an MRI taken on October 20, 2017, lists an impression of this condition, there is nothing in evidence to establish causation between the compensable injury and tendinopathy of the right supraspinatus and infraspinatus tendons. Accordingly, we reverse the ALJ's determination that the compensable injury of (date of injury), extends to tendinopathy of the right supraspinatus and infraspinatus tendons, and we render a new decision that the compensable injury of (date of injury), does not extend to tendinopathy of the right supraspinatus and infraspinatus tendons.

MMI/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 Texas Department of Insurance, Division of Workers' Compensation (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.

The ALJ determined that the claimant has not reached MMI and therefore an IR cannot be assigned based upon the MMI/IR certification from (Dr. E), a doctor acting in place of the treating doctor. Dr. E examined the claimant on May 22, 2017. Dr. E noted in his narrative report that the claimant has not reached MMI because she has been offered diagnostic right C3-4 and C4-5 selective nerve root blocks by Dr. G. The evidence reflects that the treatment recommended by Dr. G is for cervical radiculitis, a condition which we have rendered not compensable. Dr. E's MMI/IR certification cannot be adopted. Accordingly, we reverse the ALJ's determinations that the claimant has not reached MMI and therefore an IR cannot be assigned.

There is another MMI/IR certification in evidence, which is from (Dr. T), the designated doctor appointed by the Division. Dr. T examined the claimant on March 21,

2017, and in a Report of Medical Evaluation (DWC-69) dated March 24, 2017, certified the claimant reached MMI on October 24, 2016, with a zero 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). However, Dr. T's MMI/IR certification does not consider rib contusion or right shoulder impingement, which are conditions that have been determined to be part of the compensable injury. Dr. T's MMI/IR certification cannot be adopted.

There is no MMI/IR certification in evidence that considers and rates the entire compensable injury. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm that portion of the ALJ's determination that the compensable injury of (date of injury), extends to right shoulder impingement and rib contusion.

We reverse that portion of the ALJ's determination that the compensable injury of (date of injury), extends to cervical radiculitis and tendinopathy of the right supraspinatus and infraspinatus tendons, and we render a new decision that the compensable injury of (date of injury), does not extend to cervical radiculitis and tendinopathy of the right supraspinatus and infraspinatus tendons.

We reverse the ALJ's determination that the claimant has not reached MMI, and we remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that because the claimant has not reached MMI an IR cannot be assigned, and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. On remand the ALJ is to determine whether Dr. T is still qualified and available to act as the designated doctor. If Dr. T 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 MMI and IR for the compensable injury of (date of injury).

Section 401.011(30) provides MMI means the earlier of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C)

the date determined as provided by Section 408.104. The ALJ is to either take a stipulation from the parties or make a finding of fact as to the date of statutory MMI.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to concussion with loss of consciousness, cervical strain, lumbar strain, right shoulder impingement, and rib contusion. The ALJ is to inform the designated doctor that the compensable injury of (date of injury), does not extend to cervical radiculitis and tendinopathy of the right supraspinatus and infraspinatus tendons. The ALJ is also to inform the designated doctor the date of statutory MMI, and that the date of MMI cannot be after the statutory date of MMI.

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

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Carisa Space-Beam
Appeals Judge

CONCUR:

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Veronica L. Ruberto
Appeals Judge

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Margaret L. Turner
Appeals Judge