APPEAL NO. 180602
FILED APRIL 30, 2018

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 July 18, 2017, September 18, 2017, and January 23, 2018, 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 broken/cracked teeth, anxiety, depression, headaches, seizure disorder, post-traumatic stress disorder (PTSD), closed head injury, and post-concussion syndrome; (2) the appellant (claimant) reached maximum medical improvement (MMI) on September 22, 2016; and (3) the claimant's impairment rating (IR) is four percent. The claimant appealed, disputing all of the ALJ's determinations. The respondent (self-insured) responded, urging affirmance of the ALJ's determinations.

DECISION

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

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the self-insured has accepted a left shoulder rotator cuff tear, right forearm laceration, a scalp laceration to the right side of the head, bruised ribs, and a left shoulder fracture as the compensable injury; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. N) as designated doctor on the issues of extent of injury, MMI, and IR; and the statutory date of MMI is September 22, 2016. The claimant testified she was injured in a motor vehicle accident.

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).

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See Cain, supra*.

EXTENT OF INJURY

That portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to broken/cracked teeth, anxiety, depression, seizure disorder, PTSD, closed head injury, and post-concussion syndrome is supported by sufficient evidence and is affirmed.

The ALJ also determined that the compensable injury of (date of injury), does not extend to headaches. As previously noted the self-insured has accepted a scalp laceration to the right side of the claimant's head as part of the compensable injury. On the date of injury, records reflect that the claimant was transported from the scene of the accident to the hospital by ambulance. The medical records in evidence from the hospital reflect that the claimant complained of head pain, and that the scalp laceration was repaired with staples. Numerous medical records in evidence document the claimant's headaches.

Under the facts of this case, the ALJ's determination that the compensable injury does not extend to headaches is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to headaches and we render a new decision that the compensable injury of (date of injury), does extend to headaches.

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 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 the claimant reached MMI on September 22, 2016, with a four percent IR as certified by Dr. N, the designated doctor. Dr. N initially examined the claimant on October 1, 2015, and certified that the claimant had not reached MMI. Dr. N next examined the claimant on October 26, 2016, and certified that the claimant reached MMI on September 22, 2016, and assigned 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. N noted in his attached narrative report that he considered diagnoses of right side laceration of the scalp with mild traumatic brain injury, tuberosity fracture of the left shoulder, and a laceration to the right forearm. Dr. N did not discuss bruised ribs or a left shoulder rotator cuff tear, which are conditions that have been stipulated as being part of the compensable injury. Furthermore, Dr. N considered a mild traumatic brain injury, a condition which has not been determined to be part of the compensable injury. Dr. N did not consider and rate the entire compensable injury and as such his MMI/IR certification cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on September 22, 2016, with a four percent IR. Additionally, we note that although Dr. N discussed range of motion measurements of the claimant's left shoulder, he stated that the he based his rating on "the deficits that are present in the right shoulder." It is undisputed that the injury is to the claimant's left shoulder, not right shoulder. Also, Dr. N stated that flexion of "70/140" results in two percent upper extremity impairment. Figure 38 on page 3/43 of the AMA Guides provides that 70° of flexion results in seven percent upper extremity impairment, and 140° of flexion results in three percent upper extremity impairment.

The only other MMI/IR certification in evidence is from (Dr. O), the post-designated doctor required medical examination doctor. Dr. O examined the claimant on December 14, 2015, and in an MMI/IR certification dated January 22, 2016, certified that the claimant had not reached MMI but was expected to do so on or about April 22, 2016. Dr. O stated that he could not tell the extent of the claimant's injury because of her ongoing symptoms and the fact that she has not had any closed head injury treatment, had not seen the neurologist, and not had any follow-up testing and continues with symptoms. As noted above the ALJ's determination that the compensable injury of (date of injury), does not extend to a closed head injury is affirmed. Dr. O's MMI/IR certification cannot be adopted.

As there is no MMI/IR certification in evidence that can be adopted, 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), does not extend to broken/cracked teeth, anxiety, depression, seizure disorder, PTSD, closed head injury, and post-concussion syndrome.

We reverse that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to headaches, and we render a new decision that the compensable injury of (date of injury), does extend to headaches.

We reverse the ALJ's determination that the claimant reached MMI on September 22, 2016, and we remand the issue of the claimant's date of MMI to the ALJ for further action consistent with this decision.

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

REMAND INSTRUCTIONS

Dr. N is the designated doctor in this case. The ALJ is to determine whether Dr. N is still qualified and available to be the designated doctor. If Dr. N 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 (date of injury), compensable injury.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a left shoulder rotator cuff tear, right forearm laceration, a scalp laceration to the right side of the head, bruised ribs, a left shoulder fracture, and headaches. The ALJ is to inform the designated doctor that the compensable injury of (date of injury), does not extend to broken/cracked teeth, anxiety, depression, seizure disorder, PTSD, closed head injury, and post-concussion syndrome. The ALJ is further to inform the designated doctor that the statutory date of MMI in this case is September 22, 2016.

The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI, which cannot be after the statutory date of September 22, 2016, and 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 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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **HUMBLE INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

DR. ELIZABETH FAGEN, SUPERINTENDENT
20200 EASTWAY VILLAGE DRIVE
HUMBLE, TEXAS 77338.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge