

APPEAL NO. 180702  
FILED MAY 16, 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 was held on February 13, 2018, 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 a cervical sprain, thoracic sprain, and lumbar sprain; (2) the compensable injury of (date of injury), does not extend to associated periodic headaches, vertigo, memory loss, cognitive difficulties, bladder incontinency, traumatic brain injury, vision loss/blurred vision, light sensitivity, ataxia, cauda equina syndrome, C4-5 disc herniation, C5-6 disc herniation, T3-4 disc herniation with right cord compression, L4-5 disc herniation, or L5-S1 disc herniation; (3) the appellant (claimant) reached maximum medical improvement (MMI) on January 4, 2016; and (4) the claimant's impairment rating (IR) is 0%. The claimant appealed, disputing the ALJ's extent-of-injury determination that was adverse to her as well as the ALJ's MMI and IR determinations. The respondent (self-insured) responded, urging affirmance of the appealed determinations.

That portion of the ALJ's determination that the compensable injury of (date of injury), extends to a cervical sprain, thoracic sprain, and lumbar sprain was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reformed 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 in the form of a concussion on (date of injury). The claimant, a firefighter for the employer on the date of injury, testified that she was battling a fire on the top floor of an apartment complex, and that she was injured when a large beam fell on her head. The claimant testified that the beam cracked her helmet but did not break her helmet apart.

The ALJ's decision refers to one of the claimed conditions as cauda equine syndrome. However, the correct terminology for this condition is cauda equina syndrome. We reform all references to cauda equine syndrome in the decision and order to state cauda equina syndrome.

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 vertigo, memory loss, cognitive difficulties, bladder incontinency, traumatic brain injury, vision loss/blurred vision, light sensitivity, ataxia, cauda equina syndrome, C4-5 disc herniation, C5-6 disc herniation, T3-4 disc herniation with right cord compression, L4-5 disc herniation, or L5-S1 disc herniation is supported by sufficient evidence and is affirmed.

The ALJ also determined that the compensable injury does not extend to associated periodic headaches. As previously noted the parties stipulated that the claimant sustained a compensable injury in the form of a concussion. On the date of injury, records reflect that the claimant was transported from the scene of the accident to the hospital by ambulance. The claimant testified she had headaches after the date of injury, and numerous records in evidence document the claimant’s periodic headaches.

Under the facts of this case, the ALJ’s determination that the compensable injury does not extend to associated periodic 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 associated periodic headaches and we render a new decision that the compensable injury of (date of injury), does extend to associated periodic 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 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 reached MMI on January 4, 2016, with a 0% IR as certified by (Dr. S), the designated doctor. Dr. S examined the claimant for purposes of MMI and IR on December 19, 2017. Dr. S provided alternate Reports of Medical Evaluation (DWC-69), all dated December 19, 2017. In the first, which was adopted by the ALJ, Dr. S certified that the claimant reached MMI on January 4, 2016, with a 0% IR based on a concussion, cervical sprain, thoracic sprain, and lumbar sprain. As noted above we have rendered a new decision that the compensable injury extends to associated periodic headaches. Dr. S did not consider this condition, and as such his MMI/IR certification cannot be adopted.

In his second MMI/IR certification Dr. S certified that the claimant reached MMI on January 4, 2016, with a 0% IR. However, this certification is based solely on a concussion and cannot be adopted. There is no other MMI/IR certification in evidence certifying an MMI date of January 4, 2016, and assigning a 0% IR. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on January 4, 2016, with a 0% IR.

In his third MMI/IR certification Dr. S certified that the claimant reached MMI on January 4, 2016, with a 5% IR based on the conditions of concussion, cervical sprain, thoracic sprain, lumbar sprain, periodic headaches, vertigo, memory loss, cognitive difficulties, bladder incontinence, traumatic brain injury, vision loss/blurred vision, light sensitivity, ataxia, cauda equina syndrome, C4-5 disc herniation, C5-6 disc herniation, T3-4 disc herniation with right cord compression, L4-5 disc herniation, and L5-S1 disc herniation. Dr. S considered and rated conditions that have been determined to be not compensable, and as such his third MMI/IR certification cannot be adopted.

There are other MMI/IR certifications in evidence, but none of them consider and rate the compensable injury of a cervical sprain, thoracic sprain, lumbar sprain, concussion, and associated periodic headaches.

(Dr. K), the first designated doctor, examined the claimant on August 8, 2016, and certified on August 17, 2016, that the claimant reached MMI on June 22, 2016, with a 0% IR, considering only a concussion. Dr. K's MMI/IR certification cannot be adopted.

(Dr. B), the treating doctor, examined the claimant on December 12, 2016, and certified the claimant reached MMI on August 22, 2016, with a 0% IR, considering only a concussion. In an alternate MMI/IR certification Dr. B certified the claimant reached MMI on October 8, 2016, with a 15% IR. However, Dr. B considered and rated, in part, cervical and lumbar disc herniations. Neither of Dr. B's MMI/IR certifications can be adopted.

(Dr. Ba), a post-designated doctor required medical examination doctor, examined the claimant on April 12, 2017, and provided alternate certifications. In the first he certified the claimant reached MMI on October 21, 2014, with a 0% IR based on a concussion. In the second he certified that the claimant reached MMI on October 21, 2014, with a 0% IR considering neuropsychiatric abnormalities, visual abnormalities, and urinary incontinence. Dr. Ba's MMI/IR certifications cannot be adopted.

Finally, (Dr. Kh), a referral doctor acting in place of the treating doctor, examined the claimant on November 30, 2017, and provided alternate MMI/IR certifications. In the first Dr. Kh certified the claimant reached MMI on November 4, 2014, with a 0% IR considering a concussion. In the second Dr. Kh certified the claimant reached MMI on June 22, 2016, with a 5% IR considering a concussion, cervical sprain, thoracic sprain, and lumbar sprain. In the third Dr. Kh certified that the claimant reached MMI on September 18, 2017, with a 5% IR considering, in part, a concussion and cognitive difficulties, vision loss/blurred vision, light sensitivity, ataxia, traumatic brain injury, C4-5 disc herniation, C5-6 disc herniation, T3-4 disc herniation with right cord compression, L4-5 disc herniation, L5-S1 disc herniation, bladder incontinence, and cauda equina syndrome. Dr. Kh's MMI/IR certifications cannot be adopted.

There is no MMI/IR certification in evidence that can be adopted. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

## **SUMMARY**

We reform all references to cauda equine syndrome in the decision and order to state cauda equina syndrome.

We affirm that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to vertigo, memory loss, cognitive difficulties, bladder incontinency, traumatic brain injury, vision loss/blurred vision, light sensitivity, ataxia, cauda equina syndrome, C4-5 disc herniation, C5-6 disc herniation, T3-4 disc herniation with right cord compression, L4-5 disc herniation, or L5-S1 disc herniation.

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

We reverse the ALJ's determination that the claimant reached MMI on January 4, 2016, and we remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 0% and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. S is the most recently appointed designated doctor in this case. On remand the ALJ is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S 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.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a concussion, associated periodic headaches, cervical sprain, thoracic sprain, and lumbar sprain. The ALJ is also to inform the designated doctor that the (date of injury), compensable injury does not extend to vertigo, memory loss, cognitive difficulties, bladder incontinency, traumatic brain injury, vision loss/blurred vision, light sensitivity, ataxia, cauda equina syndrome, C4-5 disc herniation, C5-6 disc herniation, T3-4 disc herniation with right cord compression, L4-5 disc herniation, or L5-S1 disc herniation. The ALJ is also to inform the designated doctor of the statutory date of MMI, if applicable. The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with 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) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be 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 **CITY OF SAN ANTONIO (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**LETICIA M. VACEK  
100 MILITARY PLAZA  
SAN ANTONIO, TEXAS 78205.**

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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