

APPEAL NO. 180792
FILED JUNE 4, 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 February 5, 2018, with the record closing on February 26, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). With regard to the disputed issues, the ALJ determined that: (1) the compensable injury of (date of injury), does not extend to a right thumb laceration, but does extend to a right index finger laceration; (2) the respondent/cross-appellant's (claimant) impairment rating (IR) is 16%.

The appellant/cross-respondent (carrier) appealed the ALJ's IR determination asserting that (Dr. C), the designated doctor, considered and rated conditions that were not part of the compensable injury. The claimant responded, urging affirmance of the challenged IR determination, and the claimant also cross-appealed the IR determination arguing that the claimant's IR is 20%, rather than 16%.

The carrier responded to the claimant's cross-appeal asserting that the claimant presented no evidence at the CCH, or in his appeal, that the range of motion (ROM) measurements utilized by the designated doctor, Dr. C, and the post-designated doctor required medical examination (RME) doctor, (Dr. S), violated 28 TEX. ADMIN. CODE § 130.1(c)(4) (Rule 130.1(c)(4)).

The ALJ's determination that the compensable injury of (date of injury), does not extend to a right thumb laceration, but does extend to a right index finger laceration was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The claimant testified that he sustained an injury when his right hand was pulled into a trash compactor (baler) which caused fractures to his right index, middle, and ring fingers. The parties stipulated, in part, that: (1) the claimant sustained a compensable injury on (date of injury), in at least the form of fractures of the right index, middle, and ring fingers; (2) no other conditions need to be adjudicated at this CCH in order to determine maximum medical improvement (MMI) and IR; and (3) the claimant's date of MMI is May 15, 2017. There are two certifications of MMI and IR from the designated doctor, Dr. C, and one certification of MMI and IR from the RME doctor, Dr. S. Both Dr. C and Dr. S certify that the claimant reached MMI on May 15, 2017.

IR

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).

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. Rule 130.1(c)(3) provides, in pertinent part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The Division appointed Dr. C as the designated doctor to address MMI and IR. Initially Dr. C examined the claimant on June 14, 2017, and certified on June 21, 2017, that the claimant reached MMI on May 15, 2017, with a 20% 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. C considered and rated not only the compensable injury of fractures of the right index, middle, and ring fingers and a laceration of the right index finger, but also considered and rated the right thumb, little finger and wrist which have not been determined to be part of the compensable injury. Dr. C's certification of MMI and IR of June 21, 2017, that the claimant reached MMI on May 15, 2017, with a 20% IR cannot be adopted. The ALJ correctly found that Dr. C's June 21, 2017, certification that the claimant reached MMI on May 15, 2017, with a 20% assigned IR, was contrary to the preponderance of the other medical evidence. That finding is supported by sufficient evidence and is affirmed.

On February 7, 2018, the ALJ sent a letter of clarification (LOC) to Dr. C requesting that he explain the reason for assigning an impairment for the right thumb, little finger and wrist. On February 9, 2018, Dr. C responded by explaining why the right thumb, little finger and wrist have been considered and rated for the crush injury of the right hand. We note that there is no determination by the Division or stipulation or agreement by the parties that the compensable injury extends to a crush injury of the right hand. Specifically, the parties stipulated that the claimant sustained a

compensable injury “in at least the form of fractures of the right index, middle, and ring fingers.”

Dr. C’s amended certification of MMI and IR of February 9, 2018, that the claimant reached MMI on May 15, 2017, with a 16% IR cannot be adopted because Dr. C considered and rated more than the right index finger laceration and fractures of the right index, middle, and ring fingers. The ALJ erred in determining that Dr. C’s February 9, 2018, certification in response to the LOC that the claimant reached MMI on May 15, 2017, with a 16% assigned IR was not contrary to the preponderance of the other medical evidence. Accordingly, we reverse the ALJ’s determination that the claimant’s IR is 16%.

There is one other certification in evidence that the claimant has reached MMI on May 15, 2017. Dr. S, the RME doctor, examined the claimant on September 18, 2017, and certified on that same date that the claimant reached MMI on May 15, 2017, with an 8% IR using the AMA Guides. Dr. S states in his narrative report that he utilized the ROM measurements made by an occupational therapist on April 24, 2017, because those ROM measurements showed “significantly better [ROM]” measurements than those noted by Dr. C or by him during his examination on September 18, 2017. Dr. S noted that the ROM measurements from April 24, 2017, were “most closely approximate [to] the clinical MMI” date, and should be used for the claimant’s impairment determination. Dr. S’s September 18, 2017, certification of MMI and IR rates and considers the entire compensable injury and is made in accordance with the AMA Guides. See Appeals Panel Decision 100483, decided June 9, 2010, in which the certifying doctor utilized ROM measurements taken by a physical therapist to certify the claimant’s date of MMI and assign the claimant’s IR, and that certification of MMI and IR was adoptable. See Rule 130.1(c)(4). Dr. S’s certification of September 18, 2017, certifying that the claimant reached MMI on May 15, 2017, with an 8% IR is supported by the evidence. Accordingly, we render a new decision that the claimant’s IR is 8% as assigned by Dr. S.

SUMMARY

We reverse the ALJ’s determination that the claimant’s IR is 16% and we render a new decision that the claimant’s IR is 8%.

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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge