

APPEAL NO. 181082
FILED JUNE 28, 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 1, 2018, and April 17, 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 respondent (claimant) reached maximum medical improvement (MMI) on January 2, 2017; and (2) the claimant's impairment rating (IR) is 17%. The appellant (carrier) appeals the ALJ's determination of the MMI and IR, contending that the ALJ erred as a matter of law because she adopted a certification that did not rate the entire compensable injury. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated, in part, that: the claimant sustained a compensable injury on (date of injury); the carrier has accepted a right elbow strain, a right shoulder tear, thoracic strain, a lumbar strain, a cervical strain, a right forearm contusion, ribs contusions, a right leg contusion, thoracic intervertebral disc (IVD) disorder, and lumbar IVD disorder as the compensable injury; and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. B) as designated doctor to determine the issues of MMI and IR. The claimant testified that he was injured in a motor vehicle accident on (date of injury). We note that the Findings of Fact in the decision and order are misnumbered.

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.

Dr. B examined the claimant on April 7, 2017, and certified that the claimant reached MMI on January 2, 2017, with a 17% 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. B listed the following diagnoses in his narrative report: cervical strain, lumbar strain, thoracic strain, right shoulder sprain, right elbow/forearm sprain, right leg contusion, and disc bulge at L3-4, L5-S1. Dr. B placed the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category II of the AMA Guides for the cervical spine, assigning 5% impairment. Dr. B placed the claimant in Thoracolumbar DRE Category I for the thoracic spine, assigning 0% impairment. Dr. B placed the claimant in Lumbosacral DRE Category II for the lumbar spine, assigning 5% impairment. Dr. B then assigned 6% upper extremity impairment for loss of range of motion (ROM) for the right shoulder and 4% upper extremity impairment for loss of ROM for the right elbow. Dr. B then assigned 3% upper extremity impairment for sensory loss for peripheral nerve disorders. Dr. B then combined the upper extremity impairment assessed and converted that impairment to an 8% whole person impairment for the right upper extremity. Dr. B stated that the claimant had normal ROM for the right lower extremity and assessed 0% impairment. Dr. B then combined the 5% for the cervical spine, with the 0% for the thoracic spine, 5% for the lumbar spine, 8% for the right upper extremity, and 0% for the right lower extremity for a total whole person impairment of 17%.

Dr. B did not explain why he assessed impairment for loss of sensation based on a peripheral nerve disorder of the right upper extremity. Further, Dr. B did not consider and rate thoracic IVD disorder, lumbar IVD disorder, a right forearm contusion, or ribs contusions. Because Dr. B did not rate the entire compensable injury, his certification cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on January 2, 2017, and that the claimant's IR is 17%.

There are two other certifications in evidence. (Dr. C), a treating doctor referral, examined the claimant on July 25, 2017.¹ Dr. C certified on the DWC-69 that the claimant reached MMI on April 7, 2017, and assigned a 5% IR. In the narrative report, Dr. C assessed 17% impairment. Dr. C assessed 5% for the cervical spine, 5% for the lumbar spine, and 8% impairment for "right shoulder internal derangement." Dr. C did not rate a right elbow strain, a right forearm contusion, ribs contusions, or a right leg contusion. Accordingly, Dr. C's certification of MMI/IR cannot be adopted.

¹ We note that the Report of Medical Evaluation (DWC-69) mistakenly lists the date of examination as July 25, 2016.

The other certification is from (Dr. I), a carrier-selected required medical examination doctor. Dr. I examined the claimant on July 13, 2017, and certified that the claimant reached MMI on July 13, 2017, and assigned an 8% IR. Dr. I stated that he certified the claimant reached MMI on that date because he had received “allowable” treatment under the Official Disability Guidelines and his condition had improved since the designated doctor examination of April 7, 2017, but further material recovery or lasting improvement to the claimant’s injury could no longer be anticipated.

Dr. I assessed 0% impairment for the cervical strain, noting the claimant had no significant clinical findings, no muscle guarding or history of guarding; 0% for the thoracic strain/thoracic IVD disorder, noting no positive objective findings; 5% for the lumbar strain/lumbar IVD disorder; 3% for loss of ROM for the right shoulder tear; 0% impairment for the right forearm contusion/sprain; 0% impairment for ribs contusions; and 0% impairment for the right leg contusion. Dr. I combined the 5% whole person impairment assessed for the lumbar spine with the 3% whole person impairment assessed for the right shoulder for a total whole person impairment of 8%. Dr. I rated the entire compensable injury in accordance with the AMA Guides. Accordingly, we render a new decision that the claimant reached MMI on July 13, 2017, and that the claimant’s IR is 8%, pursuant to Dr. I’s certification.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RICHARD GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:



Veronica L. Ruberto
Appeals Judge

Carisa Space Beam
Appeals Judge