APPEAL NO. 181121
FILED JULY 26, 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 March 21, 2018, with the record closing on April 19, 2018 (we note the decision mistakenly references the record closed on March 22, 2018), in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), does not extend to disc bulges at L3-4, L4-5, and L5-S1; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on August 17, 2017; and (3) the claimant's impairment rating (IR) is five percent. The claimant appealed, disputing all of the ALJ's determinations. The respondent/cross-appellant (carrier) responded, urging affirmance of the ALJ's extent of injury and IR determinations. The carrier cross-appealed, disputing the ALJ's MMI determination. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to a lumbar sprain/strain. The claimant testified he was injured while picking up a heavy conduit pipe.

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

The ALJ's determination that the compensable injury of (date of injury), does not extend to disc bulges at L3-4, L4-5, and L5-S1 is supported by sufficient evidence and is affirmed.

MMI

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.

(Dr. D), the designated doctor appointed to opine on MMI and IR, initially examined the claimant on November 22, 2016, and certified on November 30, 2016, that the claimant had not reached MMI based on a lumbar sprain/strain and disc bulges at L3-4, L4-5, and L5-S1. Dr. D also provided an alternate Report of Medical Evaluation (DWC-69) on November 30, 2016, in which he certified that the claimant reached MMI on November 1, 2016, with a five percent IR based solely on a lumbar sprain/strain.

Dr. D next examined the claimant on April 28, 2017, and certified on May 1, 2017, that the claimant had not reached MMI based, in part, on disc bulges at L3-4, L4-5, and L5-S1. Dr. D again examined the claimant on September 15, 2017, and certified on that date that the claimant reached MMI on August 17, 2017, with a five percent IR. In response to a letter of clarification (LOC) that was sent to Dr. D in February 2018, by a Division benefit review officer, Dr. D made clear that his September 15, 2017, MMI/IR certification included disc bulges at L3-4, L4-5, and L5-S1.

The ALJ sent an LOC to Dr. D on March 27, 2018, requesting Dr. D provide an MMI/IR certification that considered and rated only a lumbar sprain/strain. In a response dated March 29, 2018, Dr. D certified on that date that the claimant reached MMI on November 1, 2016, with a five percent IR based only on a lumbar sprain/strain. The ALJ sent a subsequent LOC to Dr. D in which the ALJ requested clarification about examination and therapy dates and some phrasing Dr. D used in his report. In a response dated April 3, 2018, Dr. D clarified the examination and therapy dates and phrasing. Dr. D did not change his opinion that the claimant reached MMI on November 1, 2016, with a five percent IR for a lumbar sprain/strain.

In his discussion the ALJ stated that the preponderance of the other medical evidence is not contrary to Dr. D's MMI/IR certification. However, the ALJ mistakenly stated that Dr. D certified a date of MMI of August 17, 2017, for a lumbar sprain/strain rather than the actual certified date of November 1, 2016. The ALJ found that the preponderance of the other medical evidence is not contrary to Dr. D's MMI/IR determinations, and determined that the claimant reached MMI on August 17, 2017, with a five percent IR.

The carrier argued on appeal that the ALJ failed to consider Dr. D's November 30, 2016, MMI/IR certification in which Dr. D certified the claimant reached MMI on November 1, 2016, with a five percent IR based solely on a lumbar sprain/strain. The carrier also argued that the ALJ misconstrued Dr. D's MMI/IR certification dated March 29, 2018, in holding the claimant reached MMI on August 17, 2017, when Dr. D in fact certified the claimant reached MMI on November 1, 2016, based on a lumbar sprain/strain. The evidence supports the carrier's arguments. As noted above the August 17, 2017, date of MMI is based on conditions that have been determined to not be part of the compensable injury, and the November 1, 2016, date of MMI is based on the compensable injury. There is no MMI/IR certification from Dr. D certifying an August 17, 2017, date of MMI based on the compensable injury.

The ALJ was clearly persuaded by the evidence that the claimant reached MMI with an assigned IR pursuant to Dr. D's March 29, 2018, MMI/IR certification. However, the ALJ inadvertently determined the claimant's MMI date to be August 17, 2017, rather than November 1, 2016, which is the actual MMI date Dr. D certified for a lumbar sprain/strain on both March 29, 2018, and November 30, 2016. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on August 17, 2017, and we render a new decision that the claimant reached MMI on November 1, 2016, as reflected by the evidence.

IR

The ALJ's determination that the claimant's IR is five percent is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to disc bulges at L3-4, L4-5, and L5-S1.

We reverse the ALJ's determination that the claimant reached MMI on August 17, 2017, and we render a new decision that the claimant reached MMI on November 1, 2016, as reflected by the evidence.

We affirm the ALJ's determination that the claimant's IR is five percent.

The true corporate name of the insurance carrier is **PROPERTY & CASUALTY INSURANCE COMPANY OF HARTFORD** 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.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge