

APPEAL NO. 181959
FILED OCTOBER 15, 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 August 9, 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 appellant (claimant) reached maximum medical improvement (MMI) on January 22, 2018, and (2) the claimant's impairment rating (IR) is 3%. The claimant appealed the ALJ's MMI and IR determinations. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant testified he fell from a picker onto the concrete ground while performing his duties on (date of injury). The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of a right thorax abrasion; right lower leg abrasion; right thigh contusion, laceration, and sprain/strain; right pneumothorax injury; chest wall, thoracic, lumbar, and right ankle sprains/strains; and right third rib fracture; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. M) as the designated doctor to determine MMI and IR.

We note that in evidence is a Decision and Order dated September 14, 2017, issued by ALJ (ALJ) which states the parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), to the same conditions as stipulated to in the case on appeal.

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).

MMI AND 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.

Dr. M, the designated doctor, examined the claimant on January 22, 2018, and certified on February 5, 2018, that the claimant reached MMI on January 22, 2018, with a 3% 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. M considered and rated the compensable right thorax abrasion, right lower leg abrasion, right thigh contusion, right pneumothorax injury, lumbar strain, right ankle sprain, and right third rib fracture. Dr. M did not rate the entire compensable injury and his certification of MMI and IR cannot be adopted. Accordingly, we reverse the ALJ’s determinations that the claimant reached MMI on January 22, 2018, with a 3% IR.

There is another certification of MMI and IR in evidence from (Dr. B), a referral doctor. Dr. B examined the claimant on April 21, 2018, and he certified on May 8, 2018, that the claimant reached MMI on September 19, 2017, with a 13% IR using the AMA Guides. Dr. B’s certification considers a right ankle sprain, lumbar strain, right chest wall pneumothorax, right third rib fracture, right thoracic abrasion, right lower leg abrasion, and right thigh contusion. As Dr. B’s certification of MMI and IR does not consider or rate the entire compensable injury, it also cannot be adopted.

Since there are no other certifications of MMI and IR in evidence that consider and rate the entire compensable injury, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the claimant reached MMI on January 22, 2018, and remand the MMI issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 3% and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. M is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M 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.

If Dr. M is still qualified and available to serve as the designated doctor, the ALJ is to request that Dr. M consider and rate the entire compensable injury, which is comprised of a right thorax abrasion; right lower leg abrasion; right thigh contusion, laceration, and sprain/strain; right pneumothorax injury; chest wall, thoracic, lumbar, and right ankle sprains/strains; and right third rib fracture, 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 certification of MMI and IR 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 **ZURICH AMERICAN 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