

APPEAL NO. 181978
FILED OCTOBER 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 (CCH) was held on April 24, 2018, with the record closing on July 22, 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 left ankle ganglion cyst; (2) the compensable injury of (date of injury), does not extend to left ankle bursitis and left Achilles strain; (3) the respondent (claimant) reached maximum medical improvement (MMI) on June 26, 2018; and (4) the claimant's impairment rating (IR) is nine percent. The appellant (self-insured) appeals the ALJ's determination of the compensable injury extending to a left ankle ganglion cyst, the MMI date, and the claimant's IR. The self-insured contends that there is no valid explanation of MMI and the designated doctor rates a condition that is not part of the compensable injury. The claimant responded, urging affirmance of the disputed determinations. The ALJ's determination that the compensable injury does not extend to left ankle bursitis and left Achilles strain was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that: the claimant sustained a compensable injury on (date of injury); the compensable injury extends to a left knee medial meniscus tear and left ankle sprain; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. G) as the designated doctor to determine extent of injury, MMI, and IR. The claimant testified that she was injured in a motor vehicle accident.

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), extends to a left ankle ganglion cyst is supported by sufficient evidence and is affirmed.

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 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. G, the designated doctor, examined the claimant on July 11, 2017, and certified that the claimant had not yet reached MMI but anticipated that the claimant would reach MMI on or around October 25, 2017. Dr. G explained that the claimant had not had physical therapy to her left ankle. Subsequently, Dr. G re-examined the claimant on February 13, 2018, and certified that the claimant had not yet reached MMI but anticipated that the claimant would reach MMI on or about June 15, 2018. Again, Dr. G explained that the claimant had not had physical therapy to her left ankle.

After the CCH, the ALJ sent a Presiding Officer's Directive (POD) to Dr. G directing him to examine the claimant to determine MMI and IR. The ALJ's POD dated April 27, 2018, states that based on the accepted compensable injuries and the CCH, Dr. G is to consider the compensable injuries to be a left knee medial meniscus tear, left ankle sprain, and left ankle ganglion cyst. Dr. G re-examined the claimant on June 26, 2018, and certified on June 28, 2018, that the claimant reached MMI on June 26, 2018, with a nine percent 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).

As previously mentioned the parties stipulated that the compensable injury included a left knee medial meniscus tear; however, Dr. G considered and rated both a lateral and medial meniscus tear. Using Table 64, page 3/85, of the AMA Guides, Dr. G

assessed a four percent impairment for medial and lateral meniscectomies. We note that although the claimant had surgery for both the medial and lateral meniscus tears of the left knee, the parties did not stipulate that the compensable injury extended to a left knee lateral meniscus tear, nor was that condition litigated by the parties. Under the knee region for a partial or total meniscectomy condition, Table 64 provides different impairments specific to “[m]eniscectomy, medial *or* lateral” and “[m]eniscectomy, medial *and* lateral” (emphasis in the original).

Dr. G considered and rated a left knee lateral meniscus tear, which has not yet been determined to be part of the compensable injury. Dr. G’s certification of MMI and IR cannot be adopted. Accordingly, we reverse the ALJ’s determinations that the claimant reached MMI on June 26, 2018, with a nine percent IR.

There are two other certifications of MMI and IR from Dr. G. In both certifications (dated July 19, 2017, and February 19, 2018, respectively), Dr. G certifies that the claimant has not reached MMI and considers bursitis of the ankle, which is not a compensable injury. These certifications cannot be adopted.

There are two certifications from (Dr. M), the post-designated doctor required medical examination doctor. Dr. M examined the claimant on September 27, 2017, and certified on that same date that the claimant reached MMI on June 29, 2017, with a four percent IR. In an alternative certification, Dr. M certifies that the claimant has not reached MMI. Neither of Dr. M’s certifications can be adopted, because they consider a left knee lateral meniscus tear, which has not yet been determined to be part of the compensable injury.

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

SUMMARY

We affirm the ALJ’s determination that the compensable injury of (date of injury), extends to a left ankle ganglion cyst.

We reverse the ALJ’s determination that the claimant reached MMI on June 26, 2018, and we 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 nine percent and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

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

On remand the ALJ is to notify the designated doctor that the compensable injury extends to a left knee medial meniscus tear, left ankle sprain, and left ankle ganglion cyst and request the designated doctor determine the claimant's date of MMI, and rate the compensable injury in accordance with the AMA Guides.

The ALJ is to notify the designated doctor that, under the knee region for a partial or total meniscectomy condition, Table 64, page 3/85, of the AMA Guides, provides different impairments specific to "[m]eniscectomy, medial *or* lateral" and "[m]eniscectomy, medial *and* lateral" (emphasis in the original). The ALJ is to request the designated doctor to consider and rate the compensable injury 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 MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is 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 **SPRING INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DR. RODNEY E. WATSON, SUPERINTENDENT
16717 ELLA BOULEVARD
HOUSTON, TEXAS 77090.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge