

APPEAL NO. 182003
FILED NOVEMBER 9, 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 June 15, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). Subsequently, ALJ (ALJ) ceased to be employed with the Texas Department of Insurance, Division of Workers' Compensation (Division), and this case was reassigned to ALJ (administrative law judge) to conduct the CCH, review the evidence, and write a decision to resolve the disputed issues; that CCH was held on July 10, 2018, with the record closing on July 24, 2018, in (city), Texas. The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a right foot drop, cervical disc derangement at C4-5 and C6-7, right sided cervical radiculopathy, broad based posterior disc protrusion and annular tear at L3-4, right eye visual deficit, and right eye diplopia; and (2) the respondent's (claimant) impairment rating (IR) is 36%. The appellant (carrier) appealed the ALJ's IR determination, contending that the designated doctor misapplied 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) in assessing his 36% IR. The appeal file does not contain a response from the claimant to the carrier's appeal.

The ALJ's determination that the compensable injury of (date of injury), does not extend to a right foot drop, cervical disc derangement at C4-5 and C6-7, right sided cervical radiculopathy, broad based posterior disc protrusion and annular tear at L3-4, right eye visual deficit, and right eye diplopia was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the carrier has accepted post-concussion syndrome, forehead laceration, right shoulder sprain (including surgery), post-traumatic stress disorder (PTSD), and facial weakness as the compensable injury; and the claimant reached maximum medical improvement (MMI) on the statutory date of June 14, 2016. The claimant testified he was injured in a motor vehicle accident.

IR

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.

The ALJ determined that the claimant's IR is 36% as certified by (Dr. A), the designated doctor. Dr. A examined the claimant on May 30, 2018, and certified on that date that the claimant reached MMI on the statutory date of June 14, 2016, with a 36% IR, using the AMA Guides. Dr. A assessed 29% impairment for the claimant's PTSD, 0% impairment for the claimant's forehead laceration, 10% whole person impairment based on range of motion (ROM) measurements of the claimant's right shoulder, and "no impairment" for facial weakness. Dr. A noted in his attached narrative report that although the claimant had some "self-reported cognitive issues" there was "nothing concrete or objective and previous examinations from another neurologist and neuropsychologist have been nonconclusive. . . ." Therefore, Dr. A declined to rate anything with regards to post-concussion syndrome.

The carrier contends on appeal that Dr. A did not properly utilize the AMA Guides in assessing 36% IR. The carrier argues that Dr. A failed to include a rating for the claimant's distal clavicle resection, a surgery the claimant underwent as treatment for the compensable injury. Medical records in evidence reflect that the claimant underwent a distal clavicle resection on June 1, 2015.

The Appeals Panel has previously held that impairment for a distal clavicle resection that was received as treatment for the compensable injury results in 10% upper extremity impairment under Table 27 on page 3/61 of the AMA Guides, which is then combined with ROM impairment, if any, as provided by the AMA Guides. See Appeals Panel Decision (APD) 151158-s, decided August 4, 2015. Dr. A failed to rate the distal clavicle resection received by the claimant as treatment for the compensable injury and as directed by the AMA Guides; accordingly, we reverse the ALJ's determination that the claimant's IR is 36%.

There are multiple other MMI/IR certifications in this case. Dr. A provided two alternate MMI/IR certifications on May 30, 2018; however, these certifications consider and rate conditions that have been determined to not be part of the compensable injury,

such as a lumbar injury resulting in disc protrusion, cervical injury, foot drop, and vision issues. Neither of Dr. A's alternate May 30, 2018, MMI/IR certifications can be adopted.

Dr. A had previously examined the claimant on December 5, 2017, and certified on that date and also on March 29, 2018, that the claimant reached MMI statutorily on June 15, 2016. As noted above, the parties have stipulated that the claimant reached MMI on the statutory date of June 14, 2016. These MMI/IR certifications cannot be adopted.

There are also MMI/IR certifications from (Dr. C), a previously assigned designated doctor. Dr. C initially examined the claimant on February 4, 2016, and certified that the claimant had not yet reached MMI. Dr. C next examined the claimant on July 7, 2016, and certified on that date that the claimant had reached MMI on the statutory date of June 14, 2016, with a 46% IR. However, Dr. C considered and rated, in part, right foot drop and right eye diplopia, which are conditions that have been determined to not be part of the compensable injury. Dr. C's MMI/IR certification cannot be adopted.

Finally, (Dr. B), a post-designated doctor required medical examination doctor, provided MMI/IR certifications. Dr. B examined the claimant on August 30, 2016, and certified that the claimant reached MMI on the statutory date of June 14, 2016. However, Dr. B noted on his Report of Medical Evaluation (DWC-69), that the IR was "pending referrals" and in his attached narrative report Dr. B stated that he could not assess the IR until he had the results of requested examinations. There is a DWC-69 from Dr. B dated August 30, 2016, in which Dr. B certified that the claimant reached MMI on the statutory date of June 14, 2016, with a 10% IR. However, Dr. B assessed 0% impairment for a visual deficit, which is a condition that has been determined to not be part of the compensable injury.

There is no MMI/IR certification in evidence that can be adopted. Accordingly, we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. A is the most recently appointed designated doctor in this case. On remand the ALJ is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's IR for the (date of injury), compensable injury as of the June 14, 2016, date of MMI.

The ALJ is to notify the designated doctor that the compensable injury in this case is post-concussion syndrome, forehead laceration, right shoulder sprain (including surgery), PTSD, and facial weakness, and that the date of MMI is June 14, 2016. The ALJ is also to notify the designated doctor that the claimant underwent a distal clavicle resection for the compensable injury, and that the distal clavicle resection should be rated in accordance with Table 27 on page 3/61 of the AMA Guides and APD 151158-s, *supra*.

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 then to make a determination on the claimant's IR consistent with the evidence and 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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **STATE FARM FIRE AND CASUALTY 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge