APPEAL NO. 182111
FILED NOVEMBER 20, 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 May 15, 2018, with the record closing on August 15, 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 first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. L) dated October 1, 2017, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (2) the respondent (claimant) reached MMI on August 31, 2017; and (3) the claimant's IR is 21%. The appellant (carrier) appealed the ALJ's MMI and IR determinations. The carrier also contended that the ALJ abused his discretion in denying the carrier's request to reconvene the CCH for a post-designated doctor required medical examination (RME) doctor. The appeal file does not contain a response from the claimant to the carrier's appeal.

The ALJ's determination that the first MMI/IR certification from Dr. L dated October 1, 2017, did not become final under Section 408.123 and Rule 130.12 was not appealed and has become final pursuant to Section 410.169. We note that the Decision and Order paragraph on the first page of the decision contains a typographical error in stating that Dr. L's October 1, 2017, MMI/IR certification became final under Section 408.123 and Rule 130.12.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the carrier has accepted a (date of injury), compensable injury in the nature of a cervical sprain/strain, concussion with loss of consciousness, bilateral knee contusions, cervicalgia, post-traumatic concussive headaches, right knee medial meniscus tear/internal derangement, cervical radiculitis, and herniated nucleus pulposus/protrusion at C5-6 and C6-7, and that the claimant's statutory date of MMI is August 31, 2017. The record reflects the claimant was injured when a metal part fell from a forklift and struck him on the head.

ABUSE OF DISCRETION

Following the close of the May 15, 2018, CCH, the ALJ issued a presiding officer's directive to (Dr. Q), the designated doctor. However, Dr. Q was no longer qualified to be the designated doctor, so (Dr. G) was appointed as a new designated doctor. Dr. G examined the claimant on July 25, 2018. The ALJ provided the parties

with Dr. G's MMI/IR report on August 8, 2018, and gave the parties until the close of business on August 15, 2018, to comment or respond to Dr. G's report before he closed the record. The carrier responded on August 13, 2018, and requested a continuance so the claimant could be evaluated by a post-designated doctor RME doctor. The carrier had not previously requested a post-designated doctor RME. The ALJ noted in the discussion portion of the decision that the carrier did not show good cause for its request and he closed the record on August 15, 2018.

Section 408.0041(f) provides, in part, that if an insurance carrier is not satisfied with the opinion rendered by a designated doctor under this section, the carrier may request the commissioner to order an employee to attend an examination by a doctor selected by the insurance carrier. Carriers are entitled to a post-designated doctor RME for the purpose of evaluating a designated doctor's determination on the issues listed under Section 408.0041 (which include MMI and IR) in accordance with Rule 126.5(c)(2).

The carrier contended that the ALJ abused his discretion in denying its request to reconvene the CCH to allow a post-designated doctor RME. Rulings on continuances are reviewed under an abuse-of-discretion standard and the Appeals Panel will not disturb an ALJ's ruling on a continuance absent an abuse of discretion. *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the ALJ acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; APD 121647, decided October 24, 2012; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986).

As noted above, the carrier had not requested a post-designated doctor RME in this case until the ALJ, on his own motion after the CCH, designated a new designated doctor to examine the claimant for purposes of MMI and IR. The carrier promptly requested a post-designated doctor RME upon receipt of the new designated doctor's report. Accordingly, we hold that under the facts of this case the ALJ abused his discretion in denying the carrier's request for continuance to allow a post-designated doctor RME.

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 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. 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. 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 reached MMI on August 31, 2017, with a 21% IR as certified by Dr. G, the second designated doctor appointed to determine MMI and IR. Dr. G examined the claimant on July 25, 2018, and on that date certified the claimant reached MMI on August 31, 2017, with a 21% 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. G assigned the following impairments: 5% whole person impairment under Diagnosis-Related Estimate Category II: Minor Impairment of the AMA Guides for the claimant's cervical spine; 14% whole person impairment for the claimant's concussion using Table 3 on page 4/142 of the AMA Guides; 0% whole person impairment for the claimant's left knee; and 4% whole person impairment using Table 64 on page 3/85 of the AMA Guides for "partial medial and lateral meniscectomies" of the right knee for a total 21% IR.

As noted above the parties stipulated, in part, that the compensable injury includes a right knee medial meniscus tear/internal derangement. An operative report in evidence reflects that the claimant underwent partial medial and lateral meniscectomies on the right knee on April 4, 2017. Although the claimant had surgery for both the medial and lateral meniscus tears of the right knee, the parties did not stipulate that the compensable injury extended to a right 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). *See* APD 181978, decided October 26, 2018.

Dr. G considered and rated a right 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 August 31, 2017, with a 21% IR.

Additionally, Dr. G noted in her narrative report the following diagnoses: cervical sprain/strain; concussion with loss of consciousness; bilateral knee contusions; right knee medial meniscus tear; and cervical radiculopathy. However, the parties stipulated that the compensable injury includes cervical radiculitis, not cervical radiculopathy. The Appeals Panel has previously noted that according to Dorland's Illustrated Medical Dictionary (28th edition), radiculitis and radiculopathy are defined differently.[1] *See* APD 042744, decided December 20, 2004, and APD 090639, decided July 3, 2009. Dr. G did not consider and rate cervical radiculitis, a condition that the parties stipulated is part of the compensable injury. Dr. G also failed to discuss herniated nucleus pulposus/protrusion at C5-6 and C6-7, conditions that the parties stipulated are part of the compensable injury. Additionally, we note that Dr. G failed to document any basis for assessing 14% impairment for the claimant's concussion.

There are a number of other MMI/IR certifications in evidence. Dr. Q, the previously assigned designated doctor, examined the claimant on November 15, 2017, and on that date certified the claimant reached MMI on August 31, 2017, with a 5% IR. However, Dr. Q's narrative report makes clear that he did not consider and rate a right knee medial meniscus tear/internal derangement. Dr. Q's certification does not consider and rate the entire compensable injury and cannot be adopted.

Dr. Q also examined the claimant on November 5, 2015, and certified on November 24, 2015, that the claimant reached MMI on November 5, 2015, with a 0% IR. However, Dr. Q considered a cervical sprain/strain, cervicalgia, concussion without loss of consciousness, and bilateral knee contusions. Dr. Q provided an alternate certification on November 24, 2015, certifying that the claimant reached MMI on November 5, 2015, with a 0% IR. Dr. Q's alternate certification considered cervical sprain/strain, cervicalgia, concussion without loss of consciousness, bilateral knee contusion, thoracic sprain/strain, and post-traumatic headaches. Neither of these certifications consider a right knee medial meniscus tear/internal derangement, among other compensable conditions. Furthermore, the parties did not stipulate that a thoracic sprain/strain is part of the compensable injury, nor did the parties actually litigate that condition. Neither of Dr. Q's November 24, 2015, certifications can be adopted.

Dr. L, a referral doctor selected by the treating doctor, examined the claimant on September 21, 2017, and provided three certifications, all dated October 1, 2017. In the first Dr. L certified the claimant reached MMI on August 31, 2017, with a 21% IR. In the second Dr. L certified the claimant reached MMI on August 31, 2017, with a 25% IR. In the third Dr. L certified the claimant reached MMI on August 31, 2017, with a 25% IR.

[1] Radiculopathy is defined in Dorland's Illustrated Medical Dictionary (28th edition) as "a disease of the nerve roots." Radiculitis is defined in Dorland's Illustrated Medical Dictionary (28th edition) as "inflammation of the spinal nerve roots."

Dr. L's narrative report shows that in each of his three certifications he assigned 4% whole person impairment using Table 64 on page 3/85 of the AMA Guides for partial medial and lateral meniscectomy. Dr. L considered and rated a right knee lateral meniscus tear, which has not yet been determined to be part of the compensable injury. None of Dr. L's certifications can be adopted.

Finally, (Dr. V), a referral doctor selected by the treating doctor, provided four certifications, all based on an August 15, 2016, examination, and dated September 20, 2016. Dr. V noted in her narrative report that the first certification certifying an MMI date of November 15, 2015, with a 5% IR considers and rates a cervical sprain/strain, cervicalgia, concussion without loss of consciousness, and bilateral knee contusion. This certification does not consider and rate right knee medial meniscus tear/internal derangement, and therefore does not consider and rate the entire compensable injury.

Dr. V noted that her second certification certifying the claimant reached MMI on November 15, 2015, with a 5% IR considers and rates a cervical sprain/strain, cervicalgia, concussion without loss of consciousness, bilateral knee contusion, and post-traumatic headaches. This certification does not consider and rate right knee medial meniscus tear/internal derangement, and therefore does not consider and rate the entire compensable injury.

Dr. V noted that her third certification certifying the claimant reached MMI on November 15, 2015, with a 5% IR considers and rates a cervical sprain/strain, cervicalgia, concussion without loss of consciousness, bilateral knee contusion, post-traumatic headaches, thoracic sprain/strain, right hand sprain/strain, and left hand sprain/strain. This certification does not consider and rate right knee medial meniscus tear/internal derangement, and therefore does not consider and rate the entire compensable injury.

Dr. V noted that her fourth certification certifying the claimant had not reached MMI but was expected to do so on April 15, 2017, was based on cervical sprain/strain, cervicalgia, concussion with loss of consciousness, bilateral knee contusion, post-traumatic headaches, right knee medial meniscus tear with internal derangement, and C5-6 and C6-7 herniated nucleus pulposus. This certification does not consider cervical radiculitis, and therefore does not consider the entire compensable injury.

None of the certifications in evidence can be adopted. Therefore, 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 August 31, 2017, and we remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 21%, and we remand the issue of IR 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 still qualified and available to be the designated doctor, the ALJ is to request Dr. G to document her reasons for assessing 14% impairment for the claimant's concussion. 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.

The ALJ is to notify the designated doctor that the (date of injury), compensable injury extends to a cervical sprain/strain, concussion with loss of consciousness, bilateral knee contusions, cervicalgia, post-traumatic concussive headaches, right knee medial meniscus tear/internal derangement, cervical radiculitis, and herniated nucleus pulposus/protrusion at C5-6 and C6-7. The ALJ is to notify the designated doctor that a right knee lateral meniscus tear and cervical radiculopathy have not been determined to be part of the compensable injury.

The ALJ is also to notify the designated doctor that the date of statutory MMI in this case is August 31, 2017, and that the certification of MMI can be no later than the August 31, 2017, statutory date of MMI. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3).

The ALJ is to allow a continuance for a post-designated doctor RME. The parties are to be allowed an opportunity to respond to the designated doctor's and post-designated doctor RME doctor's reports. The ALJ is then to determine the issues of 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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **LM INSURANCE CORPORATION** 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