APPEAL NO. 182809
FILED FEBRUARY 7, 2019

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 October 31, 2018, with the record closing on November 28, 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 May 7, 2018; (2) the claimant's impairment rating (IR) is one percent; and (3) the claimant had disability beginning on June 25, 2018, to July 6, 2018.

The claimant appealed, disputing the ALJ's determinations of MMI and IR. The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations. The ALJ's determination that the claimant had disability beginning on June 25, 2018, to July 6, 2018, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury and that the compensable injury extends to a left knee sprain and left knee medial meniscus tear. The claimant testified that he was injured when he slipped and fell while at work.

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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides, in part, 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 May 7, 2018, with a one percent IR as certified by the Division-appointed designated doctor, (Dr. M). Dr. M examined the claimant on May 18, 2018, and initially certified that the claimant reached MMI on March 26, 2018, with a one 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). In his narrative report, Dr. M noted that the claimant had surgery, post-surgery treatment, and injections which all concluded on March 26, 2018, per the medical records received. After the CCH, the ALJ sent a letter of clarification (LOC) to Dr. M and noted that a medical record from (Dr. R) dated March 26, 2018, stated the claimant completed two sessions of physical therapy and had four more sessions. Additionally, the ALJ referenced a medical record from (Dr. E) dated April 24, 2018, that indicated that the claimant had been working towards completion of his physical therapy. There is no indication in the record that any additional medical records were sent to Dr. M for his consideration in connection with the LOC.

We note that the Dr. M's narrative report referenced the March 26, 2018, record from Dr. R in the records reviewed section. In his response to the LOC, Dr. M stated that the last treatment note he received was the March 26, 2018, note from Dr. R.

In response to the LOC, Dr. M amended the claimant's MMI date to May 7, 2018, because "this is when the [claimant] indicates he completed all approved physical therapy." Dr. M's narrative report does not list the April 24, 2018, medical record from Dr. E as a record he received or reviewed. In evidence is a record from Dr. R dated June 25, 2018, which states the claimant is "very happy with the results of the program. States he is walking better. His pain is only intermittent." Another medical record from Dr. R dated July 24, 2018, states, in part, the claimant finished the program on that day.

The claimant contends on appeal that the amended MMI date from Dr. M of May 7, 2018, is neither based on information he provided to Dr. M nor based on his medical record.

Rules 130.1(b)(4)(A) and 130.1(c)(3) specifically require that the certifying doctor, including the designated doctor, review the medical records before certifying an MMI date and assigning an IR. In Appeals Panel Decision (APD) 062068, decided December 4, 2006, the Appeals Panel held that the 1989 Act and the Division rules require that the designated doctor conduct an examination of the claimant and review the claimant's medical records. *See also* APD 130187, decided March 18, 2013, in

which the designated doctor did not have the post-operative physical therapy medical records prior to making his first MMI/IR certification; therefore, his certification of MMI and IR could not be adopted. Rule 127.10(a)(1) provides, in part, that the treating doctor and insurance carrier shall provide to the designated doctor copies of all the injured employee's medical records in their possession relating to the medical condition to be evaluated by the designated doctor. The evidence established that Dr. M did not have all of the claimant's medical records for his examination before making a determination on MMI and IR, the issues he was appointed to determine. *See* APD 132258, decided November 20, 2013, and APD 182362, decided December 27, 2018.

Dr. M was asked a question by the ALJ based, in part, on a medical record he did not receive for review. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on May 7, 2018, and the claimant's IR is one percent.

The only other certification of MMI/IR in evidence is from (Dr. P). Dr. P examined the claimant on August 3, 2018, and certified that the claimant reached MMI on July 24, 2018, with a five percent IR. Dr. P assessed five percent IR using the AMA Guides, based on Table 39, muscle weakness. Dr. P stated that Dr. R noted the 4/5 quad weakness on July 24, 2018, and Dr. P noted 4/5 quad weakness during his examination of August 3, 2018. However, Dr. E noted 5/5 quad strength on April 24, 2018. The ALJ in her discussion of the evidence noted that Dr. P's measurements were inconsistent with other medical evidence indicating the claimant did not have a quad strength deficit. We agree. Consequently, the certification of MMI/IR from Dr. P cannot be adopted.

Because there is not a certification of MMI/IR that can be adopted we remand the issues of MMI/IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the claimant reached MMI on May 7, 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 one percent, and 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 date of MMI and IR for the (date of

injury), compensable injury. On remand, the ALJ is to ensure that the required medical records are sent to the designated doctor pursuant to Rule 127.10, including Dr. E's medical record dated April 24, 2018, and Dr. R's medical records dated June 25, 2018, and July 24, 2018.

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 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 **TRUMBULL INSURANCE COMPANY** 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.

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge