

APPEAL NO. 190166
FILED MARCH 27, 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 was held on January 10, 2019, 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 February 9, 2018; and (2) the claimant's impairment rating (IR) is nine percent. The claimant appealed the ALJ's determinations, contending she has not reached MMI and therefore an IR is premature. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

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), in the form of a right hip fracture and a lumbar sprain/strain. The evidence established that the claimant was injured when she fell while cleaning a shower.

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

The ALJ's determination that the claimant reached MMI on February 9, 2018, is supported by sufficient evidence and is affirmed.

IR

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (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 the claimant reached MMI on February 9, 2018, with a nine percent IR as certified by (Dr. G), a doctor acting in place of the treating doctor. Dr. G examined the claimant on March 21, 2018. Dr. G makes clear in her attached narrative report that she considered a right hip fracture and a lumbar sprain/strain. 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 placed the claimant in Diagnosis-Related Estimate (DRE) Category II: Minor Impairment for five percent impairment for the claimant's lumbar sprain/strain. Dr. G also assigned the following whole person impairments (WPI) for the claimant's right hip: zero percent WPI for 110 degrees of flexion, zero percent WPI for 10 degrees of extension, zero percent WPI for 25 degrees of abduction, zero percent WPI for 20 degrees of adduction, two percent WPI for 25 degrees of internal rotation, and two percent WPI for 30 degrees of external rotation for a total four percent WPI. Dr. G combined five percent impairment of the claimant's lumbar spine with four percent impairment for the claimant's right hip for a total impairment of nine percent.

Dr. G's assigned four percent WPI for the claimant's right hip was not in compliance with the AMA Guides. Table 40, Hip Motion Impairments, on page 3/78 provides that 10 degrees of extension results in two percent WPI rather than zero percent WPI as assigned by Dr. G; 25 degrees of abduction results in two percent WPI rather than zero percent WPI as assigned by Dr. G; and 25 degrees of internal rotation results in zero percent WPI rather than two percent as assigned by Dr. G.

The Appeals Panel has held that there is no specific provision in the AMA Guides in the Lower Extremity section that requires range of motion (ROM) deficits be utilized to increase the impairment for a single joint, and it is within the certifying doctor's discretion as a matter of medical judgment to not use the different angles of loss of ROM in a single joint. See Appeals Panel Decision (APD) 132734, decided January 9, 2014. However, in the case on appeal Dr. G provided incorrect WPI results for the claimant's right hip ROM measurements. Dr. G did not state in her narrative report whether she intended to use all ROM deficits for the claimant's right hip in her IR assignment. Although Dr. G was not required to use all ROM deficits of the claimant's right hip, she did not accurately reflect the impairment assessed for the extension,

abduction, and internal rotation ROM she measured. Accordingly, we reverse the ALJ's determination that the claimant's IR is nine percent.

There are other certifications in evidence. (Dr. E), the designated doctor appointed by the Division, examined the claimant on November 27, 2017, April 3, 2018, and September 11, 2018, and each time opined that the claimant had not reached MMI. (Dr. S), the post-designated doctor required medical examination doctor, examined the claimant on July 19, 2018, and certified that the claimant reached MMI on September 25, 2017, with a zero percent IR. Given that we have affirmed the ALJ's determination that the claimant reached MMI on February 9, 2018, these certifications cannot be adopted.

There is no 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.

SUMMARY

We affirm the ALJ's determination that the claimant reached MMI on February 9, 2018.

We reverse the ALJ's determination that the claimant's IR is nine percent, and we remand the issue of the claimant's IR for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. E is the designated doctor in this case. On remand the ALJ is to determine whether Dr. E is still qualified and available to be the designated doctor. If Dr. E is still qualified and available to be the designated doctor, the ALJ is to inform Dr. E that the compensable injury is a right hip fracture, a lumbar strain, and a lumbar sprain. The ALJ is also to advise Dr. E that the compensable injury has not at this time been determined to extend to intervertebral disc displacement of the lumbar region. The ALJ is to further inform Dr. E that the date of MMI is February 9, 2018, and request him to assign an IR as of the date of MMI in accordance with Rule 130.1(c) and the AMA Guides.

If Dr. E 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 IR for the (date of injury), compensable injury as of the February 9, 2018, date of MMI. The ALJ is to inform the designated doctor that the date of MMI is February 9, 2018, and request the designated doctor assign an IR as of the date of MMI in accordance with Rule 130.1(c)

and the AMA Guides. The ALJ is to advise the designated doctor that the compensable injury is a right hip fracture, a lumbar strain, and a lumbar sprain.

The parties are to be provided with the designated doctor's new MMI/IR certification and allowed an opportunity to respond. The ALJ is then to make a determination of the claimant's 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 **LIBERTY MUTUAL FIRE 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge