

APPEAL NO. 191070
FILED JULY 17, 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 January 29, 2019, with the record closing on April 29, 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 December 5, 2017; (2) the claimant's impairment rating (IR) is six percent; (3) the claimant had disability resulting from the compensable injury of (date of injury), beginning on October 11, 2017, and continuing through December 31, 2017; and (4) the claimant did not have disability resulting from the compensable injury of (date of injury), beginning on January 1, 2018, and continuing through January 29, 2019, the date of the CCH. The claimant appealed the ALJ's MMI and IR determinations, contending he has not reached MMI, and therefore an IR is premature. The claimant also appealed that part of the disability determination that was against him. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

The ALJ's determination that the claimant had disability resulting from the compensable injury of (date of injury), beginning on October 11, 2017, and continuing through December 31, 2017, 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), in the form of a bilateral inguinal hernia, left ankle sprain, lumbar sprain, right knee sprain, and a right wrist sprain. The claimant testified that he was guiding an electric cart down an incline when it could no longer sustain the weight of its cargo. He sustained an injury when he attempted to keep the cart from tipping by pushing it back and ultimately moving out of the way when it fell.

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).

DISABILITY

The ALJ's determination that the claimant did not have disability resulting from the compensable injury of (date of injury), beginning on January 1, 2018, and continuing through January 29, 2019, the date of the CCH is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on December 5, 2017, 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 December 5, 2017, with a six percent IR as certified by (Dr. P), the designated doctor. Dr. P examined the claimant on March 27, 2018, and stated in his narrative report that he considered a bilateral inguinal hernia, left ankle sprain, lumbar sprain, right knee sprain, and a right wrist sprain. 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. P placed the claimant in Diagnosis-Related Estimate (DRE) Category II: Minor Impairment for five percent impairment for the claimant's lumbar sprain. He assigned a zero percent impairment for the left ankle, right knee, and right wrist based on full range-of-motion measurements for those body parts. Dr. P also assessed a one percent impairment for the bilateral inguinal hernia by placing the claimant in Class 1 of Table 7: Classes of Hernia-related Impairment, page 10/247 of the AMA Guides. According to the AMA Guides, in order to be placed in Class 1 of Table 7, there must be:

Palpable defect in supporting structures of abdominal wall; and

Slight protrusion at site of defect with increased abdominal pressure; readily reducible; or

Occasional mild discomfort at site of defect, but not precluding normal activity.

Each class listed in Table 7 for rating a hernia-related impairment requires a palpable defect in the supporting structures of the abdominal wall in conjunction with other criteria. See Appeals Panel Decision (APD) 072253-s, decided March 3, 2008. In his narrative report, Dr. P states, “[the][claimant’s] repair is holding well and no recurrent hernia is detected upon exam. He would exhibit no palpable defect, no protrusion with abdominal pressure and slight discomfort at operative site not limiting activity.” Dr. P’s assignment of one percent impairment for the bilateral inguinal hernia is not in accordance with the AMA Guides and is contrary to the preponderance of the evidence. Accordingly, we reverse the ALJ’s determination that the claimant’s IR is six percent.

There is no other certification in evidence with the MMI date of December 5, 2017, as affirmed in this decision. Therefore, 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 did not have disability resulting from the compensable injury of (date of injury), beginning on January 1, 2018, and continuing through January 29, 2019, the date of the CCH.

We affirm the ALJ’s determination that the claimant reached MMI on December 5, 2017.

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

REMAND INSTRUCTIONS

Dr. P is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. P is still qualified and available to be the designated doctor. If Dr. P is still qualified and available to be the designated doctor, the ALJ is to inform Dr. P that the compensable injury is a bilateral inguinal hernia, left ankle sprain, lumbar sprain, right knee sprain, and a right wrist sprain. Additionally, the ALJ is to inform Dr. P that an impairment for a hernia under Table 7 of the AMA Guides requires a palpable defect in the supporting structures of the abdominal wall. Finally, the ALJ is to inform Dr. P that

the date of MMI is December 5, 2017, 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. P 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 December 5, 2017, date of MMI. 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 on 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 INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge