

APPEAL NO. 191457
FILED OCTOBER 15, 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 May 30, 2018, August 9, 2018, and May 13, 2019, with the record closing on July 1, 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 compensable injury of (date of injury), extends to a breaching rod of the left knee mid femur surface, left knee medial compartment with bone absorption, left knee joint space narrowing, left knee medial meniscus tear, left knee chondromalacia, and genu varus deformity; (2) the compensable injury of (date of injury), does not extend to genu valgum deformity; (3) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on May 31, 2017; and (4) the claimant's impairment rating (IR) is 15%.

The appellant/cross-respondent (self-insured) appealed the ALJ's MMI, IR and that portion of the ALJ's extent-of-injury determination in favor of the claimant. The claimant did not file a response to the self-insured's appeal. The claimant cross-appealed, disputing the ALJ's IR determination. The self-insured responded to the claimant's cross-appeal.

The ALJ's determination that the compensable injury of (date of injury), does not extend to genu valgum deformity was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reformed 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 left elbow contusion, head contusion, and a left open supracondylar and intercondylar distal femur fracture and the date of statutory MMI is May 31, 2017. The evidence reflects that the claimant was attempting to stand on a chair and fell to the left side, hitting her left knee and fracturing her left femur. The claimant was airlifted to (city) where surgery was performed to repair the fracture with placement of an intramedullary rod and screws. The claimant additionally underwent a left knee partial medial meniscectomy, an arthroscopy with debridement, and a manipulation under anesthesia on October 28, 2015.

A review of the record reflects that the parties stipulated that on (date of injury), Employer provided workers' compensation insurance through TASB Risk Management

Fund. The ALJ mistakenly listed “Texas Associate [sic] of School Boards” in the stipulation in her decision and order. We reform stipulation 1.C. to read that: On (date of injury), Employer provided workers’ compensation insurance through TASB Risk Management Fund, Carrier, as stipulated by the parties.

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).

EXTENT OF INJURY

The ALJ’s determination that the compensable injury of (date of injury), extends to a breaching rod of the left knee mid femur surface, left knee medial compartment with bone absorption, left knee joint space narrowing, left knee medial meniscus tear, left knee chondromalacia, and genu varus deformity is supported by sufficient evidence and is affirmed.

MMI

The ALJ’s determination that the claimant reached MMI on May 31, 2017, in accordance with the opinion of (Dr. A), the designated doctor, is supported by sufficient evidence and is affirmed. Dr. A certified the claimant reached statutory MMI due to the fact that the intramedullary rod that was placed during the fracture repair still needed to be removed because it had breached the cortical surface of the mid femur, a condition which has been affirmed as compensable.

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 May 31, 2017, with a 15% IR in accordance with an amended certification by Dr. A. Dr. A examined the claimant for the purpose of determining MMI and IR on November 30, 2017, and initially certified the claimant had a 10% IR. Dr. A's narrative report of the same date stated he considered the conditions of right [sic] elbow contusion, left side of head contusion, left open supracondylar distal femur fracture, left intramedullary rod breaching the cortical surface of the mid femur, left knee medial joint space narrowing, medial compartment with bone absorption about the distal end of the intramedullary rod, medial meniscus tear, chondromalacia, and genu varus deformity. Dr. A assigned a 0% impairment for the head contusion and the right [sic] elbow contusion. For the left lower extremity, Dr. A assigned a 10% impairment based on Table 62: Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals of 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. A explained that he considered 13 methods for evaluating the lower extremity and chose the method that yielded the highest impairment.

In evidence is a response to a letter of clarification dated June 10, 2019, in which Dr. A responded to the ALJ's request to consider the instructions regarding evaluating the lower extremity on page 3/84 of the AMA Guides. Dr. A acknowledged that this section of the AMA Guides states that "[f]ractures in and about the joints with degenerative changes should be rated either by using [diagnosis-based estimates] and combining . . . the rating for arthritic degeneration or by using the range of motion (ROM) section. It is recommended that the section providing the greater impairment estimate be used." Dr. A then assigned a 5% impairment pursuant to the diagnosis-based estimate for a supracondylar or intercondylar displaced fracture under Table 64: Impairment Estimates for Certain Lower Extremity Impairments and combined 10% impairment for arthritis based on Table 62 for a final IR of 15%. He also rated the left elbow contusion and head contusion with a 0%. Dr. A did not consider and rate a left knee medial meniscus tear. As previously noted, we have affirmed the ALJ's determination that the compensable injury includes a left knee medial meniscus tear. The evidence establishes that the claimant underwent a partial medial meniscectomy on October 28, 2015, as treatment for this condition. As Dr. A did not rate the compensable left knee medial meniscus tear, his certification cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant's IR is 15%.

There are other certifications in evidence. (Dr. E), the post-designated doctor required medical examination (RME) doctor, examined the claimant on May 30, 2017,

and provided alternate certifications that both certified the claimant reached MMI on October 11, 2016, with a 6% IR. (Dr. O), another RME doctor, examined the claimant on March 6, 2018, and certified that the claimant reached MMI on October 11, 2016, with a 13% IR. Given that we have affirmed the ALJ's determination that the claimant reached MMI on May 31, 2017, these certifications cannot be adopted.

(Dr. B), a doctor selected by the treating doctor, examined the claimant on January 23, 2018, and provided two alternate certifications with an MMI date of May 31, 2017. In the first certification, Dr. B assigned an 8% IR based on the accepted conditions of left elbow contusion, head contusion, left open supracondylar distal femur fracture and left femur open fracture. Since we have affirmed the ALJ's decision that the compensable injury extends to a breaching rod of the left knee mid femur surface, left knee medial compartment with bone absorption, left knee joint space narrowing, left knee medial meniscus tear, left knee chondromalacia, and genu varus deformity, this certification cannot be adopted because it failed to rate the entire compensable injury.

Dr. B's second certification assigned an IR of 26%. In his narrative report, Dr. B states, "[u]tilizing the surgical report which states 'bone on bone' in Table 62 page 83 for arthritis, would have provided for 20% permanent impairment." However, page 3/82 of the AMA Guides indicates that impairments for arthritis in Table 62 are based on standard roentgenograms, not surgical reports. Dr. B further explained in his narrative report that he combined the 20% for arthritis with 8% for ROM deficits in the knee for a total IR of 26%. As noted previously, page 3/84 of the AMA Guides states that fractures with degenerative changes should be rated either by using diagnosis-based estimates and combining with the arthritis impairment or by using ROM measurements. As Dr. B combined the impairment for ROM deficits with the arthritis impairment, he incorrectly applied the AMA Guides and his certification cannot be adopted.

There is no other certification in evidence with the MMI date of May 31, 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 reform stipulation 1.C. to read that: On (date of injury), Employer provided workers' compensation insurance through TASB Risk Management Fund, Carrier.

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to a breaching rod of the left knee mid femur surface, left knee medial compartment with bone absorption, left knee joint space narrowing, left knee medial meniscus tear, left knee chondromalacia, and genu varus deformity.

We affirm the ALJ's determination that the claimant reached MMI on May 31, 2017.

We reverse the ALJ's determination that the claimant's IR is 15%, and we remand the issue of the claimant's IR for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. A is the 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 still qualified and available to be the designated doctor, the ALJ is to inform Dr. A that the compensable injury is a left elbow contusion, head contusion, a left open supracondylar and intercondylar distal femur fracture, a breaching rod of the left knee mid femur surface, left knee medial compartment with bone absorption, left knee joint space narrowing, left knee medial meniscus tear, left knee chondromalacia, and genu varus deformity. Additionally, the ALJ is to inform Dr. A that on October 28, 2015, the claimant underwent a left knee partial medial meniscectomy for the compensable left knee medial meniscus tear, which should be rated according to Table 64 on page 3/85 of the AMA Guides. Finally, the ALJ is to inform Dr. A that the date of MMI is May 31, 2017, and request him to assign an IR for the entire compensable injury as of the date of MMI in accordance with Rule 130.1(c) and the AMA Guides.

If Dr. A 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 May 31, 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **HALLETTSVILLE INDEPENDENT SCHOOL DISTRICT C/O TEXAS ASSOCIATION OF SCHOOL BOARDS (TASB) RISK MANAGEMENT FUND (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DUBRAVKA ROMANO
TEXAS ASSOCIATION OF SCHOOL BOARDS
12007 RESEARCH BLVD
AUSTIN, TEXAS 78759.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge