

APPEAL NO. 200978
AUGUST 25, 2020

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 19, 2020, 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 sustained on (date of injury), does not extend to a disc protrusion/herniation at C2-3, disc bulge at C3-4, or disc protrusions/herniations at C4-5 and C5-6; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 6, 2018; and (3) the claimant's impairment rating (IR) is 5%. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the extent of injury, MMI, and IR determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the carrier has accepted a (date of injury), compensable injury in the form of at least a scalp laceration, cervical strain, thoracic strain, left chest contusion, and concussion; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. D) as designated doctor for purposes of MMI and IR; and that the Division subsequently appointed (Dr. P) as successor designated doctor for purposes of MMI and IR. The claimant testified that she was injured when she was struck on her side and knocked to the floor by some wood for pallets that became stuck on a conveyor belt.

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 sustained on (date of injury), does not extend to a disc protrusion/herniation at C2-3, disc bulge at C3-4, or

disc protrusions/herniations at C4-5 and C5-6 is supported by sufficient evidence and is affirmed.

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 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 found that the certification from Dr. P, the designated doctor appointed by the Division, was not contrary to the preponderance of the other medical evidence. Dr. P examined the claimant on April 27, 2019, and certified that the claimant reached MMI on November 6, 2018, and assessed a 5% 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. P stated in the narrative report that on November 6, 2018, the claimant was at the conclusion of her treatment and her condition had become static. Dr. P assessed 0% impairment for the head, noting that a laceration and contusion had resolved. Dr. P assessed 0% impairment for the chest contusion, noting that it had also resolved. Dr. P assessed 0% impairment for the claimant’s cervical spine, placing the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category I. Dr. P placed the claimant in Thoracolumbar DRE Category II “given the presence of structural inclusions: 20% compression fracture of T2” and assessed 5% impairment. Dr. P rated a head contusion which has not yet been determined to be part of the compensable injury. Additionally, Dr. P rated a compression fracture of T2 which has not yet been determined to be part of the compensable injury. Further, Dr. P did not rate a concussion which has been accepted as part of the compensable injury. Dr.

P rated conditions that have not yet been determined to be part of the compensable injury and failed to rate a concussion which is a part of the compensable injury. Accordingly, the ALJ's determination that the claimant reached MMI on November 6, 2018, with a 5% IR is reversed.

There are three other certifications in evidence. (Dr. V), a referral doctor acting in place of the treating doctor, examined the claimant on August 5, 2019, and certified that the claimant had not yet reached MMI but anticipated that she would do so on November 5, 2019. The first designated doctor, Dr. D, examined the claimant on August 25, 2018, and certified that the claimant had not yet reached MMI but anticipated that she would do so on February 25, 2019. We note that the parties discussed the date of statutory MMI, but there was not a stipulation by the parties of the actual date of statutory MMI or a finding of the date of statutory MMI by the ALJ. During the CCH, the parties discussed May 23, 2020, as a potential date of statutory MMI. Based upon the evidence in this case, it appears the date of statutory MMI may have passed; however, we do not have sufficient evidence of that date. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a Decision and Order dated after the date of statutory MMI. See Appeals Panel Decision (APD) 131554, decided September 3, 2013 and APD 172017, decided October 3, 2017. Accordingly, neither the report from Dr. D nor Dr. V that the claimant has not yet reached MMI can be adopted.

The third certification in evidence is from the carrier-selected required examination doctor, (Dr. C). Dr. C examined the claimant on January 28, 2020, and certified that the claimant reached MMI on November 6, 2018, with a 5% IR. Dr. C assessed the 5% IR placing the claimant in Lumbosacral DRE Category II. A lumbar injury has not yet been determined to be part of the compensable injury. Accordingly, Dr. C's certification cannot be adopted.

There is no other certification in evidence. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury sustained on (date of injury), does not extend to a disc protrusion/herniation at C2-3, disc bulge at C3-4, or disc protrusions/herniations at C4-5 and C5-6.

We reverse the ALJ's determination that the claimant reached MMI on November 6, 2018, and 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 5% and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. P is the designated doctor in this case. The ALJ is to determine whether Dr. P is still qualified and available to serve as designated doctor. If Dr. P is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to take a stipulation from the parties regarding the date of statutory MMI. If the parties are unable to stipulate to the date of statutory MMI, the ALJ is to make a determination of the date of statutory MMI in order to inform the designated doctor of the date of statutory MMI.

The ALJ is to advise the designated doctor of the date of statutory MMI and request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury which includes a scalp laceration, cervical strain, thoracic strain, left chest contusion, and concussion in accordance with the AMA Guides considering the medical record and the certifying examination. The date of MMI cannot be after the date of statutory MMI.

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 on 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 **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
d/b/a CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge