

APPEAL NO. 201812
FILED JANUARY 20, 2021

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 October 21, 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 of (date of injury), does not extend to C5-6 paracentral disc protrusion centrally with broad-based diffuse bulging centrally and to the right with a mild degree of cord compression, moderate biforaminal, particularly on the right side due to hypertrophy of the uncinat process and facet arthropathy with effacement of the nerve root, retrolisthesis of C5 on C6 with disc desiccation, left lateral disc protrusion at the C6-7 level without any cord compression and central canal stenosis, bilateral foraminal narrowing particularly on the left side due to hypertrophy of the uncinat process, and facet arthropathy with effacement of the nerve root, cervical herniated discs at C4-5, C5-6, and C6-7, cervical radiculopathy, or cervical facet joint syndrome; (2) the appellant (claimant) reached statutory maximum medical improvement (MMI) on June 29, 2020; and (3) the claimant's impairment rating (IR) is 10%.

The claimant appealed all of the ALJ's determinations, contending that the compensable injury does extend to the disputed conditions, he has not reached MMI, and therefore no IR can be assigned at this time. 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), which extends to a left knee sprain, left shoulder rotator cuff tear/supraspinatus, left shoulder bicipital tendinitis/impingement, left ribs/chest contusion, cervical strain, lumbar strain, right hip contusion, left hip contusion, right leg contusion, left leg contusion, right shoulder sprain, and left shoulder sprain; (Dr. C) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to determine MMI, IR, extent of injury, and disability; and the date of statutory MMI is June 29, 2020. The record established the claimant was injured on (date of injury), in a motor vehicle accident.

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), does not extend to C5-6 paracentral disc protrusion centrally with broad-based diffuse bulging centrally and to the right with a mild degree of cord compression, moderate biforaminal, particularly on the right side due to hypertrophy of the uncinat process and facet arthropathy with effacement of the nerve root, retrolisthesis of C5 on C6 with disc desiccation, left lateral disc protrusion at the C6-7 level without any cord compression and central canal stenosis, bilateral foraminal narrowing particularly on the left side due to hypertrophy of the uncinat process, and facet arthropathy with effacement of the nerve root, cervical herniated discs at C4-5, C5-6, and C6-7, cervical radiculopathy, or cervical facet joint syndrome is supported by sufficient evidence and is affirmed.

MMI

Section 401.011(30) provides MMI means the earlier of: (A) 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; (B) the expiration of 104 weeks from the date on which income benefits begin to accrue; or (C) the date determined as provided by Section 408.104. 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.

The ALJ determined that the claimant reached MMI on the statutory date of June 29, 2020, as certified by Dr. C, the designated doctor.

Dr. C examined the claimant on December 14, 2019, and she opined in a certification dated December 27, 2019, that the claimant reached MMI on October 21, 2019, with a 3% IR, which was the same MMI and IR for all three of her alternate opinions. Dr. C noted in her attached narrative report that the first certification was based on the carrier-accepted conditions of a left shoulder rotator cuff tear/supraspinatus, left shoulder bicipital tendinitis/impingement, left side of ribs/chest contusion, cervical strain, lumbar strain, bilateral hip contusion, and bilateral leg contusion. Dr. C noted the second certification was based on the accepted conditions plus the disputed conditions, and the final certification was based on the injury per her

examination, which was a left shoulder rotator cuff tear/supraspinatus, left shoulder bicipital tendinitis/impingement, left side of ribs/chest contusion, cervical strain, lumbar strain, bilateral hip contusion, and bilateral leg contusion.

Dr. C again examined the claimant on July 14, 2020, and certified in alternate certifications dated July 22, 2020, that the claimant reached MMI on July 14, 2020, with a 10% IR. However, on July 23, 2020, Dr. C amended the July 22, 2020, certifications to all state that the claimant reached MMI on the statutory date of June 29, 2020, with a 10% IR. Dr. C noted in her attached narrative report that the first certification was based on the carrier-accepted conditions of a left shoulder rotator cuff tear/supraspinatus, left shoulder bicipital tendinitis/impingement, left side of ribs/chest contusion, cervical strain, lumbar strain, right hip contusion, left hip contusion, "right leg contusion," "bilateral leg contusion," right shoulder sprain, and left shoulder sprain. Dr. C noted the second certification was based on the accepted conditions plus the disputed conditions, and the final certification was based on the injury per her examination, which was a left shoulder rotator cuff tear/supraspinatus, left shoulder bicipital tendinitis/impingement, left side of ribs/chest contusion, cervical strain, lumbar strain, right hip contusion, left hip contusion, "right leg contusion," "bilateral leg contusion," right shoulder sprain, and left shoulder sprain. For all three scenarios Dr. C stated that she did not recommend further care for the claimant's injuries and noted that the claimant had completed the recommended treatments per the Official Disability Guidelines.

The ALJ noted in the Discussion portion of the decision and order that Dr. C "rated the compensable injury and provided a reasonable explanation for the date of [MMI] that she selected." The compensable injury in this case is a left knee sprain, left shoulder rotator cuff tear/supraspinatus, left shoulder bicipital tendinitis/impingement, left ribs/chest contusion, cervical strain, lumbar strain, right hip contusion, left hip contusion, right leg contusion, left leg contusion, right shoulder sprain, and left shoulder sprain. Dr. C did not consider and rate a left knee sprain, which is part of the compensable injury. However, even if further treatment for a left knee sprain may be anticipated, under the facts of this case the MMI date cannot be extended beyond the statutory date of June 29, 2020. Therefore, we affirm the ALJ's determination that the claimant reached MMI on the statutory date of June 29, 2020.

IR

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. 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's IR is 10% as certified by Dr. C, which, as noted above, is based upon her July 14, 2020, examination. Although Dr. C noted in her narrative report for the July 14, 2020, examination that the claimant complained of right knee pain and that she examined the right knee for which she gave no impairment, Dr. C did not consider or rate a left knee sprain, which is part of the compensable injury. Because Dr. C did not consider and rate the entire compensable injury in this case, we reverse the ALJ's determination that the claimant's IR is 10%.

There are other certifications in evidence. As previously noted, Dr. C has opined in different certifications that the claimant reached MMI on October 21, 2019, and July 14, 2020. Additionally, there are certifications from (Dr. M), a referral doctor acting in place of the treating doctor. Dr. M examined the claimant on July 25, 2019, and certified the claimant reached MMI on July 17, 2019, with a 3% IR. Dr. M next examined the claimant on March 17, 2020, and certified the claimant reached MMI on February 24, 2020, with an 11% IR. However, the date of MMI in this case is June 29, 2020; none of these certifications 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 compensable injury of (date of injury), does not extend to C5-6 paracentral disc protrusion centrally with broad-based diffuse bulging centrally and to the right with a mild degree of cord compression, moderate biforaminal, particularly on the right side due to hypertrophy of the uncinat process and facet arthropathy with effacement of the nerve root, retrolisthesis of C5 on C6 with disc desiccation, left lateral disc protrusion at the C6-7 level without any cord compression and central canal stenosis, bilateral foraminal narrowing particularly on the left side due to hypertrophy of the uncinat process, and facet arthropathy with effacement of the nerve root, cervical herniated discs at C4-5, C5-6, and C6-7, cervical radiculopathy, or cervical facet joint syndrome.

We affirm the ALJ's determination that the claimant reached MMI on the statutory date of June 29, 2020.

We reverse the ALJ's determination that the claimant's IR is 10%, and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

The designated doctor in this case is Dr. C. On remand the ALJ is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C 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.

The ALJ is to advise the designated doctor that the compensable injury of (date of injury), is a left knee sprain, left shoulder rotator cuff tear/supraspinatus, left shoulder bicipital tendinitis/impingement, left ribs/chest contusion, cervical strain, lumbar strain, right hip contusion, left hip contusion, right leg contusion, left leg contusion, right shoulder sprain, and left shoulder sprain. The ALJ is to request the designated doctor to rate the entire compensable injury in accordance with 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), based on the June 29, 2020, date of MMI considering the medical record and the certifying examination.

The parties are to be provided with the ALJ's letter to the designated doctor and the designated doctor's response. If another designated doctor is appointed, the parties are to be provided with the Presiding Officer's Directive to Order Designated Doctor Examination, the designated doctor's report, and are to be allowed an opportunity to respond. The ALJ is then to determine 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
TEXAS MUTUAL INSURANCE COMPANY
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge