

APPEAL NO. 210916
FILED AUGUST 26, 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 April 19, 2021, with the record closing on May 10, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), extends to right-sided lumbar sciatica, lumbar spine disc bulges at L4-5 and L5-S1, and lumbar radiculopathy; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on February 4, 2020; and (3) the claimant's impairment rating (IR) is five percent. The claimant appealed the ALJ's MMI and IR determinations. The respondent/cross-appellant (self-insured) responded, urging affirmance of those determinations. The self-insured cross-appealed the ALJ's extent-of-injury determination. The appeal file does not contain a response from the claimant to the self-insured's cross-appeal.

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); the self-insured has accepted a lumbar spine contusion, lumbar sprain/strain, and right hip strain as the compensable injury of (date of injury); and the conditions of strain of unspecified muscle and tendon at lower leg level, right leg and right hip strain are used interchangeably in this case. The claimant testified that on (date of injury), he was on the ground assisting a coworker cutting branches in a tree. The claimant testified he was pulling on a vine on a branch being cut and was injured when the branch suddenly released and caused the claimant to fall to the ground.

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 right-sided lumbar sciatica, lumbar spine disc bulges at L4-5 and L5-S1, and lumbar radiculopathy 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 Texas Department of Insurance, Division of Workers' Compensation (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 only certifications in evidence are from (Dr. O), the designated doctor appointed by the Division to determine MMI and IR, and (Dr. Ob), the post-designated doctor required medical examination (RME) doctor.

Dr. O, the designated doctor, examined the claimant on December 20, 2019, and certified on January 30, 2020, that the claimant reached MMI on October 29, 2019, with a five percent IR. Dr. O's narrative report shows that she based her certification on a contusion of the lower back and pelvis, a strain of muscle, fascia, and tendon of the lower back, and a "strain of unspecified muscle(s) and tendon(s) at lower leg level, right leg." The ALJ correctly noted in his discussion that Dr. O's certification could not be adopted because it does not rate the entire compensable injury.

Dr. Ob, the RME doctor, examined the claimant on March 31, 2021, and issued three alternate certifications, all of which certify the claimant reached MMI on February 4, 2020, based on various conditions.

In his attached narrative report Dr. Ob stated that the first certification was based on "the [self-insured accepted] conditions, which are also the conditions I have

determined compensable, of contusion of the low back and pelvis (S30.00XD), a lumbar strain (S39.012D), and a right hip strain (S76.011D).” 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. Ob placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms, and assigned a zero percent IR for those conditions. Dr. Ob noted that his assigned IR was based on the physical examination findings noted on February 4, 2020, the date of MMI.

Dr. Ob stated that the second certification was based on the self-insured accepted conditions of contusion of the low back and pelvis, a lumbar strain, and a right hip strain, as well as the disputed conditions of right lumbar sciatica, lumbar radiculopathy, L3-4 spinal canal stenosis, L4-5 spinal canal stenosis, mild right foraminal narrowing L5-S1, L3-4 disc bulge, L4-5 disc bulge, and L5-S1 disc bulge. Dr. Ob placed the claimant in DRE Lumbosacral Category II: Minor Impairment, and assigned a five percent IR for those conditions. Dr. Ob noted that the five percent IR was also based on the physical examination findings noted on February 4, 2020.

Dr. Ob stated that the third certification was based on the designated doctor-opined conditions of contusion of the low back and pelvis, a lumbar sprain/strain, right lumbar sciatica, an aggravated L4-5 disc bulge, an aggravated L5-S1 disc bulge, and lumbar radiculopathy. Dr. Ob again placed the claimant in DRE Lumbosacral Category II: Minor Impairment and assigned a five percent IR for those conditions, “as outlined in [the second certification] above.”

The ALJ stated in his discussion that “[Dr. Ob’s] certification for the compensable injury as defined in this decision was persuasive and supported by the other medical evidence,” and in Finding of Fact No. 5 found that the preponderance of the other medical evidence supports his certification.

The compensable injury in this case is a lumbar spine contusion, lumbar sprain/strain, right hip strain, right-sided lumbar sciatica, lumbar spine disc bulges at L4-5 and L5-S1, and lumbar radiculopathy. None of Dr. Ob’s certifications consider the entire compensable injury in this case. As noted above, Dr. Ob’s first certification assigning a zero percent IR considers contusion of the low back and pelvis, a lumbar strain, and a right hip strain. Dr. Ob’s second certification assigning a five percent IR considers, among other conditions, L3-4 spinal canal stenosis, L4-5 spinal canal stenosis, L3-4 disc bulge, and mild right foraminal narrowing L5-S1, which are conditions that have not yet been determined to be part of the compensable injury. Dr. Ob’s third certification assigning a five percent IR considers contusion of the low back and pelvis, a lumbar sprain/strain, right lumbar sciatica, an aggravated L4-5 and L5-S1

disc bulge, and lumbar radiculopathy. Dr. Ob did not consider a right hip strain, which is part of the compensable injury. We note the parties stipulated the conditions of strain of unspecified muscle and tendon at lower leg level, right leg and right hip strain are used interchangeably in this case. However, Dr. Ob did not state in his narrative report that his third certification considered either of those conditions.

Dr. Ob's certifications do not consider the entire compensable injury. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on February 4, 2020, and that the claimant's IR is five percent. As discussed above, Dr. O's certification does not consider the entire compensable injury and cannot be adopted. There is no certification in evidence that can be adopted; therefore, 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 extends to right-sided lumbar sciatica, lumbar spine disc bulges at L4-5 and L5-S1, and lumbar radiculopathy.

We reverse the ALJ's determination that the claimant reached MMI on February 4, 2020, and we 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 five percent, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. O is the designated doctor in this case. On remand the ALJ is to determine whether Dr. O is still qualified and available to be the designated doctor. If Dr. O 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 MMI and IR for the (date of injury), compensable injury.

The parties did not stipulate or discuss a date of statutory MMI and there was no finding of the date of statutory MMI by the ALJ. Based on the evidence in this case the date of statutory MMI may have passed. 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 if it has been reached, and also advise the designated doctor that the compensable injury of (date of injury), is a lumbar spine contusion, lumbar sprain/strain, right hip strain, right-sided lumbar sciatica, lumbar spine disc bulges at L4-5 and L5-S1, and lumbar radiculopathy. The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury 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 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 date of 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**NAME
ADDRESS
CITY, STATE ZIP CODE.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge