

APPEAL NO. 211148
FILED SEPTEMBER 2, 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 (CCH) was held on May 27, 2021, with the record closing on June 7, 2021, 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 an L4-5 disc bulge, an L5-S1 disc bulge left paracentral region where there is a disc extrusion with 5mm of cranial migration with possible contact of the traversing left S1 nerve root, and contact and probable compression of the exiting right L5 nerve root; a right shoulder posterior, tiny high-grade interstitial versus articular surface partial thickness tear, right shoulder impingement; the following right elbow conditions¹: moderate triceps insertional tendinosis with possible low-grade partial thickness tearing, moderate grade common extensor origin partial thickness tear, a radial collateral ligament tear and biceps allusion radial tuberosity; the following left shoulder conditions: supraspinatus tendon mid-substance insertional tiny low-grade partial thickness tear which is articular surface interstitial; left shoulder impingement; left elbow moderate tendinosis and medial epicondylitis; a left knee margin white zone tear with some extension into the body of the posterior horn of the medial meniscus, or a right knee aggravation of a post-prior partial meniscectomy; (2) the appellant (claimant) had disability from February 28, 2020, continuing through January 22, 2021, as a result of the (date of injury), compensable injury; (3) the claimant reached maximum medical improvement (MMI) on February 27, 2020; and (4) the claimant's impairment rating (IR) is zero percent.

The claimant appealed the ALJ's extent of injury, MMI, and IR determinations. The respondent (self-insured) responded, urging affirmance of the appealed determinations. The ALJ's determination that the claimant had disability from February 28, 2020, continuing through January 22, 2021, as a result of the (date of injury), compensable injury was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

¹ We note the ALJ stated at the CCH that she was going to amend Issue Statement 1 to reflect the following right upper extremity conditions rather than right elbow conditions because that was more accurate to the disputed conditions. Neither party addressed this in the appeal or response.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury at least in the form of contusions to both knees, both elbows, both shoulders, both upper arms, and the posterior trunk; and sprains and strains to both knees, both shoulders, both upper arms, left wrist, cervical spine, thoracic spine, and lumbar spine, and (Dr. H) was selected by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI and IR. The claimant, a detention officer, was injured on (date of injury), when he tripped over a mattress on the floor while he was running to respond to an inmate situation.

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 an L4-5 disc bulge, an L5-S1 disc bulge left paracentral region where there is a disc extrusion with 5mm of cranial migration with possible contact of the traversing left S1 nerve root, and contact and probable compression of the exiting right L5 nerve root; a right shoulder posterior, tiny high-grade interstitial versus articular surface partial thickness tear, right shoulder impingement; the following right elbow conditions: moderate triceps insertional tendinosis with possible low-grade partial thickness tearing, moderate grade common extensor origin partial thickness tear, a radial collateral ligament tear and biceps allusion radial tuberosity; the following left shoulder conditions: supraspinatus tendon mid-substance insertional tiny low-grade partial thickness tear which is articular surface interstitial; left shoulder impingement; left elbow moderate tendinosis and medial epicondylitis; a left knee margin white zone tear with some extension into the body of the posterior horn of the medial meniscus, or a right knee aggravation of a post-prior partial meniscectomy 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 determined that the claimant reached MMI on February 27, 2020, with a zero percent IR based upon the certification from Dr. H, the designated doctor. Dr. H examined the claimant on September 10, 2020². Dr. H stated in his attached narrative report that the self-insured had accepted the following conditions: contusions to bilateral knees, contusions to bilateral elbows, contusions to bilateral shoulders, contusions to upper arms, contusions to posterior trunk, sprain/strain to bilateral knees, contusion to left wrist, contusions to cervical, thoracic, and lumbar spine. Dr. H states he based his certification that the claimant reached MMI on February 27, 2020, with a zero percent IR on these conditions, as well as a cervical and lumbar sprain/strain and bilateral shoulder sprain/strains. However, as noted above the parties stipulated that the claimant sustained a compensable injury at least in the form of contusions to both knees, both elbows, both shoulders, both upper arms, and the posterior trunk; and sprains and strains to both knees, both shoulders, both upper arms, left wrist, cervical spine, thoracic spine, and lumbar spine. Dr. H did not consider sprain/strains to the left wrist or the thoracic spine. Dr. H's certification does not consider the entire compensable injury and cannot be adopted. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on February 27, 2020, with a zero percent IR.

There is only one other certification in evidence, which is from (Dr. C), a doctor acting in place of the treating doctor. Dr. C examined the claimant on October 29, 2020, and certified on that date that the claimant had not reached MMI. Dr. C noted in his attached narrative report that the injuries in question per the Request for Designated Doctor Examination (DWC-32) to be caused by or naturally resulting from the compensable injury included an "L5-S1 disc protrusion (herniation)" and an "L4-5 disc

² We note the discussion portion of the decision incorrectly states Dr. H examined the claimant on September 17, 2020.

protrusion (herniation)” Dr. C opined the claimant has not reached MMI “for multiple different injuries but first and foremost is his lumbar spine [s]prain/strain and disc injury.” As previously discussed, the ALJ’s determination that the compensable injury does not extend to an L4-5 disc bulge or an L5-S1 disc bulge left paracentral region where there is a disc extrusion with 5mm of cranial migration with possible contact of the traversing left S1 nerve, and contact and probable compression of the exiting right L5 nerve root has been affirmed. A lumbar spine disc injury to any other level has not yet been determined to be part of the compensable injury. Dr. C’s certification cannot be adopted. As there is no certification in evidence that can be adopted, 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 an L4-5 disc bulge, an L5-S1 disc bulge left paracentral region where there is a disc extrusion with 5mm of cranial migration with possible contact of the traversing left S1 nerve root, and contact and probable compression of the exiting right L5 nerve root; a right shoulder posterior, tiny high-grade interstitial versus articular surface partial thickness tear, right shoulder impingement; the following right elbow conditions: moderate triceps insertional tendinosis with possible low-grade partial thickness tearing, moderate grade common extensor origin partial thickness tear, a radial collateral ligament tear and biceps allusion radial tuberosity; the following left shoulder conditions: supraspinatus tendon mid-substance insertional tiny low-grade partial thickness tear which is articular surface interstitial; left shoulder impingement; left elbow moderate tendinosis and medial epicondylitis; a left knee margin white zone tear with some extension into the body of the posterior horn of the medial meniscus, or a right knee aggravation of a post-prior partial meniscectomy.

We reverse the ALJ’s determination that the claimant reached MMI on February 27, 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 zero percent, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand the ALJ is to determine if Dr. H is still qualified and available to serve as the designated doctor. If Dr. H 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 ALJ is to notify the designated doctor that the compensable injury in this case is contusions to both knees, both elbows, both shoulders, both upper arms, and the posterior trunk; and sprains and strains to both knees, both shoulders, both upper arms, left wrist, cervical spine, thoracic spine, and lumbar spine. The ALJ is to request the designated doctor to rate the entire compensable injury and render an opinion on the claimant's MMI and IR as of the date of MMI 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) and Rule 130.1 considering the claimant's medical record and the certifying examination.

The parties are to be provided with the designated doctor's new certification and allowed an opportunity to respond. The ALJ is then to make a determination 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