APPEAL NO. 211351
FILED OCTOBER 7, 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, 2020, January 5, 2021, March 31, 2021, and July 20, 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 of (date of injury), does not extend to a cervical sprain/strain or scoliosis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 3, 2019; (3) the claimant's impairment rating (IR) is zero percent; and (4) the claimant had disability from February 9, 2019, through July 3, 2019, but not thereafter through the date of the CCH.

The claimant appealed the ALJ's extent of injury, MMI, and IR determinations, as well as that portion of the ALJ's determination that she did not have disability from July 4, 2019, through the date of the CCH. The claimant also appealed the ALJ's finding of fact that she did not have good cause for failing to appear at the July 20, 2021, CCH. The respondent (carrier) responded, urging affirmance of the ALJ's determinations. The carrier pointed out that this case has been reset numerous times at the claimant's request and contends the claimant's request to reset the CCH would amount to her ninth continuance in this matter. That portion of the ALJ's determination that the claimant had disability from February 9, 2019, through July 3, 2019, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The record reflects that the claimant was injured on (date of injury), while working as a Warehouse Fulfillment Associate for the employer. On that date the claimant lifted a heavy item onto a shelf and felt pain in her low back. We note Finding of Fact No. 6 incorrectly identifies the date of injury as (date).

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).

GOOD CAUSE FOR FAILURE TO APPEAR AT THE JULY 20, 2021, CCH

The ALJ found that the claimant did not have good cause for her failure to appear at the July 20, 2021, CCH. We review good cause determinations under an abuse-of-discretion standard. Appeals Panel Decision (APD) 002251, decided November 8, 2000. The ALJ's determination will not be set aside unless the ALJ acted without reference to any guiding rules or principles. *See Morrow v. H.E.B., Inc.,* 714 S.W.2d 297 (Tex. 1986). The ALJ's finding that the claimant did not have good cause for her failure to appear at the July 20, 2021, CCH is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to a cervical sprain/strain or scoliosis is supported by sufficient evidence and is affirmed.

DISABILITY

That portion of the ALJ's determination that the claimant did not have disability from July 4, 2019, through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on July 3, 2019, is supported by sufficient evidence and is affirmed.

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 July 3, 2019, with a zero percent IR in accordance with the opinion of (Dr. M), the designated doctor. Dr. M

examined the claimant on July 3, 2019, and considered and rated a lumbar sprain/strain and a thoracic sprain/strain, which is the compensable injury in this case at this time. As reflected in his narrative report, Dr. M used 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 placed the claimant in Diagnosis Related Estimate (DRE) Lumbosacral Category I for a zero percent IR and DRE Thoracolumbar Category I for a zero percent IR; however, on his corresponding Report of Medical Evaluation (DWC-69), Dr. M marked that the claimant did not have any permanent impairment as a result of the compensable injury. We note that the Appeals Panel has recognized that a certification of no impairment is different and distinct from a zero percent IR. *See* APD 182223, decided November 14, 2018. Because there is an internal inconsistency between the IR in Dr. M's narrative report and the corresponding DWC-69, his assignment of IR is not adoptable. *See* APD 152290, decided January 21, 2016. Accordingly, we reverse the ALJ's determination that the claimant's IR is zero percent.

There is only one other MMI/IR certification in evidence, which is from (Dr. S), a doctor selected by the treating doctor. Dr. S examined the claimant on November 26, 2019, and certified the claimant reached MMI on July 25, 2019, with a zero percent IR. We have affirmed the ALJ's determination that the claimant reached MMI on July 3, 2019. Dr. S's MMI/IR certification cannot be adopted.

There is no IR in evidence that can be adopted. Therefore, we remand the issue of IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's finding that the claimant did not have good cause for failing to appear at the July 20, 2021, CCH.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a cervical sprain/strain or scoliosis.

We affirm the ALJ's determination that the claimant did not have disability from July 4, 2019, through the date of the CCH.

We affirm the ALJ's determination that the claimant reached MMI on July 3, 2019.

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. M is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M 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 inform the designated doctor that the date of MMI is July 3, 2019, and that the (date of injury), compensable injury is a lumbar sprain/strain and a thoracic sprain/strain. The ALJ is also to inform the designated doctor that the July 3, 2019, compensable injury does not extend to a cervical sprain/strain or scoliosis. Finally, the ALJ is to inform the designated doctor about the internal inconsistency in his prior certification.

The ALJ is to request the designated doctor to give an opinion on the claimant's IR by rating the entire compensable injury in accordance with the AMA Guides and considering the medical record and the certifying examination.

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 IR consistent with this decision. The ALJ is also to correct the error in the date of injury in Finding of Fact No. 6.

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 **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge