

APPEAL NO. 211411
FILED NOVEMBER 5, 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 3, 2021, and July 6, 2021, with the record closing on July 27, 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 respondent (claimant) reached maximum medical improvement (MMI) on October 6, 2020, and (2) the claimant's impairment rating (IR) is 17%. The appellant (carrier) appealed the ALJ's determinations of MMI and IR. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

At the May 3, 2021, CCH setting, only ALJ's exhibit 1 was admitted into evidence. The parties agreed that a letter of clarification (LOC) needed to be sent to the designated doctor along with additional medical records that had not been previously sent to the designated doctor. No testimony was taken, and the parties agreed to reset the CCH. The claimant did not appear at the July 6, 2021, setting of the CCH. A 10-day letter was sent to provide an opportunity for the claimant to explain why he did not attend the July 6, 2021, setting. No response was received from the claimant. The parties agreed that the claimant sustained a compensable injury in the form of a right forearm laceration, right flexor carpi ulnaris laceration, right flexor digitorum profundus tendon laceration at the ring finger, right flexor digitorum profundus tendon laceration at the little finger, right median nerve injury, neuroma mass, right flexor tendon injury at the forearm, right ring finger flexor digitorum superficialis tendon injury, and right little finger flexor digitorum superficialis tendon injury. The medical records reflect that the claimant was injured on (date of injury), when a large glass object that he was carrying overhead shattered.

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).

MMI

The ALJ's determination that the claimant reached MMI on October 6, 2020, 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.

The ALJ determined that the claimant's IR is 17% as certified by (Dr. C), the designated doctor appointed by the Division.

At the May 3, 2021, CCH setting the parties agreed that none of the certifications of MMI/IR from Dr. C were adoptable because the certifications included a condition that was not yet determined to be part of the compensable injury. After the May setting the ALJ sent an LOC to Dr. C and included additional medical records of the claimant not previously seen by Dr. C. The LOC requested that Dr. C provide a certification of MMI/IR for the conditions the parties agreed were part of the compensable injury. Dr. C responded, providing an amended Report of Medical Evaluation (DWC-69) which considered and rated the conditions requested and certified that the claimant reached MMI on October 6, 2020, with a 17% IR.

Dr. C noted in his narrative report that the impairment for the injuries is detailed in the attached Figure 1. However, no attached Figure 1 was included in the evidence.

28 Tex. Admin. Code §130.1(c)(3) (Rule 130.1(c)(3)) provides, in pertinent part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
- (B) document specific laboratory or clinical findings of an impairment;

- (C) analyze specific clinical and laboratory findings of an impairment;
- (D) compare the results of the analysis with the impairment criteria and provide the following:
 - (i) [a] description and explanation of specific clinical findings related to each impairment, including [0% IRs]; and
 - (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of 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)]. The doctor's inability to obtain required measurements must be explained.

The right wrist range-of-motion measurements contained in Dr. C's narrative for his most recent examination were not used to assess impairment for the right wrist. Dr. C states that the measurements for "the previous examination" are used as this is closest to the date of MMI. We note that Dr. C's range-of-motion measurements from "the previous examination" were taken prior to the date of a surgery the claimant underwent for the compensable injury. See Appeals Panel Decision (APD) 080071, decided March 20, 2008. Dr. C's narrative accompanying his DWC-69 does not document clinical findings from an examination of the claimant's right upper extremity that was used to assess impairment; therefore, his narrative report does not comply with Rule 130.1(c)(3). See APD 210361, decided April 30, 2021. Accordingly, Dr. C's assessment of IR cannot be adopted.

As previously noted, the ALJ's determination that the claimant reached MMI on October 6, 2020, is affirmed. There is no other certification in evidence that certified that the claimant reached MMI on October 6, 2020. Accordingly, there is no IR in evidence that can be adopted. Consequently, we reverse the ALJ's determination that the claimant's IR is 17%, and 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 claimant reached MMI on October 6, 2020.

We reverse the ALJ's determination that the claimant's IR is 17%, and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. 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 compensable injury of (date of injury).

The ALJ is to advise the designated doctor that the compensable injury of (date of injury), includes a right forearm laceration, right flexor carpi ulnaris laceration, right flexor digitorum profundus tendon laceration at the ring finger, right flexor digitorum profundus tendon laceration at the little finger, right median nerve injury, neuroma mass, right flexor tendon injury at the forearm, right ring finger flexor digitorum superficialis tendon injury, and right little finger flexor digitorum superficialis tendon injury.

The ALJ is to request that the designated doctor rate the entire compensable injury based on the claimant's condition as of the MMI date of October 6, 2020, considering the claimant's medical record and the certifying examination and in accordance with Rule 130.1(c)(3). The ALJ is to advise the designated doctor that Rule 130.1(c)(3) provides that the doctor assigning the IR shall: (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury; (B) document specific laboratory or clinical findings of an impairment; (C) analyze specific clinical and laboratory findings of an impairment; and (D) compare the results of the analysis with the impairment criteria and provide the following: (i) a description and explanation of specific clinical findings related to each impairment, including 0% IRs; and (ii) a description of how the findings relate to and compare with the criteria described in the applicable chapter of the AMA Guides.

The parties are to be provided with the ALJ's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond. The ALJ is then to make a determination on IR supported by the evidence and consistent with this decision. If another designated doctor examination is necessary, the parties are to be provided with the Presiding Officer's Directive to Order Designated Doctor Examination and the designated doctor's report.

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

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Tex. Labor Code § 402.083

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 **NEW HAMPSHIRE 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge