

APPEAL NO. 220009
FILED FEBRUARY 14, 2022

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 November 17, 2021, with the record closing on December 12, 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 August 11, 2020; and (2) the claimant's impairment rating (IR) is 19%. The appellant (self-insured) appealed, disputing the ALJ's MMI and IR determinations. The claimant responded, urging affirmance of the ALJ's determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that consisted of a contusion of left temporomandibular joint, left shoulder contusion, and post-concussive syndrome. The claimant was injured on (date of injury), when a cabinet affixed to a wall fell down on her.

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 ALJ determined that the claimant reached MMI on August 11, 2020, with a 19% IR as certified by (Dr. K), the designated doctor appointed by the Division to determine MMI and IR. Dr. K examined the claimant on November 5, 2020, and in a Report of Medical Evaluation (DWC-69) dated April 28, 2021, certified the claimant reached MMI on August 11, 2020, with a 19% IR. Dr. K based his certification on a left shoulder contusion, post-concussive syndrome, and “left temporomandibular joint disorder.” However, as previously mentioned the parties stipulated at the CCH that the compensable injury consists of a contusion of left temporomandibular joint, left shoulder contusion, and post-concussive syndrome. Dr. K did not consider and rate the compensable injury in this case, and as such his certification cannot be adopted. Therefore, we reverse the ALJ’s determinations that the claimant reached MMI on August 11, 2020, with a 19% IR.

There is one other certification in evidence, which is from (Dr. S), the post-designated doctor required medical examination doctor. Dr. S examined the claimant on June 25, 2021, and certified on that date that the claimant reached MMI on January 3, 2019, with a 1% IR. Dr. S noted in his attached narrative report that the compensable injury is a contusion of left temporomandibular joint, post-concussive syndrome, and a left shoulder strain. However, the parties stipulated that the compensable injury is comprised in part of a left shoulder contusion, not a left shoulder strain. Dr. S did not consider and rate the entire compensable injury in this case and therefore his certification cannot be adopted.

There is no other certification in evidence. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ’s determinations that the claimant reached MMI on August 11, 2020, with a 19% IR, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K is still qualified and available to serve as the designated doctor, the ALJ is to advise Dr. K that the compensable injury is a contusion of left temporomandibular joint, left shoulder contusion, and post-concussive syndrome, and the date of statutory MMI is August 11, 2020.

We note Dr. K's 19% IR includes a 3% impairment for "Adjustments for Effects of Treatment or Lack of Treatment" of the left temporomandibular joint based on page 2/9 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 adjustments under page 2/9 of the AMA Guides provide for additional impairment in cases where: (1) treatment of an illness results in apparent remission of symptoms but the patient has not regained his or her prior good health; and (2) pharmaceuticals themselves may lead to impairment. See Appeals Panel Decision (APD) 090692-s, decided July 14, 2009; APD 121157, decided August 9, 2012; and APD 122485, decided January 14, 2013; and APD 180714, decided May 1, 2018.

The portion of the AMA Guides relied on by Dr. K to assess 3% impairment is not applicable in the claimant's circumstances. There was no evidence that the claimant's treatment resulted in apparent total remission of her condition or that medication she took for the injury may have led to impairment. Dr. K's narrative report reflects he used subsection "Adjustments for Effects of Treatment or Lack of Treatment" on page 2/9 of the AMA Guides to assess 3% impairment in view of the claimant's ongoing difficulties and need for treatment of her "TMJ injury." However, having ongoing difficulties and need for further treatment for the compensable injury is not contemplated by the AMA Guides for assessing additional impairment under the section relied on by Dr. K, and the ALJ is to advise Dr. K accordingly. The ALJ is then to request Dr. K determine the claimant's MMI and IR.

If Dr. K is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI and IR for the compensable injury. The ALJ is to advise the designated doctor that the date of statutory MMI in this case is August 11, 2020, as found by the ALJ and not appealed by either party. The ALJ is also to advise the designated doctor that the compensable injury is a contusion of left temporomandibular joint, a left shoulder contusion, and post-concussive syndrome. The ALJ is to advise the designated doctor that the claimant's IR for the compensable injury must be based on the claimant's condition as of the MMI date, which cannot be after the statutory MMI date of August 11, 2020, considering the medical record, the certifying examination, and the rating criteria of the AMA Guides.

The designated doctor's report is to be made available to the parties, and the ALJ is to give the parties an opportunity to respond to the designated doctor's report. The ALJ is then to make a decision regarding MMI and IR based on the evidence.

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 **TEXAS POLITICAL SUBDIVISION (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**STEPHEN R. KOON
14990 LANDMARK BOULEVARD, SUITE 300
DALLAS, TEXAS 75254.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge