

APPEAL NO. 220046
FILED MARCH 3, 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 December 1, 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 an L4-5 disc protrusion, spondylolisthesis of L5 on S1, right shoulder dislocation of the right acromioclavicular (AC) joint, right shoulder impingement, right shoulder rotator cuff tear, C4-5 disc herniation/protrusion, or C5-6 disc herniation/protrusion; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 4, 2019; and (3) the claimant's impairment rating (IR) is 13%. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, MMI, and IR determinations.

DECISION

Affirmed in part as reformed and reversed and remanded in part.

The parties stipulated, in part, that: (1) the claimant sustained a compensable injury on (date of injury), in the form of face, neck, back, chest, and left forearm abrasions/contusions, traumatic brain injury with bilateral eye and auditory canal hemorrhages, bilateral pulmonary contusion, subsegmental atelectasis, rhabdomyolysis, hypokalemia, hyperglycemia, hypomagnesemia, left tibial avulsion, right knee medial and lateral meniscus tears, left knee medial and lateral meniscus tears, and cervical, lumbar, right shoulder, bilateral knee, and right ankle/foot sprains/strains; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. K) as designated doctor to determine MMI, IR, and extent of injury; and (3) the date of statutory MMI is April 15, 2020. The claimant testified that he was injured when he approached a machine that was emitting a thin stream of smoke and got "sucked into" the machine. We note that the ALJ misspelled one of the carrier-accepted conditions as hypoketemia in Finding of Fact No. 1.D. We reform Finding of Fact No. 1.D. to reflect the correct spelling of the condition: hypokalemia.

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), does not extend to an L4-5 disc protrusion, spondylolisthesis of L5 on S1, right shoulder dislocation of the right AC joint, right shoulder impingement, right shoulder rotator cuff tear, C4-5 disc herniation/protrusion, or C5-6 disc herniation/protrusion 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 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 ALJ found that the preponderance of the other medical evidence is contrary to the certification from Dr. K that certified the claimant reached MMI on April 15, 2020, with an IR of 38%. Dr. K provided two certifications. However, in both certifications, Dr. K certified that the claimant reached MMI on April 15, 2020, with an IR of 38%. The ALJ correctly notes that the first certification from Dr. K that considered the conditions listed as accepted on the Request for Designated Doctor Examination (DWC-32) did not include the right knee medial and lateral meniscus tears or the left knee medial and lateral meniscus tears because these conditions were not accepted as compensable by the carrier until the CCH. The alternate certification from Dr. K considered and rated conditions that were determined not to be compensable by the ALJ and those determinations have been affirmed. The ALJ's finding that the preponderance of the other medical evidence is contrary to the certification of Dr. K that the claimant reached MMI on April 15, 2020, with a 38% IR is supported by sufficient evidence.

On June 8, 2021, (Dr. B), a carrier-selected required medical examination doctor, examined the claimant and provided three alternative certifications of MMI/IR. In the first scenario, Dr. B certified that the claimant reached MMI on June 4, 2019, and assigned an IR of 9%. However, in the first scenario, Dr. B did not rate and consider the right knee medial and lateral meniscus tears or the left knee medial and lateral meniscus tears. In the second scenario, Dr. B certified that the claimant reached MMI statutorily on April 15, 2020, and assigned a 20% IR. However, in the second scenario Dr. B considered and rated conditions that were in dispute at the CCH and that have been determined to not be part of the compensable injury.

In the third scenario, Dr. B certified that the claimant reached MMI on June 4, 2019, and assigned an IR of 13%. The ALJ found that this certification from Dr. B was supported by a preponderance of the evidence and determined that the claimant reached MMI on June 4, 2019, with a 13% IR. We note that on page 73 of his narrative report, Dr. B correctly stated that according to the AMA Guides Table 64, page 3/85, the claimant's left knee partial medial meniscectomy would be assigned 1% whole person impairment (WPI) and that the claimant would be assigned a 4% WPI for the right knee partial medial

and lateral meniscectomy. However, on page 78 of his narrative report when combining the impairments assigned to the claimant Dr. B mistakenly stated that the claimant was assigned 3% WPI for the right knee. For reasons discussed below, a mathematical correction is not appropriate in this case.

In his narrative report, Dr. B listed the following diagnoses as compensable: facial contusion, facial abrasion, neck contusion, neck abrasion, back contusion, back abrasion, chest contusion, chest abrasion, left forearm abrasion, left forearm contusion, bilateral conjunctival hemorrhages, bilateral auditory canal hemorrhages, concussion with loss of consciousness (synonymous with mild traumatic brain injury), bilateral eye and auditory canal hemorrhages, bilateral pulmonary contusion, [sub]segmental atelectasis, rhabdomyolysis, hypokalemia, hyperglycemia, hypomagnesemia, left tibial avulsion, cervical strain, cervical sprain, lumbar strain, lumbar sprain, right shoulder strain, right shoulder sprain, right knee sprain, left knee sprain, right ankle strain, and right ankle sprain. In scenario 3, Dr. B referenced the above diagnoses as well as right knee medial and lateral meniscus tears and left knee lateral and medial meniscus tears because he opined that those conditions were compensable. Although he listed the following conditions as diagnoses: [sub]segmental atelectasis, rhabdomyolysis, hypokalemia, hyperglycemia, and hypomagnesemia, Dr. B did not specifically consider and rate the aforementioned conditions, nor did he state that such conditions had resolved. Accordingly, Dr. B's certification cannot be adopted. The ALJ's determination that the claimant reached MMI on June 4, 2019, with a 13% IR is reversed. There are no other certifications in evidence that can be adopted. Therefore, the issues of MMI and IR are remanded to the ALJ for further action consistent with this decision.

SUMMARY

We reform Finding of Fact No. 1.D to correct the spelling of hypokalemia.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to an L4-5 disc protrusion, spondylolisthesis of L5 on S1, right shoulder dislocation of the right AC joint, right shoulder impingement, right shoulder rotator cuff tear, C4-5 disc herniation/protrusion, or C5-6 disc herniation/protrusion.

We reverse the ALJ's determination that the claimant reached MMI on June 4, 2019, and 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 13% and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. The ALJ is to determine whether Dr. K is still qualified and available to serve as the designated doctor. If Dr. K is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to advise the designated doctor that the date of statutory MMI is April 15, 2020, and request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury which includes face, neck, back, chest, and left forearm abrasions/contusions, traumatic brain injury with bilateral eye and auditory canal hemorrhages, bilateral pulmonary contusion, subsegmental atelectasis, rhabdomyolysis, hypokalemia, hyperglycemia, hypomagnesemia, left tibial avulsion, right knee medial and lateral meniscus tears, left knee medial and lateral meniscus tears, and cervical, lumbar, right shoulder, bilateral knee, and right ankle/foot sprains/strains but does not extend to an L4-5 disc protrusion, spondylolisthesis of L5 on S1, right shoulder dislocation of the right AC joint, right shoulder impingement, right shoulder rotator cuff tear, C4-5 disc herniation/protrusion, or C5-6 disc herniation/protrusion 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 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 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 **GREAT MIDWEST 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