

APPEAL NO. 220644
FILED JUNE 6, 2022

This appeal arises pursuant to the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 *et seq.* (1989 Act). A bifurcated contested case hearing (CCH) was held on November 17, 2021, January 18, 2022, and March 3, 2022, with the record closing on March 11, 2022, 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), extends to concussion with loss of consciousness, chronic migraine, traumatic brain injury, post-concussion syndrome, central and right peripheral vestibular disorder, post-traumatic cognitive disorder, mild neurocognitive disorder due to mild traumatic brain injury, and post-traumatic stress disorder; (2) the compensable injury of (date of injury), does not extend to diplopia, disc bulges at L3-4 or L4-5, disc bulge at C6-7, diffuse disc bulge at T2-3, depressed mood, emotional distress, anxiety, lumbago with sciatica of either leg, cervical spondylosis or cervical radiculopathy, mild disc dehydration at any level from L2-3 through L4-5, synovial cyst at L4-5, intervertebral disc displacement at the lumbar region, or right carpal tunnel syndrome; (3) the respondent (claimant) reached maximum medical improvement (MMI) on August 19, 2020; and (4) the claimant's impairment rating (IR) is 21%.

The appellant (carrier) appealed the ALJ's extent-of-injury determination that was favorable to the claimant, as well as the ALJ's MMI and IR determinations. The claimant responded, urging affirmance of the ALJ's determinations. The ALJ's determination that the compensable injury of (date of injury), does not extend to diplopia, disc bulges at L3-4 or L4-5, disc bulge at C6-7, diffuse disc bulge at T2-3, depressed mood, emotional distress, anxiety, lumbago with sciatica of either leg, cervical spondylosis or cervical radiculopathy, mild disc dehydration at any level from L2-3 through L4-5, synovial cyst at L4-5, intervertebral disc displacement at the lumbar region, or right carpal tunnel syndrome was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to a head contusion, cervical strain, right knee medial meniscus tear, right shoulder rotator cuff tear and labral tear, and a lumbar strain, and that the claimant's date of statutory MMI is August 19, 2020. The carrier points out in its appeal that the stipulation made by the parties regarding the extent of the compensable injury in Finding of Fact No. 1.F. incorrectly states the compensable injury extends to a

left knee medial meniscus tear, which was neither stipulated to nor actually litigated by the parties, rather than a right knee medial meniscus tear. The claimant was injured on (date of injury), when she fell while assisting a client to mount a horse.

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), extends to concussion with loss of consciousness, chronic migraine, traumatic brain injury, post-concussion syndrome, central and right peripheral vestibular disorder, post-traumatic cognitive disorder, mild neurocognitive disorder due to mild traumatic brain injury, and post-traumatic stress disorder is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on August 19, 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. 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's IR is 21% as certified by (Dr. S), the designated doctor appointed by the Division to determine the extent of the claimant's compensable injury, MMI, and IR. Dr. S initially examined the claimant on January 29,

2021. Dr. S certified on that date that the claimant reached MMI statutorily on August 19, 2020, and, using 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), assigned a 21% IR. Dr. S had referred the claimant to (Dr. J) for the determination of the head injury, and adopted Dr. J's 14% IR. Dr. S placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms of the AMA Guides resulting in 0% impairment for a cervical strain, and placed the claimant in DRE Lumbosacral Category I: Complaints or Symptoms of the AMA Guides resulting in 0% impairment for a lumbar strain. Based on range of motion measurements of the claimant's right shoulder, Dr. S assigned 7% whole person impairment (WPI) for the right shoulder. Using Table 64 Impairment Estimates for Certain Lower Extremity Impairments on page 3/85 of the AMA Guides, Dr. S assigned 1% WPI for a right knee partial medial meniscectomy that was performed on October 2, 2020. Combining these impairments, Dr. S assigned a 21% IR.

Dr. S next examined the claimant on September 30, 2021, to determine the extent of the claimant's injury. Dr. S opined that the compensable injury extends to concussion with loss of consciousness, chronic migraine, traumatic brain injury, post-concussion syndrome, central and right peripheral vestibular disorder, post-traumatic cognitive disorder, mild neurocognitive disorder due to mild traumatic brain injury, and post-traumatic stress disorder, as well as the carrier-accepted head contusion, cervical strain, right knee medial meniscus tear, right shoulder rotator cuff tear and labral tear, and lumbar strain. Dr. S also again certified the claimant reached MMI statutorily on August 19, 2020, with a 21% IR.

On March 7, 2022, the ALJ sent a letter of clarification to Dr. S. The ALJ notified Dr. S that the ALJ's extent-of-injury determination was the same as Dr. S's opinion, which is concussion with loss of consciousness, chronic migraine, traumatic brain injury, post-concussion syndrome, central and right peripheral vestibular disorder, post-traumatic cognitive disorder, mild neurocognitive disorder due to mild traumatic brain injury, and post-traumatic stress disorder, as well as the carrier-accepted head contusion, cervical strain, "left"¹ knee medial meniscus tear, right shoulder rotator cuff tear and labral tear, and lumbar strain. The ALJ asked Dr. S whether his January 29, 2021, certification that the claimant reached MMI statutorily on August 19, 2020, with a 21% IR would change in rating the accepted conditions as well as the conditions determined compensable by the ALJ. Dr. S responded that he had considered all of the accepted and additional conditions found compensable by the ALJ during his January 29, 2021, examination, and stated "please consider the impairment for the additional

¹ We note the parties stipulated the medial meniscus tear is to the right knee, not the left knee.

injuries/conditions to have been already taken into consideration.” Dr. S also submitted an amended Report of Medical Evaluation (DWC-69) to “include the codes for all conditions [the ALJ had] determined to be compensable.”

As mentioned above, the ALJ determined the claimant’s IR is 21% as assigned by Dr. S. However, Dr. S included a 1% WPI for a right knee partial medial meniscectomy under Table 64 on page 3/85 of the AMA Guides. The evidence established that the partial medial meniscectomy was performed on October 2, 2020, which is after August 19, 2020, the date of statutory MMI. 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. That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. See Appeals Panel Decision (APD) 131552, decided August 29, 2013, and APD 042518, decided November 24, 2004. Dr. S assessed impairment for a surgical procedure which took place after the date of statutory MMI; therefore, his 21% IR cannot be adopted. Accordingly, we reverse the ALJ’s determination that the claimant’s IR is 21%.

The only other certifications in evidence are from (Dr. B), the post-designated doctor required medical examination doctor. However, all of Dr. B’s certifications certify the claimant reached MMI on July 11, 2018. Because we have affirmed the ALJ’s determination that the claimant reached MMI on August 19, 2020, none of Dr. B’s certifications can be adopted.

There are no certifications of IR in evidence that can be adopted. Accordingly, 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 compensable injury of (date of injury), extends to concussion with loss of consciousness, chronic migraine, traumatic brain injury, post-concussion syndrome, central and right peripheral vestibular disorder, post-traumatic cognitive disorder, mild neurocognitive disorder due to mild traumatic brain injury, and post-traumatic stress disorder.

We affirm the ALJ’s determination that the claimant reached MMI on August 19, 2020.

We reverse the ALJ's determination that the claimant's IR is 21%, and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to correct the stipulation stated in Finding of Fact No. 1.F. to reflect the correct conditions stipulated to by the parties at the CCH.

Dr. S is the designated doctor in this case. On remand the ALJ is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S is still qualified and available, the ALJ is to clarify that the medial meniscus tear is to the right knee rather than the left knee. The ALJ is also to notify Dr. S that any surgical procedures occurring after August 19, 2020, the date of MMI in this case, cannot be considered or rated in determining the claimant's IR.

If Dr. S 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 head contusion, cervical strain, right knee medial meniscus tear, right shoulder rotator cuff tear and labral tear, lumbar strain, concussion with loss of consciousness, chronic migraine, traumatic brain injury, post-concussion syndrome, central and right peripheral vestibular disorder, post-traumatic cognitive disorder, mild neurocognitive disorder due to mild traumatic brain injury, and post-traumatic stress disorder. The assignment of an IR is required to be based on the claimant's condition as of August 19, 2020, the date of MMI in this case, considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The ALJ is to determine the issue of 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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge