

APPEAL NO. 220683  
FILED JUNE 9, 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 was held on March 29, 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), does not extend to L5-S1 disc protrusion or L5-S1 lumbar radiculopathy; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. H) on February 25, 2019, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on February 5, 2019; and (4) the claimant's IR is 10%.

The claimant appealed, disputing the ALJ's determinations regarding extent of injury, finality, MMI, and IR. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part, and reversed and remanded in part.

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).

The parties stipulated, in part, that: the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. C) as designated doctor to address MMI and IR; the Division appointed (Dr. Hb) as designated doctor to address MMI, IR, and extent of injury; the carrier has accepted a lumbar strain as a component of the compensable injury; and the date of statutory MMI is February 5, 2019. The claimant testified he was injured on (date of injury), when he tripped and fell on pipes that were behind him.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to an L5-S1 disc protrusion or L5-S1 lumbar radiculopathy is supported by sufficient evidence and is affirmed.

### **FINALITY**

The ALJ's determination that the first certification of MMI and assigned IR from Dr. H, on February 25, 2019, did not become final under Section 408.123 and Rule 130.12 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. 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 found that Dr. H's certification that the claimant reached MMI on February 5, 2019, with a 10% IR for the compensable injury is supported by the preponderance of the evidence and is adopted. Dr. H, a referral from the treating doctor acting in the treating doctor's place, examined the claimant on February 14, 2019, and certified the claimant reached MMI on February 5, 2019, assigning a 10% IR 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) for a lumbar strain. Dr. H stated that statutory MMI was assigned as the claimant is pending lumbar spine operative intervention. Dr. H placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category III: Radiculopathy of the AMA Guides. In his narrative report, Dr. H noted that he placed the claimant in Category III based upon clinically significant signs of radiculopathy that include loss of relevant reflexes (left S1 reflex). The AMA

Guides provide that to be placed in DRE Lumbosacral Category III: Radiculopathy the patient has significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 cm above or below the knee, compared to measurements on the contralateral side at the same location. The Appeals Panel has held that, to receive a rating for radiculopathy under DRE Lumbosacral Category III: Radiculopathy, the claimant must have significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of 2 cm or more above or below the knee, compared to measurements on the contralateral side at the same location. See Appeals Panel Decision (APD) 072220-s, decided February 5, 2008.

However, as noted above the ALJ's determination that the compensable injury does not extend to L5-S1 lumbar radiculopathy was affirmed. Under the facts of this case, the IR includes a condition that has specifically been determined to not be part of the compensable injury. There was no evidence in the record to indicate that any pending lumbar surgery was due to a lumbar strain. See APD 210843, decided July 28, 2021.

Dr. H provided an alternate certification, but it also rates radiculopathy and considers another condition which has been determined to not be part of the compensable injury, namely an L5-S1 disc protrusion, as well as other conditions that have not yet been determined to be part of the compensable injury, including L2-3 and L4-5 disc bulges and headaches.

There are four other certifications of MMI/IR in evidence. One is from the initial designated doctor, Dr. C, and three are from Dr. Hb. All of these certifications certify that the claimant is not at MMI. As noted above, the parties stipulated that the date of statutory MMI is February 5, 2019. Accordingly, none of these certifications can be adopted. See APD 131554, decided September 3, 2013.

There are no other certifications in evidence. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on February 5, 2019, and that the claimant's IR is 10% and remand the MMI and IR issues 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), does not extend to L5-S1 disc protrusion or L5-S1 lumbar radiculopathy.

We affirm the ALJ's determination that the first certification of MMI and assigned IR from Dr. H on February 25, 2019, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on February 5, 2019, and remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 10% and remand the IR issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. Hb is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. Hb is still qualified and available to be the designated doctor. If Dr. Hb is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issues of MMI and IR for the (date of injury), compensable injury.

On remand the ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a lumbar strain but does not extend to an L5-S1 disc protrusion or L5-S1 lumbar radiculopathy. The ALJ is then to request that the designated doctor certify MMI and assign an IR for the compensable injury based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination. The ALJ is to inform the designated doctor that the date of statutory MMI is February 5, 2019. The date of MMI cannot be after the date of statutory MMI.

The parties are to be provided with the ALJ's letter to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. If another designated doctor is appointed, the parties are to be provided with the Presiding Officer's Directive to Order Designated Doctor Examination, the designated doctor's report, and are to be allowed an opportunity to respond. The ALJ is to make determinations which are supported by the evidence on the MMI and IR issues 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 **XL SPECIALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TEXAS 75201-3136.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge