

APPEAL NO. 220863  
FILED JULY 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 2, 2021, with the record closing on May 3, 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 lumbar sprain, lumbar strain, depression, and anxiety; (2) the compensable injury of (date of injury), does not extend to an L5-S1 disc herniation; (3) the respondent (claimant) reached maximum medical improvement (MMI) on December 6, 2021; and (4) the claimant's impairment rating (IR) is 12%. The appellant (carrier) appeals the ALJ's determinations of MMI and IR as well as the determination that the compensable injury extends to lumbar sprain, lumbar strain, depression, and anxiety. The claimant responded, urging affirmance of the disputed determinations. The ALJ's determination that the compensable injury does not extend to an L5-S1 disc herniation was not appealed and has become final pursuant to Section 410.169.

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: (1) the claimant sustained a compensable injury on (date of injury); (2) the carrier has accepted bilateral wrist sprains, bilateral knee sprains, left hip sprain, and left ankle sprain as the compensable injury; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. A) as designated doctor for the purposes of extent of injury, MMI, and IR; and (4) the Division also appointed (Dr. T) as designated doctor for the purposes of extent of injury, MMI, and IR. The claimant testified she was injured when she slipped and fell exiting the elevator at her workplace on (date of injury).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), extends to a lumbar sprain and a lumbar strain is supported by sufficient evidence and is affirmed.

The ALJ determined that the (date of injury), compensable injury extends to depression and anxiety. The ALJ noted in her discussion of the evidence that the Division appointed Dr. T as designated doctor to evaluate the claimant for the disputed conditions of depression and anxiety. Dr. T examined the claimant on August 12, 2020. In his narrative report, Dr. T noted that the claimant was terminated from her job on December 2, 2019, and reported having become "very depressed since she got fired." Dr. T referred the claimant for a neuropsychological evaluation to "establish the true extent of injury in this case particularly regarding any potential psychological components of that injury." The claimant was evaluated by (Dr. J), a neuropsychologist and by psychodiagnostician, (Dr. M). Dr. T points out that the report of Dr. J and Dr. M state that "given the lapse of time since her injury, treatment history, and what is known about head injuries and recovery, it is reasonable to suggest [the claimant] is at MMI...." In their narrative report, Dr. J and Dr. M under a heading titled "Rationale" discuss research literature regarding a concussion. Dr. T correctly noted in his report that there is no indication the claimant sustained a head injury in the course of her slip and fall. Dr. T further stated that there was no evidence of a closed head injury in this case that would reasonably have been expected to result in any degree of post-concussive syndrome or traumatic brain injury. Dr. T noted that the history provided by the claimant stated she has become very depressed since being terminated from her job following her work-related injury and that is certainly more consistent with a diagnosis of situational anxiety disorder and acute reactive depression than any form of closed head, post-concussive syndrome, or traumatic brain injury or proposed traumatic stress disorder. Although Dr. T opined that the compensable injury extends to anxiety and depression he explained that it was due to her termination of employment. Section 408.006(b) provides that, in pertinent part, a mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination, is not a compensable injury under this subtitle.

In evidence is also a causation letter from (Dr. S) dated January 29, 2021. Dr. S references the reports of Dr. T, Dr. J, and Dr. M, stated based on the fact the claimant has never had any history of mental health issues, the description of causative onset and timing, and the medical opinions of multiple physicians and mental health professionals, it is evident that the anxiety and depression were a direct consequence of the workplace accident on (date of injury). Dr. S fails to explain how the compensable injury was a cause of the claimant's anxiety and depression but simply concludes it does based on the other medical opinions of Dr. T, Dr. J, and Dr. M, the timing, and the claimant's lack of a history of mental health issues.

In a narrative report dated December 11, 2020, (Dr. N), a referral doctor acting in place of the treating doctor, stated based on the medical records presented and the neuropsychological evaluation and testing, Dr. N would agree with Dr. T that the claimant's disputed depression and anxiety are related to the occupational injury as a result of post-concussion syndrome type findings related to her fall. As previously noted, there is no indication that the claimant sustained a head injury or a concussion as a result of her fall. The parties did not stipulate that the claimant sustained a head injury or a concussion nor were those conditions actually litigated. Dr. N fails to explain how the slip and fall on (date of injury), caused the anxiety and depression. There are no other records in evidence that explain how the mechanism of injury caused anxiety and depression.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See *Cain, supra*.

In applying this standard to the facts of this case, the ALJ's determination that the compensable injury of (date of injury), extends to anxiety and depression is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse that portion of the ALJ's determination that the compensable injury of (date of injury), extends to anxiety and depression and render a new decision that the compensable injury of (date of injury), does not extend to anxiety or depression.

### **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 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.

After the CCH, the ALJ determined a new examination by a designated doctor was required to determine if and when the claimant reached MMI for the compensable injury. The ALJ issued a Presiding Officer's Directive (POD) requesting a new examination by a designated doctor be performed. A second POD was subsequently issued because the first one did not correctly identify all of the conditions of the determined compensable injury. The second POD resulted in the appointment of a new designated doctor, (Dr. K). Dr. K examined the claimant on April 12, 2022, and certified that the claimant reached statutory MMI on December 6, 2021, with a 12% 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). Dr. K assessed 0% impairment for the bilateral wrist sprains; 0% impairment for the bilateral knee sprains; 0% impairment for the left ankle sprain; 2% impairment for the left hip sprain; 5% impairment for the lumbar sprain/strain; and 5% impairment for the anxiety and depression. As discussed above a new decision has been rendered that the compensable injury of (date of injury), does not extend to anxiety or depression. The certification of MMI/IR adopted by the ALJ from Dr. K considers and rates conditions that have been determined not to be part of the compensable injury. Accordingly, the ALJ's determination that the claimant reached MMI on December 6, 2021, with a 12% IR is reversed.

(Dr. Sa), a referral doctor acting in place of the treating doctor, examined the claimant on January 2, 2020, and certified that the claimant had not yet reached MMI. Dr. Sa considered the following conditions: left wrist sprain, left hip sprain, left knee sprain, left ankle sprain, right knee sprain, right wrist sprain, numbness in left foot, and lumbar sprain. Dr. Sa considered conditions that have not yet been determined to be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

The initial designated doctor in this case was Dr. A. Dr. A examined the claimant on February 25, 2020, and provided three certifications of MMI/IR. In the first scenario, Dr. A certified that the claimant had not yet reached MMI, considering the following conditions: left ankle sprain, left wrist contusion, bilateral knee contusions, left hip contusion, and low back area. As previously noted, the parties stipulated that the compensable injury of (date of injury), extends to bilateral wrist sprains, bilateral knee sprains, left hip sprain, and left ankle sprain. Further the ALJ's determination that the compensable injury of (date of injury), extends to lumbar sprain and lumbar strain has

been affirmed. In the first scenario, Dr. A considered conditions that have not yet been determined to be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

In the second scenario, Dr. A again certified that the claimant had not yet reached MMI. In this scenario, Dr. A considered the following conditions: a left ankle sprain, left wrist contusion, bilateral knee contusions, left hip contusion, lower back area, lumbar sprain/strain and an L5-S1 disc herniation. Dr. A considered conditions that have been determined not to be part of the compensable injury, conditions that have not yet been determined to be part of the compensable injury, and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

In the third scenario, Dr. A certified that the claimant had not yet reached MMI. Dr. A considered the following conditions: left ankle sprain, left wrist contusion, bilateral knee contusion, left hip contusion, low back area, left wrist sprain, lumbar sprain/strain, and left hip sprain. Dr. A considered conditions that have not yet been determined to be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

Dr. T was subsequently appointed as a designated doctor and examined the claimant on August 12, 2020. Dr. T provided three alternate certifications. In the first certification Dr. T certified that the claimant reached MMI on January 14, 2020, with a 5% IR, using the AMA Guides. Dr. T considered and rated the following conditions: left ankle sprain, left wrist contusion, bilateral knee contusion, left hip contusion, and lumbar spine sprain/strain. Dr. T considered conditions that have not yet been determined to be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

In the second scenario, Dr. T certified that the claimant had not yet reached MMI. Dr. T considered the following conditions: left ankle sprain, left wrist contusion, bilateral knee contusion, left hip contusion, lumbar spine sprain/strain, depression, and anxiety. Dr. T considered conditions that have been determined to not be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

In the third scenario, Dr. T certified that the claimant has not yet reached MMI. Dr. T considered the following conditions: left ankle strain/sprain, left hand contusion, right hand contusion, right knee contusion, left knee contusion, lumbar spine

strain/sprain, sacroiliac joint sprain/strain, lumbar spine intervertebral disc bulge with annular tearing at L5-S1, acute reactive depression, and situational anxiety disorder. Dr. T considered conditions that have been determined to not be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

Dr. N, a referral doctor acting in place of the treating doctor, examined the claimant on December 11, 2020, and provided two certifications. In the first scenario, Dr. N certified that the claimant had not yet reached MMI. Dr. N considered the following conditions: lumbar spine sprain/strain, bilateral knee contusions, left ankle sprain, left hip contusion, and left wrist contusion. Dr. N considered conditions that have not yet been determined to be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

In the second scenario, Dr. N certified that the claimant had not yet reached MMI considering the following conditions: anxiety, depression, lumbar spine sprain/strain, bilateral knee contusions, left ankle sprain, left hip contusion, and left wrist contusion. Dr. N considered conditions that have been determined not to be part of the compensable injury, conditions that have not yet been determined to be part of the compensable injury, and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

ALJ exhibit 6 consists of the carrier's closing argument. However, attached to the end of the closing argument is a certification of MMI/IR from (Dr. O), a carrier-selected required medical examination doctor. The narrative from Dr. O is included in the carrier's exhibits. Dr. O certified that the claimant reached MMI on January 2, 2020, with a 0% impairment. However, Dr. O rated right and left knee contusions rather than bilateral knee sprains. Dr. O considered conditions that have not yet been determined not to be part of the compensable injury and failed to consider conditions that have been determined to be part of the compensable injury. Consequently, this certification cannot be adopted.

There are no other MMI/IR certifications in evidence. As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and 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 a lumbar sprain and a lumbar strain.

We reverse the ALJ's determination that the compensable injury of (date of injury), extends to depression and anxiety and render a new decision that the compensable injury does not extend to depression or anxiety.

We reverse the ALJ's determination that the claimant reached MMI on December 6, 2021, 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 12% and remand the IR issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

We note that statutory MMI was not discussed at the CCH and the ALJ made no finding or mention of when statutory MMI occurred. Based upon the evidence in this case, it appears the date of statutory MMI may have passed; however, we do not have sufficient evidence of that date. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a Decision and Order dated after the date of statutory MMI. See Appeals Panel Decision (APD) 131554, decided September 3, 2013, and APD 172017, decided October 3, 2017. On remand the ALJ is to make a finding or get a stipulation from the parties as to the date of statutory MMI.

Dr. K is the designated doctor in this case. The ALJ is to determine whether Dr. K is still qualified and available to be the designated doctor. 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 the claimant's MMI and IR.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to bilateral wrist sprains; bilateral knee sprains, left hip sprain; left ankle sprain; lumbar sprain; and lumbar strain but does not extend to depression, anxiety, or an L5-S1 disc herniation. The ALJ is to inform the designated doctor that the date of MMI can be no later than the statutory date and provide him with the statutory date of MMI. The ALJ is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination.

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 APD 060721, decided June 12, 2006.



The true corporate name of the insurance carrier is **THE FARMINGTON CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
d/b/a CSC-LAYWERS INCORPORATING SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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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