

APPEAL NO. 221389
FILED OCTOBER 20, 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 July 7, 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 lumbar disc herniation at L4-5 or lumbar radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 21, 2021; and (3) the claimant's impairment rating (IR) is five percent. The claimant appeals the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the issues of extent of injury, MMI, and IR.

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); the carrier accepted a compensable injury in the form of a lumbar sprain/strain and a thoracic sprain/strain; and (Dr. V) was selected by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to address the issues of MMI and IR. The claimant testified that she was injured on (date of injury), while working for the employer as a forklift driver.

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 a lumbar disc herniation at L4-5 or lumbar radiculopathy 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 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.

Dr. V examined the claimant on December 10, 2021, and certified in his narrative report that the claimant reached MMI on July 21, 2020, with a five percent 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). In his narrative report, Dr. V stated he chose July 21, 2020, as the MMI date because, “the [claimant] has received appropriate conservative medical management treatment including participation in two post-injury physical therapy programs by that date....” However, the accompanying Report of Medical Evaluation (DWC-69) certifies that the claimant reached MMI on July 21, 2021, rather than July 21, 2020.

Therefore, there is an internal inconsistency between the MMI date Dr. V certified on the DWC-69 and the MMI date Dr. V certified in the accompanying narrative report. Because the narrative report and DWC-69 list different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected. See Appeals Panel Decision (APD) 220068, decided March 3, 2022. Accordingly, the ALJ’s determination that the claimant reached MMI on July 21, 2021, is reversed.

With regard to the IR, as noted above, Rule 130.1(c)(3) provides that an assignment of IR shall be based on the injured employee’s condition as of the MMI date. Given that we have reversed the ALJ’s MMI determination, we reverse the ALJ’s determination that the claimant’s IR is five percent.

Dr. F), a doctor selected by the treating doctor to act in his place, examined the claimant on March 7, 2022, and certified that the claimant had not reached MMI. As the ALJ noted in her discussion of the evidence, Dr. F considered treatment for non-compensable conditions, specifically lumbar radiculopathy, and this certification could not be adopted.

Since there is no certification of MMI and IR in evidence that can be adopted, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

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

If Dr. V is still qualified and available to serve as the designated doctor, the ALJ is to advise Dr. V that his December 10, 2021, DWC-69 and accompanying narrative report have an internal inconsistency regarding the date of MMI.

The ALJ is to advise the appointed designated doctor that the compensable injury of (date of injury), extends to a lumbar sprain/strain and a thoracic sprain/strain but does not extend to a lumbar disc herniation at L4-5 or lumbar radiculopathy. The ALJ is to request that the designated doctor give an opinion on the claimant's date of 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 that is consistent with the evidence and 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 TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
d/b/a CSC-LAWYERS INCORPORATING SERVICE CO.
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