

APPEAL NO. 221500
FILED SEPTEMBER 28, 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 August 8, 2022, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), extends to herniated nucleus pulposus at T5-6, herniated nucleus pulposus at T7-8 with cord compression, cervicothoracic epidural abscess, and cervicothoracic epidural hematoma; (2) the compensable injury of (date of injury), does not extend to vision loss to the right eye; (3) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on September 22, 2020; (4) the claimant's impairment rating (IR) is 40%; and (5) (Dr. T) was appointed as the designated doctor in accordance with Section 408.0041 and 28 Tex. Admin. Code § 127.5 (Rule 127.5).

The claimant appealed the ALJ's extent-of-injury determination that was adverse to him, as well as the ALJ's determination that his IR is 40%. The respondent/cross-appellant (carrier) responded, urging affirmance of the appealed determinations. The carrier cross-appealed the ALJ's extent-of-injury determination that was favorable to the claimant. The claimant responded, urging affirmance of that determination. The ALJ's determinations that the claimant reached MMI on September 22, 2020, and that Dr. T was appointed as the designated doctor in accordance with Section 408.0041 and Rule 127.5 were not appealed and have 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 at least a head concussion, fractured teeth, cervical sprain/strain, thoracic sprain/strain, and cervical disc herniations at C5-6 and C6-7; Dr. T was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine extent of injury, MMI, and IR; and the statutory date of MMI is September 22, 2020. The claimant, a heavy equipment operator, was injured on (date of injury), when a heavy beam fell on the left top side of his head while he and another employee were erecting a large sign.

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 determinations that the compensable injury of (date of injury), extends to herniated nucleus pulposus at T5-6, herniated nucleus pulposus at T7-8 with cord compression, cervicothoracic epidural abscess, and cervicothoracic epidural hematoma, but does not extend to vision loss to the right eye are supported by sufficient evidence and are affirmed.

IR

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 determined the claimant reached MMI on September 22, 2020, with a 40% IR as assigned by (Dr. M), the post-designated doctor required medical examination doctor. Dr. M examined the claimant on September 17, 2021, and issued several certifications which all certified the claimant reached MMI on September 22, 2020, with a 40% IR based on different conditions 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). However, none of Dr. M's certifications considered and rated the compensable injury in this case, which is a head concussion, fractured teeth, cervical sprain/strain, thoracic sprain/strain, and cervical disc herniations at C5-6 and C6-7, herniated nucleus pulposus at T5-6, herniated nucleus pulposus at T7-8 with cord compression, cervicothoracic epidural abscess, and cervicothoracic epidural hematoma.

All of Dr. M's certifications consider and rate a head contusion, a condition which is not part of the compensable injury at this time. Additionally, one certification fails to consider a herniated nucleus pulposus at T5-6, herniated nucleus pulposus at T7-8 with cord compression, cervicothoracic epidural abscess, and cervicothoracic epidural

hematoma. Another certification fails to consider cord compression at T7-8, cervicothoracic epidural abscess, and cervicothoracic epidural hematoma. Another certification considers other conditions that have not yet been determined to be compensable: left abdominal bulge of neurogenic origin consistent with left abdominal wall paralysis and left upper and lower extremity partial paralysis secondary to radiculopathy, among other conditions. None of Dr. M's certifications consider and rate the compensable injury and, therefore, none can be adopted.

Additionally, we note that Dr. M explained in his attached narrative report that he assigned a 40% whole person impairment (WPI) "for classification into [Diagnosis-Related Estimate (DRE)] Cervicothoracic Category VI: Cauda Equina Syndrome without Bowel or Bladder Signs" of the AMA Guides.

In Appeals Panel Decision (APD) 051306-s, decided August 3, 2005, the Appeals Panel discussed the application of the AMA Guides in rating cervical, thoracic, and lumbar injuries and held as follows:

Applying the language from the bottom of page 3/95 of the AMA Guides, if the injury is primarily to the cervical spine the rating would be under part 3.3h, page 3/103 cervicothoracic spine impairment, if the injury was primarily to the thoracic area of the spine the rating would be under part 3.3i page 3/106 for thoracolumbar spine impairment and if the injury is primarily to the lumbar portion of the spine, the impairment would be under part 3.3g page 3/101 lumbosacral spine impairment. Pursuant to part 3.3f, page 3/101, paragraph 8, if more than one spine region is impaired, the doctor is to determine the impairment of the other regions and combine the regional impairments using the Combined Values Chart to express the patients (sic) total spine impairment.

The parties stipulated that the compensable injury extends to, in part, a thoracic sprain/strain, and we have affirmed the ALJ's determination that the compensable injury extends to a herniated nucleus pulposus at T5-6 and herniated nucleus pulposus at T7-8 with cord compression. Dr. M assigned 40% impairment by placing the claimant in DRE Cervicothoracic Category VI: Cauda Equina Syndrome without Bowel or Bladder Signs. As noted above, the AMA Guides provide that an injury to the thoracic spine is rated under part 3.3i: Thoracolumbar Spine on page 3/106. Dr. M did not rate the compensable injury in this case in accordance with the AMA Guides. We reverse the ALJ's determination that the claimant's IR is 40%.

The only other certifications in evidence are from Dr. T, the designated doctor. The first certification is dated September 9, 2020, and based on an examination of that

same date. In that certification Dr. T certified the claimant had not reached MMI. The date of statutory MMI in this case is September 22, 2020. The Appeals Panel has 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 APD 131554, decided September 3, 2013; and APD 220068, decided March 3, 2022. Dr. T's first certification cannot be adopted.

Dr. T's remaining certifications are all dated March 17, 2021, based on an examination of that same date, and certify an MMI date of September 22, 2020, which is the date of MMI in this case. In his first certification Dr. T assigned a 65% IR, which included a 21% WPI for loss of vision. We have affirmed the ALJ's determination that the compensable injury does not extend to vision loss to the right eye, and vision loss to the left eye has not at this time been determined to be part of the compensable injury; therefore, Dr. T's 65% IR cannot be adopted.

The final certifications from Dr. T both assign a 70% IR. Dr. T explained in his narrative report that both consider "exactly the same diagnoses," which are a head concussion, fractured teeth, cervical sprain/strain, thoracic sprain/strain, cervical disc herniation at C5-6, disc herniation at C6-7, herniated nucleus pulposus at T5-6, herniated nucleus pulposus at T7-8 with cord compression, cervicothoracic epidural abscess, and cervicothoracic epidural hematoma. Dr. T's narrative report shows the 70% IR is comprised of the following: 25% impairment for a head concussion; 0% IR for fractured teeth; 40% impairment for a cervical sprain/strain, cervical disc herniation at C5-6, cervical herniation at C6-7; 15% for a herniated nucleus pulposus at T5-6, herniated nucleus pulposus at T7-8 with cord compression, cervicothoracic epidural abscess, and cervicothoracic epidural hematoma; and 21% impairment for vision loss. Although Dr. T's narrative report states this certification does not consider and rate vision loss, Dr. T's narrative report clearly shows his 70% IR includes a rating for vision loss. Dr. T's 70% IR cannot be adopted.

There is no assignment of IR in this case that can be adopted. Therefore, we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. T is the designated doctor in this case. On remand the ALJ is to determine whether Dr. T is still qualified and available to be the designated doctor. If Dr. T is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issue of the claimant's 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 head concussion, fractured teeth, cervical sprain/strain, thoracic sprain/strain, cervical disc herniations at C5-6 and C6-7, herniated nucleus pulposus at T5-6, herniated nucleus pulposus at T7-8 with cord compression, cervicothoracic epidural abscess, and cervicothoracic epidural hematoma, but does not extend to vision loss to the right eye. The ALJ is also to inform the designated doctor that the date of MMI in this case is the statutory date of September 22, 2020. The ALJ is then to request that the designated doctor rate the entire compensable injury as of and not after September 22, 2020, the date of MMI, considering the claimant's medical record and the certifying examination and in accordance with Rule 130.1(c)(3) and the AMA Guides.

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 a determination on the claimant's IR that is supported by the evidence and 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 TRAVELERS CASUALTY AND SURETY 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 COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge