

APPEAL NO. 221634
FILED DECEMBER 1, 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 July 13, 2022, with the record closing on August 2, 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 sustained on (date of injury), does not extend to cervical radiculopathy, disc protrusions at C4-5, C5-6, C6-7, or C7-T1, or left shoulder sprain/strain; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 16, 2021; (3) the claimant's impairment rating (IR) is five percent; and (4) the claimant did not have disability from June 16, 2021, through the date of the CCH resulting from the compensable injury of (date of injury). The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, IR, and disability. The respondent (carrier) responded, urging affirmance of the disputed extent-of-injury, MMI, IR, and disability determinations.

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 consisted of a cervical sprain/strain, and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. R) as designated doctor for the issues of extent of injury, MMI, IR, and disability. The claimant testified she was injured on (date of injury), when she stepped on a piece of broken stone and fell.

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 cervical radiculopathy, disc protrusions at C4-5, C5-6, C6-7, or C7-T1, or a left shoulder sprain/strain is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant did not have disability from June 16, 2021, through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on June 16, 2021, 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 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 found that the preponderance of the other medical evidence was contrary to the report of Dr. R, the designated doctor, who certified that the claimant reached MMI on March 21, 2022, with a five percent IR. The ALJ found that the preponderance of the evidence supports the report of the carrier-selected required medical examination doctor, (Dr. M), that the claimant reached MMI on June 16, 2021, with a five percent IR. Dr. M examined the claimant on January 25, 2022, and considered and rated a cervical sprain/strain 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. M assessed five percent impairment for the cervical sprain/strain by placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category II: Minor Impairment of the AMA Guides.

Dr. M specifically stated in his narrative report that in scenario 1 he was rating the carrier-accepted condition of a grade 1 cervical sprain/strain. Dr. M noted that as of June 16, 2021, approximately nine weeks had passed since the claimant's fall and the medical documentation from this date noted that future care would be focused on treating symptoms generated by a disc osteophyte complex (pre-existing condition) in her cervical spine. Dr. M opined that no further material recovery could have been

reasonably expected after June 16, 2021. However, Dr. M placed the claimant in Lumbosacral Category II: Minor Impairment and assessed a five percent IR.

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 claimant's compensable injury is to the cervical spine only and the AMA Guides do not provide for placement in DRE Lumbosacral Category for the cervical region, rather it provides for placement in the DRE Cervicothoracic Category. Dr. M failed to place the claimant in the correct spinal region for the cervical sprain/strain; therefore, Dr. M's IR cannot be adopted. See APD 141367, decided August 28, 2014. We reverse the ALJ's determination that the claimant's IR is five percent because the IR does not comply with the AMA Guides for rating a cervical spine injury and is not supported by the evidence.

There are two other certifications in evidence from Dr. M that certify that the claimant reached MMI on June 16, 2021. In the one scenario, Dr. M again places the claimant in a Lumbosacral DRE category for a cervical spine injury and considers conditions which have been determined not to be part of the compensable injury, including a left shoulder sprain/strain, cervical radiculopathy, and disc protrusions at C4-5, C5-6, C6-7, and C7-T1. In the other scenario, Dr. M considered and rated only a cervical strain. This certification does not rate and consider a cervical sprain, which is part of the compensable injury. Additionally, in that scenario, Dr. M again places the claimant in a Lumbosacral DRE category for a cervical spine injury. Neither of the alternate certifications from Dr. M can be adopted. There is no other certification in evidence with the affirmed MMI date of June 16, 2021. Accordingly, we remand the IR issue 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 cervical radiculopathy, disc protrusions at C4-5, C5-6, C6-7, or C7-T1, or a left shoulder sprain/strain.

We affirm the ALJ's determination that the claimant did not have disability from June 16, 2021, through the date of the CCH.

We affirm the ALJ's determination that the claimant reached MMI on June 16, 2021.

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

REMAND INSTRUCTIONS

Dr. R is the designated doctor in this case. The ALJ is to determine if Dr. R is still qualified and available to be the designated doctor. If Dr. R 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.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a cervical sprain/strain but does not extend to cervical radiculopathy, disc protrusions at C4-5, C5-6, C6-7, or C7-T1, or a left shoulder sprain/strain.

The ALJ is to request the designated doctor to rate the entire compensable injury as of the date of MMI, which is June 16, 2021, in accordance with the AMA Guides and considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI and IR certification, as of the MMI date of June 16, 2021, and are to be allowed an opportunity to respond. The ALJ is then to make a determination on the claimant's IR for the (date of injury), compensable injury as of the MMI date of June 16, 2021.

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 **MARKEL 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge