

APPEAL NO. 221745
FILED JANUARY 12, 2023

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 28, 2022, with the record closing on September 20, 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 a concussion; (2) the compensable injury of (date of injury), does not extend to aggravation of C6-7 disc herniation, aggravation of C6-7 spondylosis, lumbar disc protrusion at L4-5, L2-3 disc protrusion, or lumbar radiculopathy; (3) the respondent (claimant) reached maximum medical improvement (MMI) on August 6, 2021; and (4) the claimant's impairment rating (IR) is 5%. The appellant (carrier) appeals the ALJ's determination that the compensable injury extends to a concussion as well as the ALJ's determinations of MMI and IR. The appeal file does not contain a response from the claimant. The ALJ's determination that the compensable injury does not extend to aggravation of C6-7 disc herniation, aggravation of C6-7 spondylosis, lumbar disc protrusion at L4-5, L2-3 disc protrusion, or lumbar radiculopathy was not appealed and has 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); the compensable injury extends to a head contusion, right elbow fracture, right shoulder sprain, cervical strain, and lumbar strain; the date of statutory MMI is July 25, 2022; and (Dr. L) was properly appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to opine on the issues of MMI, IR, and extent of injury. The claimant testified that he was injured when he was hit by a forklift.

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), extends to a concussion 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 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. L examined the claimant on February 26, 2021, and again on September 30, 2021. The ALJ correctly noted that none of the certifying reports from Dr. L considered and rated only the compensable conditions and could not be adopted.

The required medical examination doctor, (Dr. H), examined the claimant on November 10, 2021. The ALJ correctly noted that none of the certifying reports from Dr. H considered and rated only the compensable conditions and could not be adopted.

On April 29, 2022, the ALJ issued a Presiding Officer's Directive (POD) requesting a new designated doctor be appointed because Dr. L was no longer certified to assess impairment as a designated doctor. (Dr. Le) was appointed to opine on the issues of MMI and IR. Dr. Le examined the claimant on June 7, 2022, and certified that the claimant reached MMI on October 6, 2021, and assessed 0% impairment. Dr. Le considered and rated the following conditions: head contusion/concussion, right elbow fracture, right shoulder strain, cervical strain, and lumbar strain. We note that the parties stipulated that the compensable injury extends to a right shoulder sprain not a right shoulder strain. On June 22, 2022, the ALJ issued a letter of clarification (LOC) to Dr. Le requesting further explanation of the date of MMI and of the impairment

assessed for the head, lumbar spine, and cervical spine. Dr. Le responded on June 23, 2022, and certified that the claimant reached MMI on February 10, 2021, with a 5% IR.

On July 11, 2022, the ALJ issued a second POD and requested that Dr. Le re-examine the claimant. In the second POD the ALJ misidentified the right shoulder injury as a strain. As previously noted, the parties stipulated that the compensable injury extends to a right shoulder sprain.

Dr. Le re-examined the claimant on August 17, 2022. Dr. Le certified that the claimant reached MMI on August 6, 2021, and assessed a 10% IR. Dr. Le considered and rated the following conditions: head contusion, concussion, right elbow fracture, right shoulder strain, cervical strain, and lumbar strain. As previously noted, the parties stipulated that the compensable injury extends to a right shoulder sprain. The ALJ sent another LOC to Dr. Le on September 6, 2022, requesting that Dr. Le further explain the MMI date he assigned and further explain his assessment of the claimant's IR. In response to the LOC dated September 6, 2022, Dr. Le certified that the claimant reached MMI on August 6, 2021, and assessed a 5% IR.

Dr. Le rated a right shoulder strain rather than a right shoulder sprain in his certifications. Accordingly, none of the certifications from Dr. Le can be adopted. There are no other certifications in evidence that can be adopted. We reverse the ALJ's determination that the claimant reached MMI on August 6, 2021, and that the claimant's IR is 5%. 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 concussion.

We reverse the ALJ's determination that the claimant reached MMI on August 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 5% and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. Le is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. Le is still qualified and available to be the designated doctor. If Dr. Le 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 for the (date of injury), compensable injury.

The ALJ is to inform the designated doctor that the (date of injury), compensable injury is a head contusion, concussion, right elbow fracture, right shoulder sprain, cervical strain, and lumbar strain. The ALJ is also to inform the designated doctor that the (date of injury), compensable injury does not extend to aggravation of C6-7 disc herniation, aggravation of C6-7 spondylosis, lumbar disc protrusion at L4-5, L2-3 disc protrusion, or lumbar radiculopathy and that the statutory date of MMI is July 25, 2022.

The ALJ is to request the designated doctor to give an opinion on the claimant's MMI, which cannot be later than the statutory date of July 25, 2022, and IR by rating the entire compensable injury in accordance with 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) 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge