

APPEAL NO. 222001
FILED FEBRUARY 3, 2023

This appeal arises pursuant to the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 *et seq.* (1989 Act). Contested case hearings (CCH) were held on June 27, 2022, August 18, 2022, and November 7, 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 a rib contusion; (2) the compensable injury of (date of injury), does not extend to a right ankle strain, thoracic strain, right wrist partial tear of the triangular fibrocartilage with radial subluxation, left wrist partial tear of the triangular fibrocartilage, lumbar L2-3 left paramedian foraminal 1-2 mm disc herniation with annular fissure encroaching on the left exiting nerve root, lumbar L2-3 bilateral neural foraminal stenosis with encroachment of the exiting nerve root, lumbar annular bulge at L3-4 measuring 1-1.5 mm with nerve root impingement with cauda equina syndrome, lumbar L4-5 annular bulge measuring 1-2 mm posteriorly with neural foraminal stenosis with nerve root impingement, or lumbar L5-S1 annular bulge measuring 1-2 mm with annular fissure with nerve root impingement; (3) the appellant (claimant) reached maximum medical improvement (MMI) on October 5, 2021; (4) the claimant's impairment rating (IR) is zero percent; and (5) the claimant had disability resulting from the compensable injury beginning April 23, 2021, through October 5, 2021, but did not have disability beginning October 6, 2021, through the date of the CCH.

The claimant appealed the ALJ's extent of injury and disability determinations that were adverse to her, as well as the ALJ's MMI and IR determinations. The respondent (carrier) responded, urging affirmance of the appealed determinations. The ALJ's determination that the compensable injury of (date of injury), extends to a rib contusion, and that portion of the ALJ's determination that the claimant had disability resulting from the compensable injury beginning April 23, 2021, through October 5, 2021, were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed as clarified.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of at least a right hip contusion, right knee sprain, lumbar strain, and bilateral wrist sprains/strains; the initial Texas Department of Insurance, Division of Workers' Compensation (Division) designated doctor was (Dr. F); and the subsequent Division-selected designated doctor was (Dr. B). The claimant was injured on (date of injury), when she tripped over rubber on the floor and fell. The

claimant testified she fell onto her left side and struck the pedal of a tricycle and ultimately fell to the ground.

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 right ankle strain, thoracic strain, right wrist partial tear of the triangular fibrocartilage with radial subluxation, left wrist partial tear of the triangular fibrocartilage, lumbar L2-3 left paramedian foraminal 1-2 mm disc herniation with annular fissure encroaching on the left exiting nerve root, lumbar L2-3 bilateral neural foraminal stenosis with encroachment of the exiting nerve root, lumbar annular bulge at L3-4 measuring 1-1.5 mm with nerve root impingement with cauda equina syndrome, lumbar L4-5 annular bulge measuring 1-2 mm posteriorly with neural foraminal stenosis with nerve root impingement, or lumbar L5-S1 annular bulge measuring 1-2 mm with annular fissure with nerve root impingement is supported by sufficient evidence and is affirmed.

DISABILITY

That portion of the ALJ's determination that the claimant did not have disability beginning October 6, 2021, through the date of the CCH 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.

The ALJ found that Dr. B certified the claimant reached MMI on October 5, 2021, and assigned a zero percent IR for the compensable injury. The ALJ also found that the preponderance of the other medical evidence is not contrary to Dr. B's certification, and therefore determined the claimant reached MMI on October 5, 2021, with a zero percent IR. The ALJ's determinations that the claimant reached MMI on October 5, 2021, with a zero percent IR as certified by Dr. B are supported by the evidence. However, a written decision is being issued to clarify an inconsistency between the discussion portion of the ALJ's decision and his determinations.

In his discussion the ALJ noted there is only one certification in the record that considers all components of the compensable injury, which is from Dr. B, "who examined the [c]laimant on June 15, 2022, pursuant to a [Presiding Officer's Directive (POD)], and responded to a [Letter of Clarification (LOC)]." The ALJ further noted that "[Dr. B] certified that [the] [c]laimant reached MMI on October 5, 2021, and assessed a [one percent] IR." The ALJ noted that the one percent IR was assigned for the claimant's right wrist sprain/strain based on range of motion (ROM) deficits. The ALJ concluded his remarks regarding MMI and IR by stating that "the preponderance of the other medical evidence is not contrary to [Dr. B's] certification that [the] [c]laimant reached MMI on October 5, 2021, with a [one percent] IR."

Dr. B examined the claimant on June 15, 2022, and issued three certifications based on varying conditions. In the certification that considers the compensable injury in this case, which is a right hip contusion, right knee sprain, lumbar strain, bilateral wrist sprains/strains, and a rib contusion, Dr. B certified the claimant reached MMI on October 5, 2021. 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) and ROM values Dr. B assigned zero percent impairment for the right hip contusion, right knee sprain, lumbar strain, left wrist sprain/strain, and rib contusion, and a one percent whole person impairment for the right wrist sprain/strain.

However, the ALJ sent Dr. B an LOC dated June 28, 2022, with a copy of a Report of Medical Evaluation (DWC-69) and accompanying report from Dr. F, the previous designated doctor, because Dr. B indicated he had not received them. Dr. B responded on June 28, 2022, noting that he reviewed Dr. F's report. Dr. B stated that his opinion the claimant reached MMI on October 5, 2021, for the compensable injury would remain the same, but "the [IRs] would change in my [June 15, 2022] narrative report, and I would use the [ROM] values from [Dr. F's] report on [December 9, 2021]," because those were from a valid or reliable exam closest in time to the date of MMI.

Using Dr. F's ROM measurements, Dr. B changed his one percent IR for the compensable injury to a zero percent IR. We note Dr. B stated in his report that Dr. F assessed zero percent impairment for 30° of right wrist radial deviation; however, Dr. F's narrative report reflects she found 20° of right wrist radial deviation. Both 30° and 20° of radial deviation result in zero percent upper extremity impairment as provided by Figure 29 on page 3/38 of the AMA Guides. Dr. B's zero percent IR is in compliance with the AMA Guides and is supported by the evidence.

Although the ALJ's discussion mistakenly discusses Dr. B's initial certification that the claimant's IR is one percent, the ALJ correctly determined the claimant's IR is zero percent as assigned by Dr. B in his response to the ALJ's LOC. Accordingly, we affirm the ALJ's determinations that the claimant reached MMI on October 5, 2021, with a zero percent IR.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a right ankle strain, thoracic strain, right wrist partial tear of the triangular fibrocartilage with radial subluxation, left wrist partial tear of the triangular fibrocartilage, lumbar L2-3 left paramedian foraminal 1-2 mm disc herniation with annular fissure encroaching on the left exiting nerve root, lumbar L2-3 bilateral neural foraminal stenosis with encroachment of the exiting nerve root, lumbar annular bulge at L3-4 measuring 1-1.5 mm with nerve root impingement with cauda equina syndrome, lumbar L4-5 annular bulge measuring 1-2 mm posteriorly with neural foraminal stenosis with nerve root impingement, or lumbar L5-S1 annular bulge measuring 1-2 mm with annular fissure with nerve root impingement.

We affirm that portion of the ALJ's determination that the claimant did not have disability beginning October 6, 2021, through the date of the CCH.

We affirm the ALJ's determination that the claimant reached MMI on October 5, 2021.

We affirm the ALJ's determination that the claimant's IR is zero percent.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge