

APPEAL NO. 230104
FILED MARCH 9, 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 (CCH) was held on November 8, 2022, with the record closing on December 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 right knee tri-compartmental osteoarthritis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 10, 2021; and (3) the claimant's impairment rating (IR) is nine percent. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed extent-of-injury condition, MMI, and IR determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that: (1) the claimant sustained a compensable injury on (date of injury), that extends to a head injury, right knee dislocation, right knee tibial plateau fracture/ligament damage, right PCL tear, right ACL tear, right meniscus tear, right knee post-traumatic arthritis/arthropathy, multiple rib fractures, right pulmonary contusion, sternal fracture with retrosternal contusion, lumbar strain, and L2 transverse process fracture; (2) (Dr. L) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor for MMI, IR, extent of injury, and return to work; and (3) the date of statutory MMI is June 14, 2022. The claimant testified that he was injured on (date of injury), when working in the course and scope of his employment on an oil rig.

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 right knee tri-compartmental osteoarthritis is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on June 10, 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 designated doctor, Dr. L, examined the claimant on October 21, 2021. Dr. L provided two alternate certifications. In both certifications, Dr. L certified that the claimant reached MMI on June 10, 2021, 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) assessed a nine percent IR. In the first certification, Dr. L stated that he considered and rated the carrier-accepted conditions. However, in listing the carrier-accepted conditions, Dr. L failed to rate and consider right knee post-traumatic arthritis/arthropathy. As noted above, the parties stipulated that the compensable injury of (date of injury), extends to right knee post-traumatic arthritis/arthropathy. In the alternate certification, Dr. L again failed to rate and consider right knee post-traumatic arthritis/arthropathy and included right knee tri-compartmental osteoarthritis. The ALJ's determination that the compensable injury of (date of injury), does not extend to right knee tri-compartmental osteoarthritis has been affirmed.

Dr. L examined the claimant again on June 30, 2022. Dr. L again provided alternate certifications that were identical to his previous examination of October 21, 2021. After the CCH, the ALJ sent a letter of clarification (LOC) to Dr. L which identified post-traumatic arthritis/arthropathy as a condition that Dr. L failed to consider. Dr. L responded to the LOC in correspondence dated November 18, 2022. Dr. L provided an amended certification which rated and considered the conditions that the parties have

stipulated are part of the compensable injury including right knee post-traumatic arthritis/arthropathy. Dr. L certified that the claimant reached MMI on June 10, 2021, and using the AMA Guides assessed an IR of nine percent. Dr. L rated the lumbar spine by placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category II: Minor Impairment for five percent. Dr. L rated the head injury, the multiple rib fractures, pulmonary contusion, and sternal fracture with retrosternal contusion as zero percent. When he rated the right knee, Dr. L discussed what the rating would be for the range of motion (ROM) model of the AMA Guides as well as the diagnosis-based estimates model. When considering loss of ROM of the right knee, Dr. L stated the impairment assessed would be four percent based on Table 41, page 3/78 of the AMA Guides for loss of ROM of extension. Dr. L also analyzed what impairment would be assessed for the right lower extremity if it was based on the diagnosis-based estimates model, using Table 64, page 3/85 of the AMA Guides. Dr. L assessed one percent impairment for a partial medial meniscectomy, two percent impairment for an undisplaced tibial plateau fracture, and three percent impairment for mild cruciate ligament laxity. See Appeals Panel Decision (APD) 111720, decided January 13, 2012.

Dr. L stated in his narrative report that the largest impairment in the right lower extremity is four percent. He then combined five percent assessed for the lumbar spine with four percent assessed for the right lower extremity and zero percent for the remaining conditions for a total whole person impairment of nine percent. We note that using Table 64, page 3/85 of the AMA Guides, the impairment assessed for the right lower extremity would be six percent and would exceed the impairment assessed for the right lower extremity based on the ROM model of four percent. Dr. L stated in his narrative that he was using the largest impairment assessed for the right lower extremity but failed to do so. Given the inconsistency in Dr. L's report the nine percent IR assessed by Dr. L cannot be adopted. We reverse the ALJ's determination that the claimant's IR is nine percent.

There is only one other certification in evidence. (Dr. M), a treating doctor referral doctor, examined the claimant on February 22, 2022. Dr. M certified that the claimant had not reached MMI. Dr. M failed to consider right knee post-traumatic arthritis/arthropathy. Additionally, the parties have stipulated that the statutory date of MMI is June 14, 2022. We have affirmed the ALJ's determination that the claimant reached MMI on June 10, 2021. The certification from Dr. M cannot be adopted. There is no other certification in evidence. Accordingly, we remand the issue of 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), does not extend to right knee tri-compartmental osteoarthritis.

We affirm the ALJ's determination that the claimant reached MMI on June 10, 2021.

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

REMAND INSTRUCTIONS

Dr. L is the designated doctor in this case. On remand the ALJ is to determine whether Dr. L is still qualified and available to be the designated doctor. If Dr. L is still qualified and available, the ALJ is to ask Dr. L to clarify his inconsistent statements regarding his assessment of impairment for the right lower extremity and assess impairment for the (date of injury), compensable injury, as of the MMI date of June 10, 2021, in accordance with the AMA Guides.

If Dr. L 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 for the compensable injury of (date of injury). The ALJ is to advise the designated doctor that the compensable injury of (date of injury), includes a head injury, right knee dislocation, right knee tibial plateau fracture/ligament damage, right PCL tear, right ACL tear, right meniscus tear, right knee post-traumatic arthritis/arthropathy, multiple rib fractures, right pulmonary contusion, sternal fracture with retrosternal contusion, lumbar strain, and L2 transverse process fracture but does not include right knee tri-compartmental osteoarthritis. The assignment of an IR is required to be based on the claimant's condition as of June 10, 2021, the date of MMI in this case, considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The ALJ is to determine the issue of 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 APD 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