

APPEAL NO. 230999
FILED SEPTEMBER 15, 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 July 1, 2021, November 8, 2021, and December 29, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ) and on October 11, 2022, with the record closing on June 8, 2023, in (city), Texas, with (administrative law judge) presiding as the ALJ. The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm; (2) respondent 1/cross-appellant (claimant) reached maximum medical improvement (MMI) on July 24, 2020; (3) the claimant's impairment rating (IR) is 51%; (4) the first certification of MMI and assigned IR from (Dr. Br) on April 28, 2020, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); and (5) the claimant is not entitled to lifetime income benefits (LIBs) from June 22, 2020, through the date of the CCH based on the loss of, or total and permanent loss of use of, both feet/both hands/one foot and one hand. The appellant/cross-respondent (carrier) appealed the ALJ's determinations regarding extent of injury, finality, MMI, and IR. The claimant responded, urging affirmance of the determinations the carrier appealed. The claimant cross-appealed, disputing the ALJ's determinations regarding LIBs. The carrier responded, urging affirmance of the ALJ's LIBs determination. The appeal file does not contain a response from Respondent 2 (subclaimant).

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that: (1) on (date of injury), the claimant sustained a compensable injury; (2) the compensable injury of (date of injury), extends to at least a lumbar sprain, lumbar strain, thoracic sprain, and thoracic strain; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. B) as designated doctor to address the issues of extent of injury, MMI, IR, and return to work; and (4) the date of statutory MMI is July 24, 2020. The claimant, a security officer, was injured on (date of injury), when his vehicle was struck by another driver.

The ALJ is the sole judge of the weight and credibility to 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 right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm is supported by sufficient evidence and is affirmed.

FINALITY

The ALJ's determination that the first certification of MMI and assigned IR from Dr. Br on April 28, 2020, did not become final under Section 408.123 and Rule 130.12 is supported by sufficient evidence and is affirmed.

LIBS

The ALJ's determination that the claimant is not entitled to LIBs from June 22, 2020, through the date of the CCH based on the loss of, or total and permanent loss of use of, both feet/both hands/one foot and one hand is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on July 24, 2020, 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.

Rule 130.1(c)(3) provides, in pertinent part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination, and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
- (B) document specific laboratory or clinical findings of an impairment;

- (C) analyze specific clinical and laboratory findings of an impairment;
- (D) compare the results of the analysis with the impairment criteria and provide the following:
 - (i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and
 - (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of 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)]. The doctor's inability to obtain required measurements must be explained.

The first designated doctor, Dr. B, examined the claimant on July 2, 2019, and issued two alternate certifications that the claimant had not yet reached MMI. On February 28, 2022, a Presiding Officer's Directive to Order Designated Doctor Exam (POD) was issued by the first ALJ in the case, and (Dr. R), the second designated doctor, was appointed to address MMI and IR for the compensable injury. On April 9, 2022, Dr. R examined the claimant and considering a lumbar sprain/strain, thoracic sprain/strain, right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm certified the claimant reached MMI on July 24, 2020, with a 35% IR based on Table 8, page 5/162 of the AMA Guides. On October 27, 2022, the second ALJ in the case issued a letter of clarification to Dr. R asking if a pulmonary function test (PFT) had been completed and pointing out that there was no mention of a value for diffusing capacity of carbon monoxide (Dco) in her report. Dr. R responded that if the additional values of Dco and measured exercise capacity (VO2) are required, she requests a reexamination so that a PFT can be ordered. On November 4, 2022, a second POD was issued; however, Dr. R was no longer available. A third POD was issued on December 20, 2022, which instructed the new designated doctor, (Dr. P), to provide an MMI and IR certification based on the compensable conditions and informed him that the claimant still needed a full PFT in order to assess his respiratory impairment. Dr. P examined the claimant on March 20, 2023, and in an amended certification determined the claimant reached MMI on July 24, 2020, with a 51% IR, which was adopted by the ALJ. Dr. P assessed 0% impairment for the lumbar sprain/strain and thoracic sprain/strain. For the right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm, Dr. P stated in his narrative report that he had recommended the claimant undergo a PFT but was informed by the claimant's pulmonologist that it was not possible for the claimant to undergo the test. Dr. P stated he was informed that the claimant's condition had progressed to the point that he requires the continuous use of mechanical ventilation to

breathe. Dr. P further stated that based on this information, he felt the most appropriate category for the claimant to be placed would be the severe category per Table 8 of the AMA Guides and assessed a 51% IR.

The AMA Guides provide on page 5/163 that Table 8 presents criteria for estimating the extent of permanent impairment and that spirometry and single breath Dco must be performed. The AMA Guides provide that for an assignment of 51% impairment under Class 4 of Table 8 of the AMA Guides, all of the listed criteria except for VO2 max must be met. The required methodology includes, in part, measurements made from at least three acceptable spirometric tracings of forced expiration: forced vital capacity (FVC), forced expiratory volume in the first second (FEV1), and the ratio of FEV1/FVC, a predicted normal single-breath Dco Value for an individual according to age, and utilization of Table 8 (page 5/162) for estimating the extent of permanent impairment. As noted above, Dr. P did not have the required values to appropriately use Table 8 of the AMA Guides because the claimant could not undergo a PFT. Accordingly, Dr. P's assessment of IR cannot be adopted. See Appeals Panel Decision (APD) 112026, decided April 5, 2012. The ALJ's determination that the claimant's IR is 51% is reversed. We note that the claimant's compensable conditions of right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm are nerve injuries and not injuries of the lungs. Chapter 4 of the AMA Guides provides for measuring impairment from nerve injuries, including neurological impairment of respiration in Section 4.3c on page 4/149.

As discussed above, Dr. B, the first designated doctor, issued two certifications that the claimant had not reached MMI. We have affirmed the ALJ's determination that the claimant reached MMI on the statutory date of July 24, 2020; therefore, these certifications cannot be adopted.

As mentioned earlier, Dr. R, the second designated doctor, certified the claimant reached MMI on July 24, 2020, with a 35% IR considering the compensable injury based on Table 8 of the AMA Guides. As Dr. R did not have the required values to appropriately use Table 8 of the AMA Guides, her assessment of IR cannot be adopted.

Dr. Br, the carrier-selected required medical examination doctor, examined the claimant on March 3, 2020, and issued two alternate certifications. In the first certification, Dr. Br certified the claimant reached MMI on October 19, 2018, with a 0% IR considering and rating a lumbar sprain/strain and thoracic sprain/strain. As this certification does not rate the compensable conditions of right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm and because we have affirmed the ALJ's determination that the claimant reached MMI on the statutory date of July 24, 2020, it cannot be adopted. In the second certification, Dr.

Br certified the claimant reached MMI on January 7, 2019, with a 0% IR considering and rating a lumbar sprain/strain, thoracic sprain/strain, and right phrenic nerve paralysis with resulting diaphragm impairment. We have affirmed the ALJ's determination that the claimant reached MMI on the statutory date of July 24, 2020; therefore, this certification cannot be adopted.

There are no other certifications 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), extends to right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm.

We affirm the ALJ's determination that the first certification of MMI and assigned IR from Dr. Br on April 28, 2020, did not become final under Section 408.123 and Rule 130.12.

We affirm the ALJ's determination that the claimant is not entitled to LIBs from June 22, 2020, through the date of the CCH based on the loss of, or total and permanent loss of use of, both feet/both hands/one foot and one hand.

We affirm the ALJ's determination that the claimant reached MMI on July 24, 2020.

We reverse the ALJ's determination that the claimant's IR is 51% and remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. P is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. P is still qualified and available to be the designated doctor.

The ALJ is to request that the designated doctor rate the entire compensable injury, which is a lumbar sprain/strain, thoracic sprain/strain, right phrenic nerve disorder of diaphragm, right phrenic nerve lesion of diaphragm, and paralysis of diaphragm, based on the claimant's condition as of the date of MMI, July 24, 2020. The ALJ is to advise the designated doctor that without all the required data and a complete PFT, Table 8 on page 5/162 of the AMA Guides cannot be appropriately used to assess the claimant's IR. The ALJ is to further advise the designated doctor that Chapter 4 of the AMA Guides provides for measuring the impairment from nerve injuries, including neurological impairment of respiration in Section 4.3c on page 4/149.

The parties are to be provided with the correspondence to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. The ALJ is then to make a determination on the 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 **NEW HAMPSHIRE INSURANCE COMPANY** 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 78701-3218.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge