

APPEAL NO. 231122
FILED OCTOBER 5, 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 March 9, 2023, with the record closing on June 20, 2023, 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 cervical sprain, cervical strain, thoracic sprain, thoracic strain, lumbar sprain, lumbar strain, left scapula fracture, left rotator cuff tear, large left renal subcapsular hematoma, right occipital condyle avulsion fracture, left 5 to 12 posterior rib fractures, fractures of the left transverse process fractures of T10 to T12, left L1 to L4 transverse process fractures, right L1, L3, and L4 transverse process fractures, bilateral transverse process fractures of L3 and L4, non-displaced fracture of the anterior superior end plates of L4 and L5, left pneumothorax, and anxiety; (2) the compensable injury of (date of injury), does not extend to post-traumatic stress disorder (PTSD); (3) the respondent (claimant) reached maximum medical improvement (MMI) on October 5, 2021; (4) the claimant's impairment rating (IR) is 18%; and (5) the first certification of MMI and assigned IR from (Dr. S) on July 30, 2021, did not become final pursuant to Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12). The appellant (carrier) appeals the ALJ's determinations of the extent-of-injury conditions favorable to the claimant, MMI, IR, and finality. The appeal file does not contain a response from the claimant to the carrier's appeal. The ALJ's determination that the compensable injury does not extend to PTSD 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), that includes at least a wedge compression fracture of the first lumbar vertebra; (Dr. K) was the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) on the issue of extent of injury; Dr. S was appointed by the Division on the issues of MMI and IR. We note that although it was inadvertently left out of the decision, a review of the record reflects the parties stipulated that the statutory date of MMI for this claim is August 11, 2022. The claimant testified that he was injured on (date of injury), when using a torch to cut metal to be loaded for recycling when a large piece of metal fell on him. The claimant testified that he was in the hospital for about a month.

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 cervical sprain, cervical strain, thoracic sprain, thoracic strain, lumbar sprain, lumbar strain, left scapula fracture, left rotator cuff tear, large left renal subcapsular hematoma, right occipital condyle avulsion fracture, left 5 to 12 posterior rib fractures, fractures of the left transverse process fractures of T10 to T12, left L1 to L4 transverse process fractures, right L1, L3, and L4 transverse process fractures, bilateral transverse process fractures of L3 and L4, non-displaced fracture of the anterior superior end plates of L4 and L5, left pneumothorax, and anxiety is supported by sufficient evidence and is affirmed.

FINALITY

The ALJ's determination that the first certification of MMI and assigned IR from Dr. S on July 30, 2021, did not become final under Section 408.123 and Rule 130.12 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. 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.

Dr. S, the designated doctor for purposes of MMI and IR, examined the claimant on July 30, 2021, and certified that the claimant reached MMI on July 27, 2021, and assigned an IR of 14%. Dr. S considered and rated a wedge compression fracture of the first lumbar vertebra, a cervical sprain, cervical strain, thoracic sprain, thoracic strain, lumbar sprain, lumbar strain, and a left scapular fracture. As previously noted, the ALJ's determination that the compensable injury of (date of injury), extends to a cervical sprain, cervical strain, thoracic sprain, thoracic strain, lumbar sprain, lumbar strain, left scapula fracture, left rotator cuff tear, large left renal subcapsular hematoma, right occipital condyle avulsion fracture, left 5 to 12 posterior rib fractures, fractures of the left transverse process fractures of T10 to T12, left L1 to L4 transverse process fractures, right L1, L3, and L4 transverse process fractures, bilateral transverse process fractures of L3 and L4, non-displaced fracture of the anterior superior end plates of L4 and L5, left pneumothorax, and anxiety has been affirmed. The certification from Dr. S did not consider and rate the entire compensable injury and could not be adopted.

In evidence is a response from Dr. S to a letter of clarification (LOC) sent to him requesting that he only address the compensable condition of a wedge compression fracture. Dr. S provided a new Report of Medical Evaluation (DWC-69) and certified that the claimant reached MMI on July 27, 2021, with a 10% IR considering only a wedge compression fracture of the first lumbar vertebra. This certification cannot be adopted because it did not consider and rate the entire compensable injury.

The ALJ correctly noted in her decision that there was no certification of MMI and assigned IR that rated the determined conditions. Therefore, the ALJ issued a Presiding Officer's Directive to Order Designated Doctor Exam after the CCH. (Dr. Q) was appointed as designated doctor and examined the claimant on May 10, 2023. Dr. Q certified that the claimant reached MMI on October 5, 2021, and assigned an 18% IR 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. Q did not consider and rate a wedge compression fracture of the first lumbar vertebra, left 5 to 12 posterior rib fractures, left pneumothorax, or T10-12 transverse process fractures, so, the ALJ subsequently sent Dr. Q an LOC requesting that Dr. Q issue a certification of MMI/IR that includes the entire compensable injury.

Dr. Q responded to the LOC acknowledging that he inadvertently left off some of the conditions that were part of the compensable injury and submitted a corrected

DWC-69. Dr. Q again certified that the claimant reached MMI on October 5, 2021, and assessed an 18% IR.

Dr. Q assigned 0% impairment for the left 5 to 12 posterior rib fractures and the left pneumothorax. Dr. Q assessed 4% whole person impairment for loss of range of motion of the left shoulder considering the left scapula fracture and left rotator cuff tear. Dr. Q noted that the large left renal subcapsular hematoma was completely healed. Dr. Q placed the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category I and assigned 0% impairment for the cervical spine considering the cervical sprain, cervical strain, and right occipital condyle avulsion fracture. Dr. Q placed the claimant in Thoracolumbar DRE Category II and assigned 5% impairment considering left transverse process fractures of T10 to T12, thoracic strain, and thoracic sprain. Dr. Q placed the claimant in Lumbosacral DRE Category III and assigned 10% considering a lumbar strain, lumbar sprain, a wedge compression fracture of L1, and bilateral transverse process fractures from L1 to L4. We note that the compensable injury includes bilateral transverse process fractures of L3 and L4, left L1 to L4 transverse process fractures, and right L1, L3, and L4 transverse process fractures. In considering transverse process fractures from L1 to L4, Dr. Q considered and rated right L2 transverse process fracture which is not part of the compensable injury.

Dr. Q utilized Chapter 4, the Nervous System of the AMA Guides to rate emotional disorders associated with PTSD and assigned 0% impairment. In his discussion of impairment, Dr. Q stated that the claimant's medical records revealed pre-existing evidence of emotional problems and did not meet the criteria for a permanent impairment. Dr. Q noted that PTSD is a condition that is expected to resolve over time and does not cause functional limitations in the claimant's normal activities of daily living. However, the ALJ determined that PTSD was not part of the compensable injury and that determination has been affirmed. The ALJ's determination that the compensable injury includes anxiety has been affirmed. Dr. Q's report rates PTSD rather than anxiety. Because Dr. Q's certification rates a condition that has not yet been determined to be part of the compensable injury (right L2 transverse process fracture), fails to rate anxiety, and rates a condition that has been determined not to be part of the compensable injury (PTSD), his certification cannot be adopted.

There is no other certification in evidence that rates the entire compensable injury. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on October 5, 2021, with an 18% IR and remand the issues of MMI and IR 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 cervical sprain, cervical strain, thoracic sprain, thoracic strain, lumbar sprain, lumbar strain, left scapula fracture, left rotator cuff tear, large left renal subcapsular hematoma, right occipital condyle avulsion fracture, left 5 to 12 posterior rib fractures, fractures of the left transverse process fractures of T10 to T12, left L1 to L4 transverse process fractures, right L1, L3, and L4 transverse process fractures, bilateral transverse process fractures of L3 and L4, non-displaced fracture of the anterior superior end plates of L4 and L5, left pneumothorax, and anxiety.

We affirm the ALJ's determination that the first certification of MMI and assigned IR from Dr. S on July 30, 2021, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on October 5, 2021, and remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 18% and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. Q is the designated doctor in this case. The ALJ is to determine whether Dr. Q is still qualified and available to serve as designated doctor. If Dr. Q is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to request that the designated doctor give an opinion on the claimant's date of MMI, which can be no later than the stipulated statutory date of MMI, August 11, 2022, and rate the entire (date of injury), compensable injury which includes a wedge compression fracture of the first lumbar vertebra, a cervical sprain, cervical strain, thoracic sprain, thoracic strain, lumbar sprain, lumbar strain, left scapula fracture, left rotator cuff tear, large left renal subcapsular hematoma, right occipital condyle avulsion fracture, left 5 to 12 posterior rib fractures, fractures of the left transverse process fractures of T10 to T12, left L1 to L4 transverse process fractures, right L1, L3, and L4 transverse process fractures, bilateral transverse process fractures of L3 and L4, non-displaced fracture of the anterior superior end plates of L4 and L5, left pneumothorax, and anxiety in accordance with the AMA Guides considering the medical record and the certifying examination. The ALJ is to inform the designated doctor that the compensable injury of (date of injury), does not extend to PTSD.

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 **XL INSURANCE AMERICA, INC.** 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