

APPEAL NO. 231200
FILED OCTOBER 26, 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 July 12, 2023, with the record closing on July 14, 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 sustained on (date of injury), did not extend to visual disturbance or lumbar spine sprain; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 4, 2020; (3) the claimant's impairment rating (IR) is zero percent; and (4) the claimant had disability resulting from an injury sustained on (date of injury), from June 16, 2020, through February 3, 2021, but not from February 4, 2021, through June 20, 2022. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, IR, and disability. The respondent (carrier) responded, urging affirmance. That portion of the ALJ's disability determination that the claimant had disability resulting from the injury sustained on (date of injury), from June 16, 2020, through February 3, 2021, 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 on (date of injury), the claimant sustained a compensable injury that extends to at least a scalp laceration/contusion, concussion without loss of consciousness, cervical spine sprain/strain, and post-traumatic headaches; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. S) as the initial designated doctor to address the issues of MMI, IR, extent of injury, disability, and return to work; the Division appointed (Dr. B) as the most recent designated doctor to address the issues of MMI, IR, and return to work; the date of statutory MMI is June 20, 2022; and the claimant had disability resulting from the injury sustained on (date of injury), from June 16, 2020, through August 3, 2020. The claimant testified that he was injured on (date of injury), when a co-worker who was working about five feet above him dropped a metal object that hit the claimant on the back of his head.

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 visual disturbance or lumbar spine sprain is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant did not have disability resulting from an injury sustained on (date of injury), from February 4, 2021, through June 20, 2022, 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. Rule 130.1(d)(1) states, in part, that a certification of MMI and assignment of an IR for the compensable injury "requires completion, signing, and submission of the Report of Medical Evaluation [DWC-69] and a narrative report."

Dr. B examined the claimant on April 7, 2023, and certified that the claimant reached MMI on October 7, 2021, with a two percent 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). In his discussion of the MMI date, Dr. B noted the average recovery time for post-concussion syndrome, a condition that has not yet been determined to be part of the compensable injury. The ALJ found that the preponderance of the evidence was contrary to the certification from Dr. B. That finding is supported by sufficient evidence.

(Dr. Br), a carrier-selected required medical examination doctor, examined the claimant on June 30, 2022, and provided three alternate certifications. The ALJ found that the preponderance of the evidence supports the certification from Dr. Br that considered and rated the compensable injury and certified the claimant reached MMI on August 4, 2020, and assigned a zero percent IR. However, Dr. Br did not sign the DWC-69. As noted above, Rule 130.1(d)(1) provides that a certification of MMI and assignment of an IR for the compensable injury requires the “completion, signing, and submission of the [DWC-69] and a narrative report.” See Appeals Panel Decision (APD) 100510, decided June 24, 2010; APD 101734, decided January 27, 2011; and APD 230349, decided April 14, 2023. Because the DWC-69 was not signed by Dr. Br, it was error for the ALJ to adopt his certification. Consequently, we reverse the ALJ’s determinations that the claimant’s MMI date is August 4, 2020, and that the claimant’s IR is zero percent.

Dr. Br provided two other alternate certifications. We note that neither of the other certifications were signed and cannot be adopted. Additionally, the certification from Dr. Br identified as scenario 1 did not rate a cervical sprain or post-traumatic headaches which are conditions that are part of the compensable injury. The certification from Dr. Br identified as scenario 2 considered and rated a visual disturbance and lumbar sprain which have been determined not to be part of the compensable injury. See APD 140505, decided May 19, 2014.

Dr. S, the initial designated doctor, examined the claimant on October 15, 2020, and in three alternate scenarios certified that the claimant had not yet reached MMI. As noted above, the parties stipulated that the date of statutory MMI is June 20, 2022. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a Decision and Order dated after the date of statutory MMI. See APD 131554, decided September 3, 2013; and APD 172017, decided October 3, 2017; see *also* APD 200978, decided August 25, 2020.

As there is no MMI/IR certification in evidence that can be adopted, 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), does not extend to visual disturbance or lumbar spine sprain.

We affirm the ALJ's determination that the claimant did not have disability resulting from an injury sustained on (date of injury), from February 4, 2021, through June 20, 2022.

We reverse the ALJ's determinations that the claimant's MMI date is August 4, 2020, and that the claimant's IR is zero percent, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. The ALJ is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B 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.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a scalp laceration/contusion, concussion without loss of consciousness, cervical spine sprain/strain, and post-traumatic headaches but does not extend to visual disturbance or lumbar spine sprain. The ALJ is to request the designated doctor to give an opinion on the claimant's MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The ALJ should inform the designated doctor that the date of MMI cannot be later than the statutory date of June 20, 2022.

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 APD 060721, decided June 12, 2006.

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

ROBIN MILLER
5221 NORTH O'CONNOR BOULEVARD, SUITE 400
IRVING, TEXAS 75039-3711.

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge