

APPEAL NO. 231317
FILED OCTOBER 31, 2023

This appeal arises pursuant to the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 *et seq.* (1989 Act). Contested case hearings were held in Tyler, Texas, on June 28, 2023, with (administrative law judge) presiding as the administrative law judge (ALJ) and on August 2, 2023, 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), does not extend to avascular necrosis of the femoral head, arthrofibrosis right hip, cerebral venous thrombosis, pulmonary embolus, and degenerative joint disease right hip; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 25, 2021; (3) the claimant's impairment rating (IR) is 4%; and (4) none of the services provided by (medical facility) from June 29, 2022, through July 8, 2022, relate to the compensable injury. The claimant appealed, disputing all the ALJ's determinations. Respondent 2 (carrier) responded, urging affirmance of the disputed determinations. The appeal file does not contain a response from respondent 1 (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 that extends to at least an intertrochanteric fracture of the right femur; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. S) as the designated doctor to address extent of injury, MMI, IR, and return to work; and (3) the date of statutory MMI is February 25, 2023. We note that although the parties stipulated to the correct date of statutory MMI on the record, the ALJ mistakenly wrote (date of injury), in Finding of Fact No. 1.G. We therefore reform Finding of Fact No. 1.G. to state that the date of statutory MMI is February 25, 2023, as stipulated on the record. We additionally note that although the ALJ indicated in his decision that the claimant affirmed that the claimant's exhibits consisted of 251 pages, the record indicates that the claimant affirmed that there are 277 pages in the claimant's exhibits. Therefore, we reform the Evidence Presented section of the decision to state that the claimant affirmed there are 277 pages of claimant's exhibits. The claimant was injured on (date of injury), while working as a facility maintenance manager when he slipped and fell due to icy conditions.

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 avascular necrosis of the femoral head, arthrofibrosis right hip, cerebral venous thrombosis, pulmonary embolus, and degenerative joint disease right hip is supported by sufficient evidence and is affirmed.

RELATEDNESS OF MEDICAL SERVICES

The ALJ's determination that none of the services provided by (medical facility) from June 29, 2022, through July 8, 2022, relate to the compensable injury is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on October 25, 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 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 ALJ determined the claimant reached MMI on October 25, 2021, with a 4% IR in accordance with the certification of Dr. S, the designated doctor. Dr. S examined the claimant on December 6, 2022, and issued alternate certifications with the same MMI date and IR. In the first certification, which was adopted by the ALJ, Dr. S considered and rated the accepted condition of a right hip/femur fracture. Dr. S stated that ongoing treatment beyond October 25, 2021, would not have been expected to change the claimant's condition. Regarding the IR, Dr. S noted that the claimant had decreased hip range of motion (ROM) at the time of Dr. S's previous evaluation on October 12, 2021. Using Table 40 on page 3/78 of the AMA Guides, Dr. S stated the claimant had moderate ROM loss which resulted in 4% whole person IR. However, Dr. S did not include the ROM measurements from his previous exam, nor was the report from that exam in evidence. As Dr. S's narrative does not document the clinical findings that were used to assess the claimant's impairment, his narrative report does not comply with Rule 130.1(c)(3). See Appeals Panel Decision (APD) 211411, decided November 5, 2021; and APD 210361, decided April 30, 2021.

Dr. S's second certification, which also certifies the claimant reached MMI on October 25, 2021, with a 4% IR, considers a right hip/femur fracture as well as the conditions of lumbar sprain/strain and hip sprain/strain. As this certification considers conditions that have not been determined to be compensable, this certification cannot be adopted. Therefore, we reverse the ALJ's determination that the claimant's IR is 4%.

There are two other certifications in evidence which are from (Dr. H), a doctor selected by the treating doctor. Dr. H examined the claimant on March 1, 2023, and, in both certifications, certified that the claimant reached MMI on November 21, 2022, with a 20% IR. As we have affirmed the ALJ's determination that the claimant reached MMI on October 25, 2021, Dr. H's certifications cannot be adopted. Additionally, it is clear

from Dr. H's narrative report that he considered deep vein thrombosis and pulmonary embolism as part of the compensable injury in both certifications.

There is no other IR in evidence that can be adopted. Therefore, we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

SUMMARY

We reform Finding of Fact No. 1.G. to state that the date of statutory MMI is February 25, 2023, as stipulated on the record.

We reform the Evidence Presented section of the decision to state that the claimant affirmed there are 277 pages of claimant's exhibits.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to avascular necrosis of the femoral head, arthrofibrosis right hip, cerebral venous thrombosis, pulmonary embolus, and degenerative joint disease right hip.

We affirm the ALJ's determination that none of the services provided by (medical facility) from June 29, 2022, through July 8, 2022, relate to the compensable injury.

We affirm the ALJ's determination that the claimant reached MMI on October 25, 2021.

We reverse the ALJ's determination that the claimant's IR is 4% and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

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

The ALJ is to advise the designated doctor that the claimant reached MMI on October 25, 2021, and request that the designated doctor rate the compensable injury, which is an intertrochanteric fracture of the right femur. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical record 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 provided with the designated doctor's new assignment of IR and are to be allowed an opportunity to respond. The ALJ is then to make a determination 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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** 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.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge