

APPEAL NO. 172128  
FILED OCTOBER 31, 2017

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 August 3, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ).<sup>1</sup> The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear, left shoulder impingement syndrome, arthralgia of the left acromioclavicular joint, and left bicep tendinosis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on May 4, 2016; and (3) the claimant's impairment rating (IR) is five percent.

The claimant appealed the ALJ's determinations, arguing that the evidence supports inclusion of the disputed conditions as part of the compensable injury, and that the ALJ erred in adopting the certification of MMI and assignment of IR from (Dr. F), a referral of the treating doctor, due to the "Federal issues" in which Dr. F is involved and because he did not rate the entire compensable injury.

The respondent (self-insured) responded, urging affirmance.

#### DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she injured her shoulders while moving a box of files. The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that the self-insured has accepted bilateral shoulder strains as components of the compensable injury.

#### EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear, left shoulder impingement syndrome, arthralgia of the left acromioclavicular joint, or left bicep tendinosis is supported by sufficient evidence and is affirmed.

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<sup>1</sup> Section 410.152 was amended in House Bill 2111 of the 85th Leg., R.S. (2017), effective September 1, 2017, changing the title of hearing officer to ALJ.

## 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 Texas Department of Insurance, Division of Workers’ Compensation (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(a) provides that if an IR is disputed, the commissioner shall direct the employee to the next available doctor on the Division’s list of designated doctors, as provided by Section 408.0041. 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 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 ALJ determined that the claimant reached MMI on May 4, 2016, with a five percent IR in accordance with the certification of Dr. F, a referral of the treating doctor. In his Finding of Fact No. 5, the ALJ states that Dr. F’s certification of MMI and IR is consistent with the preponderance of the evidence. Although the evidence in the record indicates that (Dr. A) was appointed by the Division to act as designated doctor to address extent of the compensable injury, there has not been a designated doctor appointed in this case to address MMI/IR. As mentioned above, Section 408.125(a) provides that if an IR is disputed, the commissioner shall direct the employee to be examined by a designated doctor. We note the Appeals Panel has stated that “[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant’s IR because there is no report from a designated doctor.” See Appeals Panel Decision (APD) 020385, decided March 18, 2002. See also APD 142008, decided November 5, 2014, and APD 132423, decided December 19, 2013, in which the issues of MMI and IR were in dispute, and a designated doctor had not been appointed to opine on the issues of MMI and IR. In both APD 142008 and APD 132423, the Appeals Panel reversed the ALJ’s decision and remanded for a designated doctor to be appointed on the issues of MMI and IR. We accordingly reverse the ALJ’s determinations that the claimant reached MMI on May 4, 2016, with a five percent IR

and 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 a left shoulder rotator cuff tear, left shoulder impingement syndrome, arthralgia of the left acromioclavicular joint, or left bicep tendinosis.

We reverse the ALJ's determination that the claimant reached MMI on May 4, 2016, 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 five percent and remand the issue of IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. A is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI/IR for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the compensable injury of (date of injury), includes bilateral shoulder strains but does not extend to a left shoulder rotator cuff tear, left shoulder impingement syndrome, arthralgia of the left acromioclavicular joint, or left bicep tendinosis. The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with 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) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is to reconsider the evidence on MMI/IR, including the designated doctor's certification, and make a determination concerning MMI/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 **BRAZOS COUNTY (a self-insured governmental entity), C/O TEXAS ASSOCIATION OF COUNTIES RISK MANAGEMENT POOL** and the name and address of its registered agent for service of process is

**TRACY SEILER  
RISK MANAGEMENT SERVICES DIRECTOR  
TEXAS ASSOCIATION OF COUNTIES  
1210 SAN ANTONIO  
AUSTIN, TEXAS 78701.**

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K. Eugene Kraft  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge