

APPEAL NO. 181804
FILED SEPTEMBER 19, 2018

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 10, 2018, 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 appellant (claimant) reached maximum medical improvement (MMI) on April 29, 2016; and (2) the claimant's impairment rating (IR) is 4%. The claimant appealed, disputing the ALJ's MMI and IR determinations. The respondent (carrier) responded, urging affirmance of the ALJ's MMI and IR determinations.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that she was injured while lifting a box to place on a pallet. The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. M) as designated doctor to determine MMI and IR.

In evidence is a Decision and Order dated July 25, 2016, issued by ALJ (ALJ) which states that the parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of a right shoulder sprain/strain. Also, the decision reflects that ALJ (ALJ) determined that the compensable injury of (date of injury), extends to a right shoulder labrum tear, right shoulder impingement, cervical sprain/strain and lumbar sprain/strain; the claimant had not reached MMI as of April 15, 2016, per the report of (Dr. J), the post-designated doctor required medical examination (RME) doctor; and the issue of IR is premature since the date of MMI has not yet been determined. Division records indicate that ALJ (ALJ) decision was not appealed to the Appeals Panel and the ALJ's determinations on the issues of extent of injury, MMI and IR became final as a matter of law.

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).

MMI AND 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 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 designated doctor, Dr. M, examined the claimant on June 8, 2017, and certified on that same date that the claimant reached MMI on February 28, 2017, with a 14% 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). The ALJ found that the designated doctor, Dr. M, did not consider or rate the entire compensable injury and the preponderance of the other medical evidence is contrary to his MMI and IR determinations. The ALJ’s findings are supported by sufficient evidence and are affirmed.

The subsequent RME doctor, (Dr. W), examined the claimant on May 1, 2018, and certified on that same date that the claimant reached MMI on April 29, 2016, with a 4% IR using the AMA Guides. Dr. W’s narrative report dated May 1, 2018, states she assessed a 0% impairment for the cervical spine, a 0% impairment for the lumbar spine and a 4% impairment for the right shoulder.

With regard to the right shoulder impairment, Dr. W explained in her narrative report dated May 1, 2018, that she used range-of-motion (ROM) measurements taken from (Dr. G), the claimant’s surgeon, dated April 29, 2016, for flexion, extension, abduction and external rotation of the right shoulder. Furthermore, Dr. W explained that since Dr. G did not provide ROM measurements for adduction and internal rotation of the right shoulder that she used ROM measurements taken on December 22, 2015,

from Dr. M, the designated doctor, for adduction and internal rotation of the right shoulder.

The ALJ found that Dr. W's certification that the claimant reached MMI on April 29, 2016, with a 4% IR is supported by a preponderance of the evidence. The ALJ's determination that the claimant reached MMI on April 29, 2016, is supported by sufficient evidence and is affirmed. The ALJ determined that the claimant's IR is 4%; however, Dr. W erred in applying Figure 38, page 3/43 of the AMA Guides, for flexion of the right shoulder.

Dr. W noted that on April 29, 2016, Dr. G measured 135° of flexion for the right shoulder. The AMA Guides on pages 3/42 through 3/44 provide directions for ROM figures to be rounded to the nearest 10°. Using Figure 38 on page 3/43, 135° of flexion results in 3% impairment whether 135° is rounded to 130° or 140°. Dr. W erred in assessing a 2% impairment, rather than a 3% impairment, for 135° of flexion as provided in Figure 38.

Dr. W noted the following other right shoulder ROM measurements from Dr. G, the surgeon, on April 29, 2016: 40° of extension resulting in 1% impairment (Figure 38, page 3/43), 125° of abduction resulting in 2% impairment (Figure 41, page 3/44) and 45° of external rotation resulting in 1% impairment (Figure 44, page 3/45). Dr. W noted the following right shoulder ROM measurements from Dr. M, the designated doctor, on December 22, 2015: 30° of adduction resulting in 1% impairment (Figure 41, page 3/44) and 90° of internal rotation resulting in 0% impairment (Figure 44, page 3/45).

The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. See Appeals Panel Decision (APD) 171766, decided September 7, 2017; APD 172488, decided December 18, 2017; APD 152464, decided February 17, 2016; APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011.

Using Dr. W's right shoulder ROM measurements as documented in her narrative report (3% flexion, as corrected + 1% extension + 2% abduction + 1% adduction + 1% external rotation + 0% internal rotation) results in 8% upper extremity (UE) impairment, rather than 7% UE impairment as assessed by Dr. W. The 8% UE impairment converts to 5% whole person impairment using Table 3 on page 3/20, rather than 4% whole person impairment as assessed by Dr. W. Combining 0% impairment

for the cervical spine, 0% impairment for the lumbar spine and 5% impairment for the right shoulder results in a 5% IR, rather than a 4% IR as assessed by Dr. W.

The ALJ found that Dr. W's assessment of IR is supported by the preponderance of the evidence. After a mathematical correction, that finding is supported by the evidence. Accordingly, we reverse the ALJ's determination that the claimant's IR is 4% and render a new decision that the claimant's IR is 5% as mathematically corrected.

Furthermore, we note there are other certifications of MMI and IR in evidence; however, those certifications cannot be adopted because they assess an MMI date other than the MMI date of April 29, 2016, as determined by the ALJ and affirmed in this decision.

SUMMARY

We affirm the ALJ's determination that the claimant reached MMI on April 29, 2016.

We reverse the ALJ's determination that the claimant's IR is 4% and render a new decision that the claimant's IR is 5% as mathematically corrected.

The true corporate name of the insurance carrier is **NORGUARD INSURANCE COMPANY** 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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge