

APPEAL NO. 190561  
FILED MAY 15, 2019

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 February 14, 2019, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), does not extend to disc bulge/protrusion at L4-5, disc bulges at L3-4 and L5-S1, lumbar spinal stenosis and lumbar radiculopathy, left shoulder A/C joint osteoarthritis and glenohumeral joint osteoarthritis, and left shoulder glenoid labrum tear, or aggravation of those diagnoses; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on August 3, 2018; (3) the claimant's impairment rating (IR) is 15%; and (4) the claimant did not have disability from March 7, 2018, through the date of the CCH as a result of the compensable injury of (date of injury).

The claimant appealed, disputing the ALJ's extent of injury and disability determinations. The respondent/cross-appellant (carrier) responded, urging affirmance of those determinations. The carrier also cross-appealed, disputing the ALJ's MMI and IR determinations. The claimant responded, urging affirmance of those determinations.

**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), in the form of at least the carrier-accepted conditions of head contusion, left shoulder contusion, and thoracolumbar strain/sprain. The claimant testified he was injured when he tripped over a chair and fell to the floor.

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 disc bulge/protrusion at L4-5, disc bulges at L3-4 and L5-S1, lumbar spinal stenosis and lumbar radiculopathy, left shoulder A/C joint osteoarthritis and glenohumeral joint osteoarthritis, and left shoulder glenoid labrum tear, or aggravation of those diagnoses is supported by sufficient evidence and is affirmed.

### **DISABILITY**

The ALJ's determination that the claimant did not have disability from March 7, 2018, through the date of the CCH as a result of the compensable injury of (date of injury), 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 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(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.

(Dr. L), the designated doctor appointed by the Division, examined the claimant on August 3, 2018, and issued alternate certifications. In the first certification Dr. L certified that the claimant had not reached MMI based on the disputed extent-of-injury conditions. Because we have affirmed the ALJ's determination that the compensable injury does not extend to the disputed conditions, this certification cannot be adopted.

In the second certification Dr. L certified that the claimant reached MMI on August 3, 2018, with a 15% IR. Dr. L opined that the claimant reached MMI on August 3, 2018, and, 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), assigned a 15%

IR. Dr. L noted in her narrative report that her MMI/IR certification considered and rated a head contusion, left shoulder contusion, and thoracolumbar strain/sprain. Dr. L assigned 0% impairment for the head contusion and 6% impairment for diminished range of motion (ROM) of the claimant's left shoulder. Dr. L placed the claimant in Diagnosis-Related Estimate (DRE) Thoracolumbar Category II for 5% impairment and DRE Lumbosacral Category II for 5% impairment, which resulted in 10% impairment for the thoracolumbar strain/sprain.

The ALJ determined that the claimant reached MMI on August 3, 2018, with a 15% IR as certified by Dr. L. The ALJ noted in his discussion that the carrier argued for the adoption of the MMI/IR certification by (Dr. O), the post-designated doctor required medical examination doctor. The ALJ noted that Dr. O's 9% IR consisted of 0% for the head contusion, 4% for left shoulder ROM, and 5% "for the lumbar spine under lumbosacral Category II." The ALJ stated that Dr. O's certification was problematic because "[Dr. O] did not consider the thoracic spine which was . . . accepted by [the carrier]." The carrier contended in its cross-appeal that the ALJ made a mistake of material fact in stating Dr. O failed to consider the thoracic spine.

Dr. O examined the claimant on October 15, 2018, and on that date issued alternate certifications. In the first certification Dr. O certified that the claimant reached MMI on July 10, 2018, with an 8% IR based in part on meralgia paresthetica, a condition that has neither been stipulated to by the parties as part of the compensable injury nor actually litigated at the CCH. Therefore, this certification cannot be adopted.

In the second certification Dr. O certified that the claimant reached MMI on July 10, 2018, with a 9% IR "for the accepted injuries only." Dr. O noted in his narrative report that the accepted injuries were a head contusion, left shoulder contusion, and thoracolumbar spine sprain/strain. Dr. O assigned 4% impairment for loss of ROM of the left shoulder and 0% impairment for the head contusion. Regarding the thoracolumbar sprain/strain Dr. O stated:

For the thoracolumbar spine sprain/strain, [the claimant] cannot be a Category IV, there is no structural integrity abnormality. He could not be a Category III because there is no loss of reflex. There is no atrophy of 2 cm or more. You could rate him at a Category II for a non-verifiable radicular complaint at 5%. So, combining the 5% of the spine with 4% for the shoulder, you get 9% Whole Person Impairment.

As noted above, the ALJ found Dr. O to have rated only the lumbar spine under DRE Lumbosacral Category II, and did not rate the claimant's thoracic spine.

In Appeals Panel Decision (APD) 051306-s, decided August 3, 2005, the Appeals Panel discussed the application of the AMA Guides in rating cervical, thoracic, and lumbar injuries and held as follows:

Applying the language from the bottom of page 3/95 of the AMA Guides, if the injury is primarily to the cervical spine the rating would be under part 3.3h, page 3/103 cervicothoracic spine impairment, if the injury was primarily to the thoracic area of the spine the rating would be under part 3.3i page 3/106 for thoracolumbar spine impairment and if the injury is primarily to the lumbar portion of the spine, the impairment would be under part 3.3g page 3/101 lumbosacral spine impairment. Pursuant to part 3.3f, page 3/101, paragraph 8, if more than one spine region is impaired, the doctor is to determine the impairment of the other regions and combine the regional impairments using the Combined Values Chart to express the patients (sic) total spine impairment.

The parties stipulated that the compensable injury is, in part, a thoracolumbar strain/sprain. As noted above, Dr. O stated in his narrative report that he considered “the thoracolumbar spine sprain/strain.” The AMA Guides makes clear that “thoracolumbar” considers injuries primarily to the thoracic area, so pursuant to the AMA Guides definition of thoracolumbar Dr. O considered and rated the claimant’s thoracic spine. The ALJ’s statement that Dr. O did not consider the thoracic spine in his certification is a misstatement of the evidence. While the ALJ can accept or reject Dr. O’s certification, his decision in this case is based, in part, upon a misstatement of the medical evidence in the record. Accordingly, we reverse the ALJ’s determinations that the claimant reached MMI on August 3, 2018, with a 15% IR.

The parties did not clarify whether the stipulated condition of thoracolumbar strain/sprain was only to the thoracic spine or both the thoracic and lumbar spine. Dr. L placed the claimant in both DRE Thoracolumbar Category II and DRE Lumbosacral Category II for a total 10% impairment for the thoracolumbar strain/sprain. Dr. O placed the claimant in DRE Thoracolumbar Category II for 5% impairment for the thoracolumbar strain/sprain. Given the AMA Guides’s method of evaluating thoracolumbar spine impairments and lumbosacral spine impairments and the uncertainty of whether the stipulated condition of a thoracolumbar strain/sprain is to only the thoracic spine or to the thoracic and lumbar spine, we cannot render a decision in this case. We therefore 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 disc bulge/protrusion at L4-5, disc bulges at L3-4 and L5-S1, lumbar spinal stenosis and lumbar radiculopathy, left shoulder A/C joint osteoarthritis and glenohumeral joint osteoarthritis, and left shoulder glenoid labrum tear, or aggravation of those diagnoses.

We affirm the ALJ's determination that the claimant did not have disability from March 7, 2018, through the date of the CCH as a result of the compensable injury of (date of injury).

We reverse the ALJ's determination that the claimant reached MMI on August 3, 2018, and we 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 15%, and we remand the issue of IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand the ALJ is to correct his misstatement of the medical evidence in the record. Additionally, the ALJ should clarify whether the stipulated condition of a thoracolumbar strain/sprain is to the thoracic spine only or to the thoracic and lumbar spine. The ALJ shall consider all of the evidence and make a determination of the claimant's date of MMI and IR.

Dr. L is the designated doctor in this case. If necessary, on remand the ALJ is to determine whether Dr. L is still qualified and available to be the designated doctor. If Dr. L is no longer qualified or available to serve as the designated doctor and it is necessary for the ALJ to obtain a new MMI/IR certification, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury. The parties are to be provided with the designated doctor's new certification of MMI and IR 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 **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Margaret L. Turner  
Appeals Judge