

APPEAL NO. 191995
FILED JANUARY 3, 2020

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 October 7, 2019, in (city), Texas, with (administrative law judge). as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to reactive bursitis and aggravation of chronic cuff abrasion/impingement of the left shoulder; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, an impairment rating (IR) cannot be assigned at this time; and (4) the claimant had disability from October 28, 2018, through the date of the CCH.

The appellant (carrier) appealed the ALJ's determinations regarding extent of the compensable injury, MMI, IR, and disability. The claimant responded to the carrier's appeal, urging affirmance on the issues of extent of injury, MMI, IR, and disability.

DECISION

Affirmed in part and affirmed on other grounds, as modified 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 condition of left shoulder strain. The evidence indicates that the claimant, a delivery driver, was injured when she lifted a heavy box and felt a pop in her left shoulder.

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 AND DISABILITY

The ALJ's determinations that: (1) the compensable injury of (date of injury), extends to reactive bursitis and aggravation of chronic cuff abrasion/impingement of the

left shoulder; and (2) the claimant had disability from October 28, 2018, through the date of the CCH are supported by sufficient evidence and are 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, 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.

The ALJ determined that the claimant has not reached MMI for the compensable injury based on the April 12, 2019, certification by (Dr. P), a doctor selected by the treating doctor to act in his place. Dr. P examined the claimant on April 12, 2019, and issued alternate certifications. In the certification that was adopted by the ALJ, Dr. P’s narrative report indicates that he considered a rotator cuff tear of the left shoulder, a condition that has not been determined to be part of the compensable injury, was not stipulated to as compensable by the parties, and was not actually litigated as part of the extent-of-injury issue in the CCH. As this certification is based on a condition that is not compensable, it cannot be adopted.

There are five other certifications of MMI/IR in evidence. (Dr. E), the designated doctor assigned to determine MMI/IR, and Dr. P, in his alternate certification, both certified the claimant reached MMI on October 27, 2018, with a four percent IR when considering the accepted injury of a left shoulder strain. As these certifications fail to rate reactive bursitis and aggravation of chronic cuff abrasion/impingement of the left shoulder, conditions determined by the ALJ to be compensable and affirmed in this decision, they cannot be adopted.

(Dr. D), the post-designated doctor required medical examination doctor, examined the claimant on August 9, 2019, and issued three alternate certifications. In his first certification, Dr. D only considered the accepted condition of a left shoulder strain and found the claimant at MMI on October 3, 2018, with a four percent IR. As this certification does not rate the entire compensable injury, it cannot be adopted. The second certification considered the left shoulder strain, left shoulder AC joint arthritis, reactive bursitis, and aggravation of chronic cuff abrasion/impingement and found that the claimant has not reached MMI. As this certification considered left shoulder AC joint arthritis, a condition that has not been determined to be part of the compensable injury, was not stipulated to as compensable by the parties, and was not actually litigated as part of the extent-of-injury issue in the CCH, it cannot be adopted.

Dr. D's final certification considered the conditions of a left shoulder strain, reactive bursitis, and aggravation of chronic cuff abrasion/impingement, which is the compensable injury as determined by the ALJ and affirmed in this decision. Dr. D found that the claimant has not reached MMI for these conditions but is expected to do so on or about January 15, 2020. Dr. D explained in his narrative report that the claimant has not reached MMI because the medical records indicate that surgery has been recommended and utilization review is pending. This certification considers the entire compensable injury, and it is supported by the evidence. Therefore, we modify the ALJ's finding that the claimant has not reached MMI as explained by Dr. P in his report of April 12, 2019, to reflect that the claimant has not reached MMI as determined by Dr. D in his alternate report dated August 9, 2019.

Accordingly, we affirm on other grounds, as modified, the ALJ's determinations that the claimant has not reached MMI and because the claimant has not reached MMI, an IR cannot be assigned at this time.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to reactive bursitis and aggravation of chronic cuff abrasion/impingement of the left shoulder.

We affirm the ALJ's determination that the claimant had disability from October 28, 2018, through the date of the CCH.

We affirm on other grounds, as modified, the ALJ's determinations that the claimant has not reached MMI and because the claimant has not reached MMI, an IR cannot be assigned at this time.

The true corporate name of the insurance carrier is **ACCIDENT FUND INSURANCE COMPANY OF 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 75201-3136.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge