

APPEAL NO. 192264
FILED FEBRUARY 6, 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 was held on November 13, 2019, 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 March 28, 2019; and (2) the claimant's impairment rating (IR) is 14%. The claimant appealed, disputing the ALJ's determinations of MMI and IR, arguing that she has not reached MMI. The respondent (carrier) responded, urging affirmance of the disputed MMI and IR determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the carrier has accepted a (date of injury), compensable injury in the form of a right arm sprain/strain, right shoulder sprain/strain, left elbow sprain/strain, right elbow sprain/strain, right elbow fracture, and right rib fracture and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. C) as the designated doctor to address MMI and IR. The claimant testified that she was injured when she tripped and fell.

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, 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 reached MMI on March 28, 2019, with a 14% IR based on a certification by the designated doctor, Dr. C, 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). Dr. C examined the claimant on March 28, 2019. Dr. C considered and rated the following conditions: right shoulder sprain/strain, left elbow sprain, right elbow sprain/strain, and non-displaced fracture of the right elbow. Dr. C assessed 14% upper extremity impairment based on loss of range of motion (ROM) of the right shoulder and 7% upper extremity impairment for the right elbow. Dr. C further assessed 1% upper extremity impairment for loss of ROM of the left elbow. Dr. C stated the final upper extremity impairment would be 23% with a whole person IR of 14%. The AMA Guides provide on page 3/17 that if both limbs are involved, calculate the whole person impairment for each on a separate chart and combine the percents of each limb. See Appeals Panel Decision (APD) 130633, decided April 24, 2013. We note that 14% upper extremity for the right shoulder combined with 7% upper extremity impairment for the right elbow results in 20% upper extremity impairment which, using Table 3 on page 3/20 of the AMA Guides, converts to 12% whole person impairment for the right upper extremity. The 1% upper extremity impairment for the left elbow using Table 3 converts to 1% whole person impairment for the left upper extremity. We note that 12% whole person impairment for the right upper extremity combined with 1% whole person impairment for the left upper extremity results in 13% whole person impairment rather than 14% whole person impairment assessed by Dr. C. Further, we note that in her narrative report, Dr. C stated that “due to invalid self-limiting results for the right shoulder and bilateral elbows, the whole person [IR] of 14% is invalid.” However, Dr. C assessed a 14% impairment for the claimant’s injury.

As previously noted, the claimant’s compensable injury includes a right rib fracture. Dr. C did not consider and rate a right rib fracture. Because Dr. C did not rate the entire compensable injury, this certification from Dr. C cannot be adopted. Accordingly, we reverse the ALJ’s determination that the claimant reached MMI on March 28, 2019, and that the claimant’s IR is 14%.

There is another certification from Dr. C in evidence based on the March 28, 2019, examination. In the alternate certification, Dr. C considered and rated the following conditions: right shoulder sprain/strain, left elbow sprain, right elbow sprain/strain, non-displaced fracture of the right elbow, right rotator cuff tear, right arm sprain/strain, right rib fracture, and bilateral elbow sprain/strain. Dr. C certified that considering the above referenced conditions that the claimant had not yet reached MMI. In evidence is a prior decision and order that determined the compensable injury of (date of injury), does not extend to the right shoulder rotator cuff tear. Because this

certification considers a condition that is not part of the compensable injury of (date of injury), this certification cannot be adopted.

The only other certification in evidence is from (Dr. V), a doctor selected to act in place of the treating doctor. Dr. V examined the claimant on August 16, 2019, and certified that the claimant had not yet reached MMI. The ALJ stated in her discussion of the evidence that Dr. C's findings were persuasive to establish that any further treatment after March 28, 2019, was for non-compensable conditions. This statement is supported by the evidence. Accordingly, that certification cannot be adopted.

Since there is no certification in evidence that can be adopted we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the claimant reached MMI on March 28, 2019, and remand the MMI issue to the ALJ.

We reverse the ALJ's determination that the claimant's IR is 14% and remand the IR issue to the ALJ.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand the ALJ is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, then another doctor is to be appointed to determine the claimant's date of MMI and IR for the (date of injury), compensable injury. On remand, the ALJ is to inform the designated doctor that the compensable injury includes a right arm sprain/strain, right shoulder sprain/strain, left elbow sprain/strain, right elbow sprain/strain, right elbow fracture, and right rib fracture but does not include a right shoulder rotator cuff tear and that when rating both upper extremities, the whole person impairment should be calculated for each limb and then combined. On remand, if Dr. C is still the designated doctor, the ALJ is to request that Dr. C clarify whether the claimant's ROM measurements were invalidated.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is to request the designated doctor to consider and rate the compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination. The ALJ is then to make a determination of 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 **LUBA CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CAPITOL CORPORATE SERVICES, INC.
800 BRAZOS STREET, SUITE 400
AUSTIN, TEXAS 78701-2548.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge