

APPEAL NO. 201042
FILED SEPTEMBER 10, 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 June 11, 2020, 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 compensable injury sustained on (date of injury), does not extend to a right shoulder labral tear, right shoulder partial tear of the supraspinatus, or right eye macular hole; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 30, 2019; and (3) the claimant's impairment rating (IR) is 2%. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (self-insured) responded, urging affirmance of the extent of injury, MMI, and IR determinations.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the compensable injury of (date of injury), consisted of a right shoulder contusion, left shoulder contusion, right elbow contusion, left elbow contusion, right shoulder sprain, and left shoulder sprain; the compensable injury does not extend to right shoulder impingement; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. J) as the designated doctor to determine the issues of extent of injury, MMI and IR. The claimant was injured on (date of injury), when the bucket of a backhoe swung into him and pushed him backwards while his arms were outstretched in front him.

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 sustained on (date of injury), does not extend to a right shoulder labral tear, right shoulder partial tear of the

supraspinatus, or right eye macular hole 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 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 August 30, 2019, with a 2% IR in accordance with an amended certification dated December 10, 2019, from Dr. J, the designated doctor. Dr. J examined the claimant on August 30, 2019, and initially issued three alternate certifications. Following the August 30, 2019, exam, a Division benefit review officer sent a letter of clarification to Dr. J on December 6, 2019, asking him to provide a fourth certification that rated the bilateral contusions of the shoulders and elbows and the bilateral shoulder sprains. In a response dated December 10, 2019, Dr. J explained that he did not believe that the claimant suffered contusions; however, he did provide a fourth certification. The listed diagnoses in the December 10, 2019, response were right shoulder contusion and sprain, left shoulder contusion and sprain, right elbow contusion and sprain, and left elbow contusion and sprain. Dr. J maintained the prior MMI date of August 30, 2019, and 2% 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), Dr. J assigned a 2% upper extremity (UE) impairment for range of motion (ROM) deficits in the right shoulder and 1% UE impairment for ROM deficits in the left shoulder. He also assigned 0% UE impairment for the bilateral elbows based on normal ROM measurements. The shoulder impairments resulted in a 2%

whole person impairment. However, bilateral elbow sprains are conditions that have not been accepted and have not yet been determined to be part of the compensable injury. Accordingly, the ALJ's determination that the claimant reached MMI on August 30, 2019, with a 2% IR is reversed.

There are ten other certifications in evidence. As mentioned above, Dr. J initially examined the claimant on August 30, 2019, and issued alternate certifications. His first certification considered the conditions of bilateral shoulder contusions and a right elbow contusion and placed the claimant at MMI on August 30, 2019, with a 2% IR. However, the compensable conditions of bilateral shoulder sprains and left elbow contusion were not considered or rated, so this certification cannot be adopted. Dr. J's second certification considered bilateral shoulder contusions and a right elbow contusion as well as a right shoulder labral tear and a right shoulder partial tear of the supraspinatus, among other conditions in dispute at that time. Dr. J certified that the claimant was not at MMI when considering the disputed conditions. Dr. J's finding of not at MMI is based on conditions that have been determined to be non-compensable or have not yet been determined to be compensable. Therefore, this certification cannot be adopted. Dr. J's third certification considered and rated the conditions of bilateral shoulder sprains and placed the claimant at MMI on August 30, 2019, with a 2% IR based on ROM deficits in the shoulders. The compensable conditions of bilateral shoulder contusions and bilateral elbow contusions were not considered or rated. Accordingly, this certification cannot be adopted.

(Dr. S), a doctor selected by the treating doctor to act in his place, examined the claimant on January 29, 2020, and issued three alternate certifications. His first certification considered the diagnoses of bilateral shoulder contusions and bilateral elbow contusions and for these conditions, Dr. S placed the claimant at MMI on August 30, 2019, with a 2% IR for ROM loss of the shoulders. As this certification did not consider or rate the compensable conditions of bilateral shoulder sprains, it cannot be adopted. The second certification considered the diagnoses of right shoulder impingement with A/C arthrosis, right elbow lateral epicondylitis, and bilateral carpal tunnel syndrome. Dr. S determined that for these conditions, the claimant reached MMI on August 30, 2019, with no impairment. Because this certification considered conditions that have either been determined not to be compensable or have not yet been determined to be compensable, it cannot be adopted. The third certification from Dr. S considered the diagnoses of right shoulder labral tear, SLAP tear of the glenoid labrum, right shoulder partial tear of the supraspinatus, and partial thickness interstitial tear at the footprint of the supraspinatus tendon. Dr. S determined that the claimant has not reached MMI for these conditions. As this certification considered conditions that have either been determined not to be compensable or have not yet been determined to be compensable, this certification cannot be adopted.

(Dr. M), a doctor selected by the treating doctor to act in his place, examined the claimant on November 19, 2019, and certified the claimant reached MMI on October 1, 2019, with a 10% IR. In his narrative report, Dr. M explained that the claimant reached MMI because he was returned to regular duty on October 1, 2019, and additional treatment, including the recommended surgeries, were denied by the self-insured. Using the AMA Guides, Dr. M assigned 5% impairment based on left shoulder ROM deficits, 0% impairment for the left elbow, 0% impairment for the left wrist, and no additional impairment for the left hand or fingers. He additionally assigned 5% impairment for the right shoulder based on ROM deficits, 0% impairment for the right elbow, 0% impairment for the right wrist, and no additional impairment for the right hand or fingers. Finally, Dr. M assigned 0% impairment for the right eye. As the certification considered and rated the right eye and we have affirmed the ALJ's determination that a right eye macular hole is not compensable, this certification cannot be adopted.

(Dr. D), the carrier-selected required medical examination doctor, examined the claimant on January 8, 2020, and issued three alternate certifications. The first certification considered and rated bilateral shoulder contusions and bilateral elbow contusions. Dr. D determined that the claimant reached MMI on July 1, 2019, with a 0% IR. This certification fails to rate the compensable bilateral shoulder sprains and cannot be adopted. The second certification considered bilateral shoulder contusions, bilateral elbow contusions, as well as a right shoulder labral tear, right shoulder partial tear of the supraspinatus, and right shoulder impingement, among other conditions in dispute at that time. Dr. D certified the claimant had not reached MMI because surgery has been recommended. Dr. D's finding of not at MMI is based on treatment for conditions that have been determined to be non-compensable or have not yet been determined to be compensable and, therefore, this certification cannot be adopted. The third certification from Dr. D considered and rated bilateral shoulder contusions, bilateral elbow contusions and bilateral shoulder sprains. For these conditions, Dr. D certified that the claimant reached MMI on July 26, 2019, with a 2% IR based on ROM deficits in the bilateral shoulders. In explaining the date of MMI, Dr. D stated that no treatment was planned or rendered after that date that is met with the anticipation of further material recovery or lasting improvement. He further explained that the absence of sprains on imaging studies is consistent with resolution of these conditions. As this certification from Dr. D rated the entire compensable injury and is supported by a preponderance of the evidence, it will be adopted. Therefore, we render a new decision that the claimant reached MMI on July 26, 2019, with a 2% IR.

SUMMARY

We affirm the ALJ's determination that the compensable injury sustained on (date of injury), does not extend to a right shoulder labral tear, right shoulder partial tear of the supraspinatus, or right eye macular hole.

We reverse the ALJ's determination that the claimant reached MMI on August 30, 2019, with a 2% IR in accordance with the certification of Dr. J, and we render a new decision that the claimant reached MMI on July 26, 2019, with a 2% IR in accordance with the certification of Dr. D.

The true corporate name of the insurance carrier is **CITY OF FRIENDSWOOD (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**STEVE FOREMAN, MAYOR
910 SOUTH FRIENDSWOOD DR.
FRIENDSWOOD, TEXAS 77546.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge