

APPEAL NO. 210067
MARCH 12, 2021

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 December 3, 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 of (date of injury), does not extend to right shoulder supraspinatus tendon full thickness tearing, infraspinatus tendon full thickness tear of the anterior insertional fibers, subscapularis tendon with moderate grade partial-thickness tearing, tendinosis along head of bicep, acromioclavicular joint effusion, degenerative type tear at the superior labrum, small glenohumeral joint effusion and a high riding humeral head, left total hip arthroplasty, or chronic appearing partial thickness tear of the gluteus medius or gluteus minimus tendon; (2) the appellant (claimant) reached maximum medical improvement (MMI) on January 15, 2020; and (3) the claimant's impairment rating (IR) is four percent.

The claimant appealed, disputing the ALJ's determinations regarding extent of injury, MMI, and IR. The respondent (self-insured) responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed, in part, and reversed and remanded, in part.

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).

The parties stipulated that the claimant sustained a compensable injury on (date of injury), in the form of at least a left hip strain and right shoulder/trapezius strain, and that (Dr. H) was appointed as designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine extent of injury, MMI, and IR. The claimant, a bus operator, was injured when he stepped off a curb and fell onto the pavement while trying to find security to deal with an upset passenger.

EXTENT OF INJURY

That portion of the ALJ's extent-of-injury determination that the compensable injury of (date of injury), does not extend to right shoulder supraspinatus tendon full thickness tearing, infraspinatus tendon full thickness tear of the anterior insertional fibers, subscapularis tendon with moderate grade partial-thickness tearing, tendinosis along head of bicep, acromioclavicular joint effusion, degenerative type tear at the superior labrum, small glenohumeral joint effusion, and a high riding humeral head is supported by sufficient evidence and is affirmed.

Dr. H examined the claimant on September 22, 2020, for the purpose of determining extent of injury to the conditions in dispute, as well as MMI and IR. Regarding the right shoulder, Dr. H stated, "[a]s to the multitude of 'findings' referenced to the shoulder, I can state unequivocally that all of these findings are of long standing and pre-existing....In addition to this, this one single fall would not with 100% certainty be a substantial producing cause of this myriad of abnormal pathology." Regarding the left hip, Dr. H. stated that he requested a technetium bone scan of the left hip, and "[i]f this is negative, then there would be no more concerns referable to the left hip with regard to this injury." Dr. H then stated that he would reserve the "final scenario" until after he receives the results of the technetium bone scan of the left hip.

In an addendum, Dr. H reiterated that he had requested the technetium bone scan, but that the study he received was a bone density study instead. He further stated that he could not wait any longer but that a properly performed technetium bone scan remains mandatory. He concluded the report by stating, "as in my preliminary report, the multitude of regurgitation of the MRI findings is not related to the effects naturally resulting from this one slip and fall event."

Section 408.0041(a)(3) provides that at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about the extent of the employee's compensable injury. See also 28 TEX. ADMIN. CODE § 127.1(a)(3) (Rule 127.1(a)(3)). Rule 127.10(c) provides, in part, that the designated doctor shall perform additional testing when necessary to resolve the issue in question. Rule 127.220(a)(2) provides, in pertinent part, that designated doctor narrative reports must be filed in the form and manner required by the Division and at a minimum provide a clearly defined answer for each question to be addressed by the designated doctor examination.

In the instant case, Dr. H was appointed by the Division to provide an opinion on the extent of the compensable injury, including a clearly defined answer as to whether the disputed conditions of left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon are part of the compensable injury. The ALJ in his decision and order stated that Dr. H "offered a

pointed opinion regarding why the conditions were unrelated, noting in part the abnormal pathology and retraction and atrophy of the supraspinatus. Dr. [H]'s addendum report specifically noted that the MRI findings were not a result of the compensable injury." However, it is clear from reading the entirety of Dr. H's report that his opinion regarding the "multitude of regurgitation of the MRI findings" was in relation to the right shoulder disputed conditions. Dr. H failed to give an opinion regarding whether the left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon are part of the compensable injury, stating that a technetium bone scan is required before he could give an opinion regarding the left total hip arthroplasty.

Accordingly, we reverse that portion of the ALJ's extent-of-injury determination that the compensable injury of (date of injury), does not extend to a left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon, and we remand the issue of whether the compensable injury of (date of injury), extends to a left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon to the ALJ for further action consistent with this decision.

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 401.011(24) defines IR as the percentage of permanent impairment of the whole body resulting from a compensable injury. Rule 130.1(c)(1) states, in part, that an IR is the percentage of permanent impairment of the whole body resulting from the current compensable injury. Because we have reversed and remanded a portion of the extent-of-injury determination, we also reverse the ALJ's determinations that the claimant reached MMI on January 15, 2020, with a four percent IR, and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm that portion of the ALJ's extent-of-injury determination that the compensable injury of (date of injury), does not extend to right shoulder supraspinatus tendon full thickness tearing, infraspinatus tendon full thickness tear of the anterior insertional fibers, subscapularis tendon with moderate grade partial-thickness tearing, tendinosis along head of bicep, acromioclavicular joint effusion, degenerative type tear at the superior labrum, small glenohumeral joint effusion, and a high riding humeral head.

We reverse that portion of the ALJ's extent-of-injury determination that the compensable injury of (date of injury), does not extend to a left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon, and we remand the issue of whether the compensable injury of (date of injury), extends to a left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon to the ALJ for further action consistent with this decision.

We reverse the ALJ's determinations that the claimant reached MMI on January 15, 2020, with a four percent IR, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to give an opinion on the extent of the compensable injury and, if necessary, MMI and IR.

If Dr. H is still qualified and available to serve as designated doctor, the ALJ is to send a letter of clarification (LOC) to the designated doctor to request that he give an opinion, along with an explanation, regarding whether the compensable injury sustained on (date of injury), extends to a left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon. The ALJ should instruct the designated doctor to order any tests that are necessary to aid in making his decision. The parties are to be provided with the response from the designated doctor giving his opinion regarding the extent of the compensable injury and are to be allowed an opportunity to respond. The ALJ should then make a determination regarding whether the compensable injury sustained on (date of injury), extends to a left total hip arthroplasty and chronic appearing partial thickness tear of the gluteus medius and gluteus minimus tendon. The ALJ should then make a determination of MMI/IR considering the entire compensable injury. If necessary, the ALJ should send a LOC to the designated doctor to obtain a certification of MMI/IR that rates the entire compensable injury.

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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **VIA METROPOLITAN TRANSIT (a certified self-insured)** and the name and address of its registered agent for service of process is

**JEFF ARNDT, PRESIDENT AND CEO
VIA METROPOLITAN TRANSIT
800 WEST MYRTLE
SAN ANTONIO, TEXAS 78212.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge