

APPEAL NO. 210884  
FILED JULY 29, 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 January 14, 2021, with the record closing on April 29, 2021, 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), extends to a lumbar spine strain, right shoulder sprain, and left shoulder sprain; (2) the compensable injury of (date of injury), does not extend to right shoulder impingement syndrome or tear of right supraspinatus tendon; (3) the appellant (claimant) reached maximum medical improvement (MMI) on March 18, 2019; (4) the claimant's impairment rating (IR) is 6%; (5) the claimant did not have disability from March 28, 2019, through August 13, 2020; and (6) the claimant did not have good cause for failing to submit to the designated doctor's examination on March 28, 2019, and April 18, 2019, so the claimant is not entitled to temporary income benefits (TIBs) from March 28, 2019, through August 13, 2020.

The claimant appealed the ALJ's extent-of-injury determination that was adverse to him, as well as the ALJ's MMI, IR, and disability determinations. The claimant also appealed the ALJ's determination that he did not have good cause for failing to submit to the designated doctor's examination on March 28, 2019, and April 18, 2019, and is not entitled to TIBs from March 28, 2019, through August 13, 2020. The respondent (carrier) responded, urging affirmance of the appealed determinations. The ALJ's determination that the compensable injury of (date of injury), extends to a lumbar spine strain, right shoulder sprain, and left shoulder sprain was not appealed and has become final pursuant to Section 410.169.

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); the carrier has accepted bilateral shoulder strains as the compensable injury; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. A) as designated doctor for purposes of extent of injury, MMI, IR, disability, and return to work; and the statutory MMI date is December 25, 2020. The claimant testified he was injured on (date of injury), while lifting a basket weighing between 50 and 70 pounds from one rack to a higher rack.

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 right shoulder impingement syndrome or tear of right supraspinatus tendon is supported by sufficient evidence and is affirmed.

### **DISABILITY**

The ALJ's determination that the claimant did not have disability from March 28, 2019, through August 13, 2020, is supported by sufficient evidence and is affirmed.

### **FAILURE TO SUBMIT TO DESIGNATED DOCTOR'S EXAMINATION**

The ALJ's determination that the claimant did not have good cause for failing to submit to the designated doctor's examination on March 28, 2019, and April 18, 2019, and the claimant is not entitled to TIBs from March 28, 2019, through August 13, 2020, is supported by sufficient evidence and is affirmed.

### **MMI**

The ALJ's determination that the claimant reached MMI on March 18, 2019, is supported by sufficient evidence and is affirmed.

### **IR**

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.

The ALJ found the preponderance of the other medical evidence is contrary to the certification of Dr. A, the designated doctor. This finding is supported by the evidence, which is further discussed below. The ALJ then found the evidence supported the certification of (Dr. L), the post-designated doctor required medical examination doctor, and determined that the claimant's IR is 6% based on Dr. L's certification.

Dr. L initially examined the claimant on November 10, 2020, and issued alternate certifications. In one of his certifications Dr. L opined that the claimant had not reached MMI but was expected to do so February 10, 2021, based upon a left shoulder strain/sprain, right shoulder strain/sprain, lumbar strain, right shoulder impingement syndrome, and tear of the right supraspinatus tendon. In his other certification Dr. L certified the claimant reached MMI on March 18, 2019, with a 6% IR based on a left shoulder strain and right shoulder strain. We note that neither of these certifications considers and rates the entire compensable injury in this case, which is bilateral shoulder strains, bilateral shoulder sprains, and a lumbar spine strain.

Dr. L then examined the claimant on April 7, 2021, and again certified the claimant reached MMI on March 18, 2019, with a 6% IR. Dr. L based this certification on bilateral shoulder strains, bilateral shoulder sprains, and a lumbar spine strain. We note that although Dr. L acknowledged the compensable injury included a lumbar spine strain, he did not specifically discuss an IR for that condition. It is this certification that was adopted by the ALJ.

Dr. L stated in his report that he used the range of motion (ROM) measurements from Dr. A's August 13, 2020, examination to determine the IR because "this was the first evaluation that documented the bilateral shoulder planes of motion," and assessed the same IR as Dr. A. We note that Dr. A's August 13, 2020, report contains two sets of ROM measurements for the right shoulder, one for "TODAY('s)" date of August 13, 2020, and the second for December 3, 2018. Dr. A's report contains one set of ROM measurements for the claimant's left shoulder with no date specified. Dr. A stated in his report that the claimant's right shoulder examination "was limited due to recent surgery" and his right shoulder movement was "severely restricted," and we note those ROM measurements do not correspond with the impairments Dr. A assessed for the right shoulder. Dr. A did not identify in his report where the December 3, 2018, ROM measurements were taken.

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. L assigned a 6% IR based on the bilateral shoulder ROM measurements noted in Dr. A's examination by

combining 2% whole person impairment (WPI) for the left shoulder with 4% WPI for the right shoulder. Specifically, Dr. L used Figure 38 on page 3/43, Figure 41 on page 3/44, Figure 44 on page 3/45, and Table 3 on page 3/20 of the AMA Guides.

Using Dr. A's ROM measurements listed for the right shoulder, Dr. L assigned 2% upper extremity (UE) impairment for flexion; 1% UE impairment for extension; 1% UE impairment for abduction; and 2% UE impairment for internal rotation. We note the ROM measurements listed in Dr. A's and Dr. L's reports for right shoulder adduction and external rotation both result in 0% impairment. Dr. L stated that these figures add to "7% (UE) impairment," which, using Table 3 on page 3/20, "converts to a 4% WPI rating." Adding the impairments for right shoulder flexion, extension, abduction, and internal rotation results in 6% UE impairment, not 7%. We note Dr. A's report contains this same error. However, Table 3 provides that both 6% UE impairment and 7% UE impairment convert to 4% WPI.

Using Dr. A's ROM measurements listed for the claimant's left shoulder, Dr. L assigned 2% UE impairment for flexion and 2% UE impairment for adduction.<sup>1</sup> Dr. L noted the remaining left shoulder planes "were full." Dr. L stated these impairments add to 4% UE impairment, which converts to 2% WPI. Dr. A's August 13, 2020, report lists the claimant's left shoulder ROM as 65° of internal rotation, for which both he and Dr. L assessed 0% impairment. However, Figure 44 on page 3/45 of the AMA Guides provides that 65° of internal rotation results in either 2% UE impairment or 1% UE impairment depending on how 65° internal rotation is rounded, not 0% UE impairment.

The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. See Appeals Panel Decision (APD) 171766, decided September 7, 2017; APD 152464, decided February 17, 2016; APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011. Because there are questions regarding how to round the ROM measurements, which require medical judgment, a mathematical correction would not be appropriate in this case. Dr. L's IR cannot be adopted.

There are numerous other certifications in evidence. As discussed above, Dr. L initially examined the claimant on November 10, 2020, and issued alternate

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<sup>1</sup> We note that Dr. A states in his report he assigned 2% UE impairment for abduction, not adduction as specified by Dr. L. Dr. A assigned 0% UE impairment for adduction. We view Dr. L's use of adduction versus abduction as a typographical error.

certifications. In one of his certifications Dr. L opined that the claimant had not reached MMI but was expected to do so February 10, 2021. Given that we have affirmed the ALJ's determination that the claimant reached MMI on March 18, 2019, this certification cannot be adopted. In his other certification Dr. L certified the claimant reached MMI on March 18, 2019, with a 6% IR based on a left shoulder strain and right shoulder strain. However, because this IR contains the same error as explained above, and because this IR does not consider and rate the compensable injury of bilateral shoulder strains, bilateral shoulder sprains, and a lumbar spine strain, this IR cannot be adopted.

The other certifications in evidence are from Dr. A, the designated doctor. Dr. A initially examined the claimant on August 13, 2020, and issued three certifications. In the first certification Dr. A certified the claimant reached MMI on March 28, 2019, with a 6% IR. We note Dr. A's 6% IR contains the same error as discussed above for Dr. L's 6% IR. In the second and third certifications Dr. A opined the claimant had not reached MMI but was expected to do so on December 15, 2020, based on various disputed conditions. Because we have affirmed the ALJ's determination that the claimant reached MMI on March 18, 2019, these certifications cannot be adopted.

Dr. A also examined the claimant on January 7, 2021, and again issued three certifications. In all three of these certifications Dr. A certified the claimant reached MMI on December 25, 2020, with a 20% IR based on various accepted and disputed conditions. Dr. A also provided three additional certifications in response to a letter of clarification sent to him by the ALJ on January 28, 2021, all of which certified the claimant reached MMI on December 25, 2020, with a 15% IR. Because these certifications are not based on the affirmed MMI date of March 18, 2019, they cannot be adopted.

There is no IR in evidence that can be adopted. Therefore, we reverse the ALJ's determination that the claimant's IR is 6%, and we remand the issue of the claimant's 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 right shoulder impingement syndrome or tear of right supraspinatus tendon.

We affirm the ALJ's determination that the claimant did not have disability from March 28, 2019, through August 13, 2020.

We affirm the ALJ's determination that the claimant did not have good cause for failing to submit to the designated doctor's examination on March 28, 2019, and April

18, 2019, and the claimant is not entitled to TIBs from March 28, 2019, through August 13, 2020.

We affirm the ALJ's determination that the claimant reached MMI on March 18, 2019.

We reverse the ALJ's determination that the claimant's IR is 6%, and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. A is the designated doctor in this case. On remand the ALJ is to determine whether Dr. A is still qualified and available to be the designated doctor. If Dr. A is still qualified and available to be the designated doctor, the ALJ is to inform Dr. A that the compensable injury in this case is bilateral shoulder strains, bilateral shoulder sprains, and a lumbar spine strain and that the date of MMI is March 18, 2019. The ALJ is to notify Dr. A of his error in calculating 7% UE impairment for the claimant's right shoulder, and in calculating 0% impairment for 65° of internal rotation for the claimant's left shoulder. As previously noted, Dr. A's August 13, 2020, report contains two sets of ROM measurements for the claimant's right shoulder with different dates. The ALJ is to ask Dr. A to clarify which ROM measurements he is using to assess the claimant's IR, the date those measurements were taken, and where those measurements were obtained. The ALJ is to request Dr. A to rate the entire compensable injury as of the MMI date of March 18, 2019, considering the medical records, the certifying examination, and rating criteria in the AMA Guides.

If Dr. A is no longer qualified or available, then another designated doctor is to be appointed to determine the claimant's IR. The ALJ is to inform the designated doctor that the compensable injury in this case is bilateral shoulder strains, bilateral shoulder sprains, and a lumbar spine strain and that the date of MMI is March 18, 2019. The ALJ is to request the designated doctor to rate the entire compensable injury in accordance with Rule 130.1(c)(3) based on the claimant's condition as of the MMI date of March 18, 2019, considering the medical records, the certifying examination, and rating criteria in the AMA Guides.

The parties are to be provided with the ALJ's letter of clarification to Dr. A or Presiding Officer's Directive to Order Designated Doctor Examination if another designated doctor is assigned, as well as the designated doctor's report. The ALJ is to give the parties an opportunity to respond prior to closing the record and issuing a 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 **AMERICAN ZURICH 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