

APPEAL NO. 211402
FILED NOVEMBER 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 July 26, 2021, with the record closing on August 4, 2021, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), extends to left shoulder adhesive capsulitis, left shoulder rotator cuff tendinosis, cervical sprain, cervical strain, and left shoulder sprain; (2) the compensable injury of (date of injury), does not extend to cervical disc protrusion at C3-4 or cervical disc herniation at C4-5; (3) the appellant/cross-respondent (claimant) has not reached maximum medical improvement (MMI); and (4) because the claimant has not reached MMI an impairment rating (IR) cannot be assigned at this time. The claimant appealed that portion of the ALJ's extent-of-injury determination that was adverse to him. The respondent/cross-appellant (carrier) responded, urging affirmance of that determination. The carrier also cross-appealed that portion of the ALJ's extent-of-injury determination in favor of the claimant, as well as the ALJ's MMI and IR determinations. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and affirmed on other grounds, as modified, in part.

The parties stipulated, in part, that the carrier has accepted a grade 1 left shoulder strain as a component of the compensable injury, and the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) on the issues of MMI, IR, and extent of injury is (Dr. A). The claimant was injured on (date of injury), while unloading his trailer at a distribution center. The claimant was moving two carts with cargo nets that had fallen off, causing his feet to get caught up and resulting in him falling against the wall and the base of the trailer.

We note the Evidence Presented section of the decision and order states claimant's exhibits 1-7 were admitted. However, the recording of the CCH reflects the claimant sought to admit claimant's exhibits 1-6. The claimant's exhibit list states there are 6 exhibits total, and the appeal file does not contain a claimant's exhibit 7. We therefore modify the decision to state claimant's exhibits 1-6 were admitted to conform to the evidence that was actually admitted at the CCH.

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 determinations that the compensable injury of (date of injury), extends to left shoulder adhesive capsulitis, left shoulder rotator cuff tendinosis, cervical sprain, cervical strain, and left shoulder sprain but does not extend to cervical disc protrusion at C3-4 or cervical disc herniation at C4-5 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 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 had not reached MMI based on Dr. A's certification dated April 30, 2021. Dr. A examined the claimant on that day and issued three certifications, two of which considered the same conditions and certify the claimant had not reached MMI. In the first, Dr. A certified the claimant reached MMI on April 30, 2021, with a seven percent IR considering a left shoulder strain. The ALJ correctly stated in her decision that this certification cannot be adopted because it does not consider the entire compensable injury. In the second, Dr. A certified the claimant had not reached MMI based on a left shoulder sprain, cervical strain, a C3-4 protrusion,

and a C4-5 herniation. It was this certification the ALJ adopted. We have affirmed the ALJ's determination that the compensable injury does not extend to a cervical disc protrusion at C3-4 or a cervical disc herniation at C4-5. Dr. A stated in his attached narrative report that, regarding the left shoulder sprain, cervical strain, C3-4 protrusion, and C4-5 herniation, the claimant had not yet reached MMI, as further treatment including therapy and surgery was recommended. It is not clear from Dr. A's report that he based his opinion on the compensable injury as opposed to conditions that have been determined to not be part of the compensable injury; therefore, Dr. A's April 30, 2021, certification cannot be adopted.

There are other certifications in evidence, which include those from (Dr. M), the post-designated doctor required medical examination doctor. Dr. M initially examined the claimant on March 16, 2021, and issued three certifications, all of which certified the claimant reached MMI on June 16, 2020, with a five percent IR. The first of these certifications is based on a left shoulder sprain/strain. The second is based on a grade 1 left shoulder sprain/strain, left shoulder adhesive capsulitis, and left shoulder rotator cuff tendinosis. The third is based on a grade 1 left shoulder strain. None of these certifications consider and rate the compensable injury in this case, which is a grade 1 left shoulder strain, left shoulder adhesive capsulitis, left shoulder rotator cuff tendinosis, a cervical sprain, a cervical strain, and a left shoulder sprain. Therefore, none of Dr. M's March 16, 2021, certifications are adoptable.

Dr. M next examined the claimant on July 6, 2021, and issued two certifications. Both of these certifications certify the claimant reached MMI on June 16, 2020, with a five percent IR. The first of these certifications is based on a grade 1 left shoulder strain, and the second is based on a grade 1 left shoulder strain, a left shoulder sprain, a cervical sprain, a cervical strain, a C3-4 protrusion, and a C4-5 protrusion. Because neither of these certifications considers and rates the compensable injury in this case, neither is adoptable.

The other certifications in evidence are three issued by Dr. A based on his initial examination of the claimant on November 30, 2020, two of which consider the same conditions and certify the claimant had not reached MMI. In the first of these certifications, Dr. A certified the claimant reached MMI on November 4, 2020, with an eight percent IR based on a left shoulder sprain. This certification cannot be adopted because it does not rate the compensable injury. In the second, Dr. A certified the claimant had not reached MMI based on left shoulder adhesive capsulitis and left shoulder rotator cuff tendinosis, which are both part of the compensable injury. Dr. A stated that the claimant had not reached MMI based on those conditions because further treatment, including surgery, is recommended. This certification is supported by the evidence. Therefore, we modify the ALJ's finding that on April 30, 2021, Dr. A

determined the claimant has not reached MMI and his report is not contrary to the preponderance of the other medical evidence, to reflect the claimant has not reached MMI as determined by Dr. A in his November 30, 2020, certification.

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 modify the decision to state claimant's exhibits 1-6 were admitted to conform to the evidence that was actually admitted at the CCH.

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to left shoulder adhesive capsulitis, left shoulder rotator cuff tendinosis, cervical sprain, cervical strain, and left shoulder sprain.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to cervical disc protrusion at C3-4 or cervical disc herniation at C4-5.

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 **VANLINER 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge