

APPEAL NO. 211581  
FILED NOVEMBER 23, 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 (CCH) was held on July 27, 2021, with the record closing on August 20, 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), does not extend to right knee medial meniscus tear, right knee lateral meniscus tear, superior glenoid labrum lesion of the left shoulder, fracture of left rib, or right ankle Achilles tendinosis with tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on February 17, 2020; and (3) the claimant's impairment rating (IR) is 8%. The claimant appealed, disputing the ALJ's determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

DECISION

Modified by striking in part, affirmed in part, and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to a left rib contusion, left elbow contusion, right knee contusion, right ankle strain, and left shoulder strain; the claimant's date of statutory MMI is May 24, 2021; and (Dr. E) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR, and the extent of the claimant's compensable injury. The parties also stipulated at the CCH that on (date of injury), the claimant was the employee of (employer) Inc. There was some discussion between the parties and the ALJ whether the employer's name is (employer) Inc. or (employer), when it was determined the employer's legal name is (employer) Inc., while its d/b/a name is (employer). However, Finding of Fact No. 1.B. reflects the employer's name as (employer) Inc. Partners. We modify Finding of Fact No. 1.B. by striking "Partners" from the employer's name to conform to the stipulation made by the parties.

The claimant was injured on (date of injury), as she was getting out of her truck, which was the same height as an 18-wheeler truck. The claimant slipped on the first step of the truck and rolled out, hitting the step on the way down and then hitting the ground.

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 knee medial meniscus tear, right knee lateral meniscus tear, superior glenoid labrum lesion of the left shoulder, fracture of left rib, or right ankle Achilles tendinosis with tear 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.

There are multiple certifications in evidence. The ALJ correctly noted in his discussion that the compensable injury for the purpose of determining MMI and IR in this case is a left rib contusion, left elbow contusion, right knee contusion, right ankle strain, and left shoulder strain. The ALJ also correctly noted that two certifications in evidence rate the compensable injury, and these two certifications are from Dr. E, the designated doctor, and (Dr. M), the post-designated doctor required medical examination (RME) doctor. The ALJ found Dr. E's certification to be more consistent with the definition of clinical MMI in Section 401.011(30)(A), but noted that Dr. E

incorrectly certified 5% IR on the Report of Medical Evaluation (DWC-69) when Dr. E's attached narrative report assigned an 8% IR. The ALJ sent Dr. E a letter of clarification regarding this inconsistency, and Dr. E responded with a new DWC-69 certifying MMI on February 17, 2020, with an 8% IR. It was this corrected certification from Dr. E that the ALJ adopted.

Dr. E examined the claimant on August 28, 2020, and issued three certifications dated September 7, 2020, considering various conditions. In the first certification, Dr. E certified the claimant reached MMI on February 17, 2020, with a 5% IR, considering a left rib contusion, left elbow contusion, right knee contusion, right ankle strain, and left shoulder strain. As noted by the ALJ Dr. E's corresponding narrative report assigned an IR of 8%. However, Dr. E's narrative report also certified the claimant reached MMI on February 17, 2019, not February 17, 2020, as stated on the DWC-69.

On July 29, 2021, the ALJ sent Dr. E a letter of clarification to submit a corrected DWC-69. Dr. E responded with a new DWC-69 certifying the claimant reached MMI on February 17, 2020, with an 8% IR. However, Dr. E's attached narrative report again certified an MMI date of February 17, 2019. There is an internal inconsistency between the MMI date Dr. E certified on the DWC-69 and the MMI date Dr. E indicated in the accompanying narrative report. Because the narrative report and DWC-69 list completely different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected. See Appeals Panel Decision (APD) 140237, decided April 11, 2014. Accordingly, the ALJ's determinations that the claimant reached MMI on February 17, 2020, with an 8% IR are reversed.

As noted above, Dr. E issued two other certifications on September 7, 2020. In both of these certifications Dr. E certified the claimant had not reached MMI for various conditions. The statutory date of MMI in this case is May 24, 2021. Neither of Dr. E's alternate certifications can be adopted.

Another certification is from (Dr. B), a doctor selected by the treating doctor to act in place of the treating doctor. Dr. B examined the claimant on April 13, 2020, and certified the claimant reached MMI on March 18, 2020, with a 4% IR. Dr. B considered and rated a left elbow contusion, contusion of the right knee and lower leg, a contusion to the right ankle, and a closed fracture of the left rib. Dr. B considered and rated a condition determined not to be part of the compensable injury and as such his certification cannot be adopted.

Another certification in evidence is from (Dr. N), another doctor selected by the treating doctor to act in place of the treating doctor. Dr. N examined the claimant on May 26, 2021, and certified on that date the claimant reached MMI on May 24, 2021, with a 26% IR considering, among other conditions, a left rib fracture and left shoulder glenoid labrum lesion. Dr. N considered and rated conditions determined not to be part of the compensable injury and as such his certification cannot be adopted.

The final certifications in evidence are from Dr. M, the post-designated doctor RME doctor. Dr. M examined the claimant on November 17, 2020, and issued three certifications on that same date. In the first certification Dr. M certified the claimant reached MMI on December 11, 2019, with a 22% IR considering, among other conditions, right medial and lateral meniscus tears, left shoulder tear, right ankle tear, and left rib fracture. In the second certification Dr. M certified the claimant reached MMI on March 4, 2019, with a 0% IR considering, among other conditions, right medial and lateral meniscus tears and a rib fracture. Also in evidence is an amended certification from Dr. M dated July 19, 2021, based on the November 17, 2020, examination, in which Dr. M certified the claimant reached MMI on December 11, 2019, with a 22% IR considering, among other conditions, right medial and lateral meniscus tears, left rib fracture, and left shoulder superior glenoid labrum lesion. All of these certifications consider and rate conditions determined not to be part of the compensable injury, and as such cannot be adopted.

Dr. M's third November 17, 2020, certification is the one discussed by the ALJ in his decision as being one of the two certifications in evidence that does consider and rate the compensable injury. Dr. M certified the claimant reached MMI on March 4, 2019, with a 0% IR. In this certification Dr. M considered and rated a left rib contusion, left elbow contusion, right knee contusion, right ankle strain, and left shoulder strain. This certification considers and rates the compensable injury and is supported by the evidence. Therefore, we render a new decision that the claimant reached MMI on March 4, 2019, with a 0% IR.

## **SUMMARY**

We modify Finding of Fact No. 1.B. by striking "Partners" from the employer's name.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to right knee medial meniscus tear, right knee lateral meniscus tear, superior glenoid labrum lesion of the left shoulder, fracture of left rib, or right ankle Achilles tendinosis with tear.

We reverse the ALJ's determinations that the claimant reached MMI on February 17, 2020, with an 8% IR, and we render a new decision that the claimant reached MMI on March 4, 2019, with a 0% IR as certified by Dr. M.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO  
2200 ALDRICH STREET  
AUSTIN, TEXAS 78723.**

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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