

APPEAL NO. 211591  
NOVEMBER 18, 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 June 30, 2021, with the record closing on August 23, 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 right shoulder rotator cuff tear, but does not extend to a rupture of the right shoulder; (2) the appellant (claimant) reached maximum medical improvement (MMI) on September 16, 2019; and (3) the claimant's impairment rating (IR) is 7%.

The claimant appealed that portion of the ALJ's extent-of-injury determination that was against him, as well as the ALJ's MMI and IR determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

The ALJ's determination that the compensable injury extends to a right shoulder rotator cuff tear 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), which extends to a myofascial right shoulder strain; the Texas Department of Insurance, Division of Workers' Compensation (Division) properly appointed (Dr. M) as the designated doctor to determine extent of injury, MMI, and IR; and statutory MMI in this matter is September 9, 2020. The claimant, a shift leader in a pizza restaurant, was injured on (date of injury), when he was pulling pizzas from a conveyor belt and cutting them. He testified that he felt sharp pain in his right shoulder as he was cutting a pizza.

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 a rupture of the right shoulder is supported by sufficient evidence and is affirmed.

### **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 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 September 16, 2019, with a 7% IR as certified by Dr. M, the designated doctor, during his designated doctor exam on April 13, 2021. Dr. M considered and rated a myofascial right shoulder strain and a right shoulder rotator cuff tear. The Report of Medical Evaluation (DWC-69) accompanying Dr. M's narrative for the April 13, 2021, examination does certify a September 16, 2019, date of clinical MMI with a 7% IR. However, when Dr. M explains the MMI date in the corresponding narrative report, he states that the date of MMI is September 26, 2019, which is the date of Dr. M's prior examination of the claimant. Dr. M further explains that the claimant's range of motion (ROM) was better on that date than during his April 13, 2021, exam, and the claimant did not have any treatment between his last exam of September 26, 2019, and the statutory MMI date.

There is an internal inconsistency between the MMI date Dr. M certified on the DWC-69 and the MMI date Dr. M 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 September 16, 2019, with a 7% IR are reversed.

We note that Dr. M also made an error on the IR that is indicated both on the DWC-69 and narrative report dated April 13, 2021. They both state that the claimant's IR is a 7%. However, the attached worksheet correctly calculates the right shoulder ROM measurements, which were taken from Dr. M's September 26, 2019, exam, to result in a 10% upper extremity (UE) impairment, which then converts to a 6% whole person impairment (WPI). The narrative report mistakenly states that the ROM measurements result in an 11% UE impairment that converts to a 7% WPI.

As discussed above, Dr. M also examined the claimant on September 26, 2019, and certified that the claimant had not reached MMI. Dr. M considered a right shoulder sprain and a rotator cuff tear. As the parties stipulated that the date of statutory MMI in this case was September 9, 2020, this certification cannot be adopted.

Additionally, in evidence is a certification from (Dr. R), a doctor selected by the treating doctor to act in his place. Dr. R examined the claimant on October 20, 2020, and certified that the claimant reached MMI on that date with a 10% IR. Dr. R considered and rated pain in the right shoulder and a strain of the muscles and tendons of the right shoulder rotator cuff. As stated above, the date of statutory MMI in this case was September 9, 2020. Since the MMI date certified by Dr. R is past the statutory date, his certification cannot be adopted. Additionally, the ALJ's determination that the compensable injury of (date of injury), extends to a right shoulder rotator cuff tear has become final. As this certification does not rate the entire compensable injury, it cannot be adopted.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and 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 a rupture of the right shoulder.

We reverse the ALJ's determinations that the claimant reached MMI on September 16, 2019, with a 7% IR, and we remand the issues of MMI and IR back to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. M is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. M is still qualified and available to be the designated doctor. If Dr. M is no

longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The ALJ is to inform the designated doctor that (date of injury), compensable injury is a myofascial right shoulder strain and a right shoulder rotator cuff tear. The ALJ is also to inform the designated doctor that the (date of injury), compensable injury does not extend to a rupture of the right shoulder. Finally, the ALJ is to inform the designated doctor that the date of statutory MMI in this case is September 9, 2020.

The ALJ is to request the designated doctor to give an opinion on the claimant's MMI and IR by rating the entire compensable injury in accordance with 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) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on MMI and IR consistent with this 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 **ZNAT INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TEXAS 75201-3136.**

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Cristina Beceiro  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge