

APPEAL NO. 211628  
FILED DECEMBER 13, 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 May 10, 2021, with the record closing on September 7, 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 extends to a complex tear of the superior glenoid labrum and a partial tear of the supraspinatus tendon of the left shoulder; (2) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on June 15, 2019; (3) the claimant's impairment rating (IR) is 0%; and (4) the claimant's statutory date of MMI fell on April 22, 2021. The appellant/cross-respondent (carrier) appealed the ALJ's extent-of-injury determination. The claimant cross-appealed the ALJ's MMI, IR, and statutory MMI date determinations. The carrier responded, urging affirmance of those determinations. The appeal file does not contain a response from the claimant to the carrier's appeal.

**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), that extends to at least a left knee contusion, left leg contusion, and a lumbar strain. The claimant was injured on (date of injury), when he slipped off of a six-foot ladder on which he was standing to clean walls as directed by his employer.

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 extends to a complex tear of the superior glenoid labrum and a partial tear of the supraspinatus tendon of the left shoulder is supported by sufficient evidence and is affirmed.

**STATUTORY DATE OF MMI**

The ALJ's determination that the claimant's statutory date of MMI is April 22, 2021, 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 Texas Department of Insurance, Division of Workers' Compensation (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 the claimant reached MMI on June 15, 2019, with a 0% IR as certified by (Dr. L), a designated doctor appointed by the Division. The ALJ correctly noted in her discussion that the numerous certifications in evidence could not be adopted and issued a Presiding Officer's Directive to obtain an adoptable certification that considered and rated the entire compensable injury. Dr. L was appointed and examined the claimant on July 29, 2021. Dr. L noted in his attached narrative report that the compensable injury is a left knee contusion, left leg contusion, lumbar strain, a complex tear of the superior glenoid labrum, and a partial tear of the supraspinatus tendon of the left shoulder. Dr. L stated the following as the basis for his opinion the claimant reached MMI on June 15, 2019:

[The claimant] completed conservative therapy for the compensable injuries. Specifically, uncomplicated left knee contusion and left leg contusion resolve with the passage of time requiring ice and elevation. A lumbar strain is a soft tissue injury which heals without treatment in four to six weeks. Although I do not believe the MRI findings in the left shoulder were sustained in the work-related event, the active range of motion [ROM] demonstrated by the [claimant] is non-physiologic and implausible from an orthopedic standpoint based on thousands of examinations

performed personally. There is no objective evidence of injury to the left shoulder in the records just after the work-related fall. Moreover, the MRI findings in the left shoulder, if caused by the fall, would have been more painful within seconds of the fall than the other compensable injuries based on reasonable medical probability.

Dr. L assigned 0% IR because he found the claimant's ROM recorded in a previous designated doctor examination closer in time to MMI to be invalid.

The ALJ stated in her discussion that Dr. L "persuasively noted his concerns regarding [the] [c]laimant's complaint levels as exaggerating his movements to his left shoulder," and that Dr. L noted numerous times that the claimant's active left shoulder ROM is "non-physiologic and implausible from an orthopedic standpoint." The ALJ concluded that as there was no other certification to adopt, the preponderance of the other medical evidence is not contrary to Dr. L's certification.

However, Dr. L's narrative report reflecting his opinion that the claimant reached MMI on June 15, 2019, does not consider the pending treatment for the claimant's complex tear of the superior glenoid labrum and the partial tear of the supraspinatus tendon of the left shoulder, both of which have been determined to be part of the compensable injury. In evidence are numerous medical records discussing recommended treatment for these two conditions.

On May 15, 2019, (Dr. A), a doctor with whom the claimant treated, noted the claimant had completed six physical therapy sessions and left shoulder movements were painful with decreased ROM. On May 29, 2019, Dr. A noted an initial encounter for a superior glenoid labrum lesion of the left shoulder, and referred the claimant to an orthopedic surgeon for a surgical opinion on a labrum tear and supraspinatus tear. On June 7, 2019, Dr. A noted the claimant had seen an orthopedic surgeon on the previous day and surgery was planned for June 28, 2019.

On June 6, 2019, (Dr. V), an orthopedic surgeon, saw the claimant and noted a diagnosis of superior glenoid labrum lesion of the left shoulder. Dr. V opined that "since non operative measures have not given lasting relief and pain persists, arthroscopy with rotator cuff repair and all other indicated procedures of the involved shoulder was advised." A physical therapy record dated June 14, 2019, noted the claimant's progression in therapy had been minimal due to pain intensity and limited ability to perform activities due to restrictions and pending surgery for the left shoulder.

On July 16, 2019, (Dr. R), another doctor with whom the claimant treated, noted a diagnosis of a superior glenoid labrum lesion of the left shoulder, and that Dr. V saw the claimant and recommended surgery for the claimant's left shoulder. Dr. R also

noted that another physical therapy referral was given that day for continuation of therapy.

In a report dated April 27, 2021, (Dr. H), the post-designated doctor required medical examination (RME) doctor, opined that, regarding the superior glenoid labrum lesion of the left shoulder and supraspinatus tear of the left shoulder, the claimant reached MMI on April 25, 2021, the statutory date of MMI (we note the correct statutory date of MMI is April 22, 2021), because the claimant has severe limitation of motion of the left shoulder. Dr. H further opined “[i]t is unfortunate that [the claimant] has not had approval for shoulder surgery.”

The medical records reflect the recommended left shoulder surgery was for a condition that is part of the compensable injury, and Dr. L did not consider the recommended treatment for the compensable injury. We hold that the ALJ’s determination that the claimant reached MMI on June 15, 2019, based on Dr. L’s certification is against the great weight and preponderance of the evidence. We therefore reverse the ALJ’s determination that the claimant reached MMI on June 15, 2019. Because we have reversed the ALJ’s determination of MMI, we also reverse the ALJ’s determination that the claimant’s IR is 0%.

There are numerous other certifications in evidence from various doctors. Several of these doctors certified the claimant had not reached MMI. As previously discussed, we have affirmed the ALJ’s determination that the statutory date of MMI is April 22, 2021; therefore, a certification that the claimant has not reached MMI cannot be adopted in this case. See Appeals Panel Decision (APD) 131554, decided September 3, 2013. Certifications that the claimant had not reached MMI in evidence include (Dr. M), a previously assigned designated doctor, on September 23, 2019; (Dr. T), another previously assigned designated doctor, on August 7, 2020; and Dr. H, the post-designated doctor RME doctor, on January 9, 2020. None of these certifications can be adopted.

There are other certifications from Dr. H, one of which was discussed above. Dr. H examined the claimant on April 27, 2021, and issued alternate certifications. In two of these certifications Dr. H certified the claimant reached MMI on the statutory date of April 25, 2021, with a 20% IR. However, as the correct statutory date of MMI is April 22, 2021, neither of these certifications can be adopted. An alternate certification from Dr. H on April 27, 2021, certified the claimant reached MMI on June 15, 2019, with a 0% IR. However, this certification does not consider and rate a complex tear of the superior glenoid labrum or a partial tear of the supraspinatus tendon of the left shoulder, and therefore that certification cannot be adopted.

Another certification is from Dr. R, who examined the claimant on May 7, 2020, and certified the claimant reached MMI on May 7, 2020, with a 6% IR. However, Dr. R's attached narrative report reflects that he considered, among other conditions, a sprain of other ligament of the left ankle, which has not been stipulated to as being compensable by the parties or actually litigated at the CCH. Dr. R's certification cannot be adopted.

Another certification is an alternate certification from Dr. T, a previously appointed designated doctor. Dr. T examined the claimant on August 7, 2020, and certified the claimant reached MMI on June 15, 2019, with a 0% IR. However, this certification does not consider and rate a complex tear of the superior glenoid labrum and a partial tear of the supraspinatus tendon of the left shoulder. Dr. T's certification cannot be adopted.

There is no certification in evidence that can be adopted. Therefore, 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 extends to a complex tear of the superior glenoid labrum and a partial tear of the supraspinatus tendon of the left shoulder.

We affirm the ALJ's determination that the claimant's statutory date of MMI is April 22, 2021.

We reverse the ALJ's determinations that the claimant reached MMI on June 15, 2019, with a 0% IR, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. L is the designated doctor in this case. On remand the ALJ is to determine whether Dr. L is still qualified and available to be the designated doctor. If Dr. L is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI and IR for the claimant's (date of injury), compensable injury.

On remand the ALJ is to notify the designated doctor that the compensable injury in this case is a left knee contusion, left leg contusion, a lumbar strain, a complex tear of the superior glenoid labrum, and a partial tear of the supraspinatus tendon of the left shoulder, and that the statutory date of MMI is April 22, 2021. If Dr. L is still qualified and available to be the designated doctor, the ALJ is to request Dr. L to review and

consider the records regarding pending treatment for the claimant's complex tear of the superior glenoid labrum and partial tear of the supraspinatus tendon of the left shoulder, and to explain how those records impact his opinion on the claimant's date of MMI. The ALJ is then to request Dr. L to determine the claimant's date of MMI, which cannot be after April 22, 2021, the date of statutory MMI, and rate the claimant's 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).

The parties are to be provided with the designated doctor's new certification and allowed an opportunity to respond. The ALJ is then to make a determination on MMI and IR consistent with the evidence and 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 **NEW HAMPSHIRE 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