

APPEAL NO. 220068
FILED MARCH 3, 2022

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 December 1, 2020, April 19, 2021, and November 1, 2021, with the record closing on November 30, 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 sprain/strain; (2) the respondent (claimant) reached maximum medical improvement (MMI) on December 15, 2020; and (3) the claimant's impairment rating (IR) is 18%. The appellant (carrier) appeals the ALJ's determinations of MMI and IR. The claimant responded, urging affirmance of the issues of MMI and IR.

The ALJ's determination that the compensable injury of (date of injury), extends to a right shoulder sprain/strain was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated, in part, that: the claimant sustained a compensable injury on (date of injury), in at least the form of a cervical sprain/strain, a lumbar sprain/strain, a right shoulder contusion, and a right shoulder rotator cuff tear full thickness with development of synovitis; (Dr. A) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as the designated doctor to determine MMI and IR; and the statutory date of MMI is December 15, 2020. The claimant testified that she was injured on (date of injury), when she was opening a trailer door, the door fell on top of her head, and she was thrown to the ground.

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.

Dr. A initially examined the claimant on March 4, 2020, and certified the claimant reached MMI on October 16, 2019, with a 19% IR 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). In his narrative report, Dr. A stated he chose October 16, 2019, as the MMI date because the claimant did not continue with her approved therapy and did not return to the treating doctor for the scheduled follow-up appointments. The parties agreed at the CCH that the designated doctor did not initially rate all of the conditions that were part of the compensable injury.

Dr. A subsequently examined the claimant on June 8, 2021, and certified in his narrative that the claimant reached MMI on the statutory date of December 15, 2020, with an 18% IR. Dr. A referenced his earlier examination and stated that since that time the claimant has kept up with her treatment plan and the additional treatment "may have resulted in further improvement in [her] condition." However, the accompanying Report of Medical Evaluation (DWC-69) certifies that the claimant reached MMI on December 15, 2000, rather than the statutory date of December 15, 2020.

Therefore, there is an internal inconsistency between the MMI date Dr. A certified on the DWC-69 and the MMI date Dr. A certified in the accompanying narrative report. Because the narrative report and DWC-69 list 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) 130739, decided May 7, 2013. Accordingly, the ALJ's determination that the claimant reached MMI on December 15, 2020, is reversed.

With regard to the IR, Rule 130.1(c)(3) provides that an assignment of IR shall be based on the claimant's condition as of the MMI date. Given that we have reversed the ALJ's MMI determination, we reverse the ALJ's determination that the claimant's IR is 18%.

As noted above, Dr. A's initial certification of MMI/IR dated March 4, 2020, did not consider and rate the entire compensable injury. Accordingly, it cannot be adopted.

(Dr. H), a post-designated doctor required medical examination (RME) doctor, examined the claimant on July 28, 2020, and certified that the claimant was not at MMI. As previously noted, the parties stipulated that the statutory date in this case is December 15, 2020. Since the date of statutory MMI has already passed in this case, Dr. H's certification cannot be adopted. The Appeals Panel has held that it is legal error to determine a claimant has not reached MMI in a decision and order dated after the date of statutory MMI. See APD 131554, decided September 3, 2013.

(Dr. O), a post-designated doctor RME doctor, examined the claimant on August 26, 2021, and certified that the claimant reached MMI on the statutory date of December 15, 2020, with an 11% IR. In evidence is an operative report dated December 31, 2018, that reflects the claimant had a right shoulder arthroscopic distal clavicle excision. The ALJ noted in her discussion of the evidence that Dr. O did not rate a distal clavicle resection procedure. The ALJ found that the preponderance of the other medical evidence is not contrary to the determination of Dr. A who did consider and rate a right shoulder arthroscopic distal clavicle excision. The ALJ was persuaded that the right shoulder arthroscopic distal clavicle excision was treatment for the compensable injury. The Appeals Panel has previously held that impairment for a distal clavicle resection that was received as treatment for the compensable injury results in 10% upper extremity impairment under Table 27 on page 3/61 of the AMA Guides, which is then combined with range-of-motion impairment, if any, as provided by the AMA Guides. See APD 151158-s, decided August 4, 2015.

Since there is no certification of MMI and IR in evidence that can be adopted, we remand the issues of MMI and 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 no longer qualified or is no longer 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.

If Dr. A is still qualified and available to serve as the designated doctor, the ALJ is to advise Dr. A that his June 8, 2021, DWC-69 and accompanying narrative report have an internal inconsistency regarding the date of MMI.

The ALJ is to advise the appointed designated doctor that the compensable injury of (date of injury), extends to a cervical sprain/strain, lumbar sprain/strain, right shoulder contusion, right shoulder rotator cuff tear full thickness with development of synovitis, and right shoulder sprain/strain. The ALJ is to request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the 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 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 **BRIDGEFIELD EMPLOYERS 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 75201-3140.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge