

APPEAL NO. 220266
FILED APRIL 14, 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 was held on June 3, 2021, and July 28, 2021, with the record closing on January 24, 2022, 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 left shoulder bicipital tenosynovitis; (2) the compensable injury of (date of injury), does not extend to left shoulder adhesive capsulitis or a left shoulder rotator cuff tear; (3) the appellant (claimant) reached maximum medical improvement (MMI) on November 18, 2019; and (4) the claimant's impairment rating (IR) is 4%.

The claimant appealed the ALJ's extent-of-injury determination that was adverse to him, as well as the ALJ's MMI and IR determinations. The respondent (carrier) responded, urging affirmance of the disputed determinations. The ALJ's determination that the compensable injury of (date of injury), extends to left shoulder bicipital tenosynovitis 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), that extends to an unspecified sprain of the left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis supraspinatus, and mild bicipital tenosynovitis; and the claimant's date of statutory MMI is November 9, 2020. The claimant was injured on (date of injury), when pulling a heavy door.

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 left shoulder adhesive capsulitis or a left shoulder rotator cuff 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 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 November 18, 2019, with a 4% IR as certified by (Dr. K), a subsequently appointed designated doctor. Dr. K examined the claimant on January 6, 2022, and certified the claimant reached MMI on November 18, 2019, with a 4% 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). Dr. K stated in his attached narrative report that he considered the following conditions: unspecified sprain of the left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis of the supraspinatus tendon, mild bicipital tenosynovitis, and left shoulder adhesive capsulitis. The compensable injury in this case, at this time, is an unspecified sprain of the left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis supraspinatus, mild bicipital tenosynovitis, and left shoulder bicipital tenosynovitis. We have affirmed the ALJ's determination that the compensable injury does not extend to left shoulder adhesive capsulitis. Dr. K considered and rated a condition that has been determined to be not part of the compensable injury, and as such his certification cannot be adopted. We therefore reverse the ALJ's determinations that the claimant reached MMI on November 18, 2019, with a 4% IR.

There are other certifications in evidence, which are all from (Dr. C), the previously appointed designated doctor. Dr. C first examined the claimant on January 14, 2020, and on that date certified the claimant reached MMI on November 24, 2019, with a 4% IR. Dr. C stated in his narrative report that he considered and rated a strain of the muscle, fascia, and tendon at the neck level, a left shoulder sprain, and status post left shoulder arthroplasty. As discussed above, the compensable injury at this time is an unspecified sprain of the left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis supraspinatus, mild bicipital tenosynovitis, and left shoulder bicipital tenosynovitis. Dr. C's January 14, 2020, certification does not consider and rate the compensable injury and cannot be adopted.

Dr. C next examined the claimant for MMI and IR on January 8, 2021, and on that date issued two certifications that the claimant reached MMI on November 18, 2019, with a 4% IR. The first of these certifications considered and rated a left shoulder joint sprain, left shoulder impingement syndrome, and left shoulder bicipital tenosynovitis. The second considered and rated these same three conditions plus left shoulder adhesive capsulitis, traumatic rupture of the left shoulder, and a strain of the muscle, fascia, and tendon at the neck level. Neither of Dr. C's January 8, 2021, certifications consider and rate the entire compensable injury and cannot be adopted.

Dr. C next examined the claimant on September 20, 2021, pursuant to a presiding officer's directive issued by the ALJ and on that date certified the claimant reached MMI on November 18, 2019, with a 10% IR. However, Dr. C considered and rated left shoulder adhesive capsulitis, which is not part of the compensable injury. Dr. C's September 20, 2021, certification cannot be adopted.

On October 13, 2021, the ALJ sent a letter of clarification to Dr. C regarding the disputed left shoulder adhesive capsulitis, and requested him to submit a certification considering an unspecified sprain of the left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis supraspinatus, mild bicipital tenosynovitis, left shoulder adhesive capsulitis, and left shoulder bicipital tenosynovitis, and a certification considering an unspecified sprain of the left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis supraspinatus, and mild bicipital tenosynovitis. Dr. C responded on October 15, 2021, stating that:

An [IR] that includes left shoulder bicipital tenosynovitis as well as all of the compensable conditions as determined by the [presiding officer's directive] is a 10% [IR]. This is the same impairment I calculated on September 20, 2021. This diagnosis was already included in the diagnoses considered when I calculated that [IR].

My certification of [IR] that includes only the accepted conditions of an unspecified sprain of [the] left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis supraspinatus, and mild bicipital tenosynovitis is the 4% whole person impairment [WPI] that I calculated on January 14, 2020.

No Report of Medical Evaluation (DWC-69) was attached to Dr. C's response. His certification that the claimant reached MMI on November 18, 2019, with a 10% IR as clarified cannot be adopted because it considers and rates left shoulder adhesive capsulitis. His certification that the claimant reached MMI on November 24, 2019, with a 4% IR as clarified cannot be adopted because it does not consider and rate left shoulder bicipital tenosynovitis, which is part of the compensable injury.

There is no certification in evidence rating the compensable injury in this case; accordingly, 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 left shoulder adhesive capsulitis or a left shoulder rotator cuff tear.

We reverse the ALJ's determination that the claimant reached MMI on November 18, 2019, and we remand the issue of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 4% and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. In reviewing Dr. K's certification, errors were found in his IR calculations. Dr. K assigned a 4% WPI for the claimant's left shoulder based on left shoulder range of motion measurements. Dr. K's impairments for the claimant's left shoulder extension, abduction, adduction, external rotation, and internal rotation were all made in accordance with the AMA Guides. However, Dr. K assigned 1% upper extremity (UE) impairment for 150° of flexion. Figure 38 on page 3/43 of the AMA Guides provides that 150° of flexion results in 2% UE impairment, not 1%. Adding the UE impairments with the correct 2% impairment for flexion results in 8% UE impairment, not 7% UE impairment as assigned by Dr. K. Table 3 on page 3/20 of the AMA Guides provides that 8% UE impairment converts to 5% WPI, and 7% UE impairment converts to 4% WPI.

The ALJ is to determine whether Dr. K is still qualified and available to serve as designated doctor. If Dr. K is still qualified and available, the ALJ is to advise Dr. K of the errors made in his IR calculations. If Dr. K is no longer qualified or available, a new designated doctor is to be appointed to determine the claimant's date of MMI and IR.

The ALJ is to advise the designated doctor of the date of statutory MMI and request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury, which is an unspecified sprain of left shoulder joint, left shoulder impingement syndrome, mild tenosynovitis supraspinatus, mild bicipital tenosynovitis, and left shoulder bicipital tenosynovitis, in accordance with the AMA Guides considering the medical record and the certifying examination. The date of MMI cannot be after November 9, 2020, the date of statutory MMI.

The parties are to be provided with the designated doctor's new 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **LM INSURANCE CORPORATION** 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