

APPEAL NO. 220303  
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 (CCH) was held 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), does not extend to right elbow ulnar nerve neuropathy or right shoulder subacromial bursitis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 17, 2020; and (3) the claimant's impairment rating (IR) is one percent. The claimant appealed, disputing the ALJ's determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

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 the carrier has accepted a right shoulder sprain/strain and right elbow sprain/strain as the compensable injury; and that the date of statutory MMI is November 7, 2021. The claimant, a flight attendant, was injured on (date of injury), while she was pushing up with her right arm to close an overhead bin in the aircraft. She testified that she felt a pinch and pain in her neck, right shoulder, and right elbow and tingling in her right fingers after this incident.

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

Section 410.168 provides that an ALJ's decision contain findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. 28 Tex. Admin. Code § 142.16 (Rule 142.16) provides that an ALJ's decision shall be in writing and include findings of fact, conclusions of law, and a determination of whether benefits are due and if so, an award of benefits due.

The extent-of-injury issue as stated on the Benefit Review Conference Report was whether the compensable injury of (date of injury), extends to right elbow ulnar nerve neuropathy or right shoulder subacromial bursitis. That portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to right elbow ulnar nerve neuropathy or right shoulder subacromial bursitis is supported by sufficient evidence and is affirmed. However, during the CCH, the parties agreed to modify the extent-of-injury issue to include the conditions of right elbow epicondylitis, right shoulder impingement, and right shoulder rotator cuff tear. The ALJ failed to make specific finding of facts, conclusions of law, and decisions regarding the compensability of the disputed conditions of right elbow epicondylitis, right shoulder impingement, and right shoulder rotator cuff tear as required by Section 410.168 and Rule 142.16. See Appeals Panel Decision (APD) 132339, decided December 12, 2013; APD 150510, decided April 21, 2015; APD 162262, decided January 10, 2017; and APD 181349, decided August 15, 2018.

Accordingly, we reverse the ALJ's extent-of-injury determination as being incomplete, and we remand the issue of whether the compensable injury of (date of injury), extends to right elbow epicondylitis, right shoulder impingement, and right shoulder rotator cuff tear to the ALJ for further action consistent with this decision.

### **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. Rule 130.1(c)(3) provides, in part, that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;

- (B) document specific laboratory or clinical findings of an impairment;
- (C) analyze specific clinical and laboratory findings of an impairment;
- (D) compare the results of the analysis with the impairment criteria and provide the following:
  - (i) [a] description and explanation of specific clinical findings related to each impairment, including zero percent [IRs]; and
  - (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of 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 doctor's inability to obtain required measurements must be explained.

The ALJ determined that the claimant reached MMI on November 17, 2020, with a one percent IR, as certified by (Dr. J), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division). However, given that we have reversed the ALJ's extent-of injury determination as being incomplete and have remanded the issue of whether the compensable injury of (date of injury), extends to right elbow epicondylitis, right shoulder impingement, and right shoulder rotator cuff tear, we also reverse the ALJ's determinations that the claimant reached MMI on November 17, 2020, with a one percent IR. We remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

Pursuant to Section 410.203(c), the Appeals Panel may not remand a case more than once. Given that we are remanding this case to the ALJ, we note that although Dr. J assigned a one percent IR based on range of motion (ROM) deficits in the claimant's right elbow, he did not provide the measurements he used to calculate the claimant's IR in his narrative report as required by Rule 130.1(c)(3). Additionally, in his narrative report, Dr. J stated that the claimant had full ROM of the right shoulder and elbow despite assigning a one percent IR for ROM deficits in the right elbow.

### **SUMMARY**

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to right elbow ulnar nerve neuropathy or right shoulder subacromial bursitis.

We reverse the ALJ's extent of injury as being incomplete, and we remand the issue of whether the compensable injury of (date of injury), extends to right elbow

epicondylitis, right shoulder impingement, and right shoulder rotator cuff tear to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant reached MMI on November 17, 2020, 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 one percent and we remand the issue of IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand the ALJ is to make findings of fact, conclusions of law, and a decision as to whether the compensable injury of (date of injury), extends to right elbow epicondylitis, right shoulder impingement, and right shoulder rotator cuff tear.

Dr. J is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. J is still qualified and available to be the designated doctor. If Dr. J is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issues of MMI and IR for the (date of injury), compensable injury.

The ALJ is to inform the designated doctor what conditions are included in the compensable injury and that the date of statutory MMI in this case is November 7, 2021. 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 ALJ is to instruct the designated doctor to provide all measurements that were used to calculate the IR per Rule 130.1(c)(3) and to clarify the inconsistency in his narrative report regarding the claimant's ROM in the right elbow.

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 **STARR INDEMNITY & LIABILITY 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