

APPEAL NO. 221039
FILED AUGUST 25, 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 May 10, 2022, with the record closing on May 20, 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 a partial tear of the right common extensor tendon or right lateral epicondylitis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on September 26, 2021; and (3) the claimant's impairment rating (IR) is two percent. The claimant appealed the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded to the claimant's appeal, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that: (1) on (date of injury), the claimant sustained a compensable injury; (2) the claimant's compensable injury extends to at least a right shoulder rotator cuff tear for the purpose of determining MMI and IR; and (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. K) as designated doctor to determine the issues of MMI and IR. The claimant testified that she was injured on (date of injury), while working on a production line for the employer. The claimant further testified that a machine on the assembly line kept breaking down, and she had to move and stack boxes, causing pain in her shoulder and wrist.

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 partial tear of the right common extensor tendon or right lateral epicondylitis 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. Under 28 Tex. Admin. Code § 130.1(c)(3) (Rule 130.1(c)(3)), 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 found that the certification of Dr. K, the designated doctor, is not contrary to the preponderance of the evidence. This finding is supported by sufficient evidence. The record indicates that Dr. K examined the claimant on October 18, 2021, and certified that the claimant reached MMI on September 28, 2021, with a two percent IR. The ALJ mistakenly found that the designated doctor certified that the claimant reached MMI on September 26, 2021. The designated doctor actually certified that the claimant reached MMI on September 28, 2021, as reflected on the Report of Medical Evaluation (DWC-69) and the designated doctor's narrative report in evidence. Consequently, the ALJ's determination that the claimant reached MMI on September 26, 2021, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the ALJ's determination that the claimant reached MMI on September 26, 2021, and render a new decision that the claimant reached MMI on September 28, 2021, to conform to the evidence. See Appeals Panel Decision (APD) 100661, decided July 16, 2010, and APD 131179, decided July 25, 2013. We affirm the ALJ's determination that the claimant's IR is two percent.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a partial tear of the right common extensor tendon or right lateral epicondylitis.

We reverse the ALJ's determination that the claimant reached MMI on September 26, 2021, and render a new decision that the claimant reached MMI on September 28, 2021.

We affirm the ALJ's determination that the claimant's IR is two percent.

The true corporate name of the insurance carrier is **XL INSURANCE AMERICA, INC.** 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.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge