

APPEAL NO. 221277
FILED SEPTEMBER 21, 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 21, 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 right shoulder acromioclavicular joint separation, effusion/rotator cuff tear, rotator cuff tendonitis, impingement syndrome, flap tear, muscle wasting and atrophy, and periarticular bursitis; (2) the compensable injury of (date of injury), does not extend to right hand neurapraxia or right hand nerve injury; (3) the appellant (claimant) reached maximum medical improvement (MMI) on August 3, 2021; and (4) the claimant's impairment rating (IR) is five percent.

The claimant appealed that portion of the ALJ's extent-of-injury determination that was adverse to her, as well as the ALJ's MMI and IR determinations. The respondent (carrier) responded, urging affirmance of the appealed determinations. The ALJ's determination that the compensable injury of (date of injury), extends to the following right shoulder conditions: acromioclavicular joint separation, effusion/rotator cuff tear, rotator cuff tendonitis, impingement syndrome, flap tear, muscle wasting and atrophy, and periarticular bursitis 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), which extends to a right shoulder sprain/strain. The claimant, a meat wrapper for the employer, was injured on (date of injury), when putting down a box of frozen meat.

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 right hand neurapraxia or right hand nerve injury 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 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 August 3, 2021, with a five percent IR as certified by (Dr. L), the designated doctor appointed by the Division. Dr. L examined the claimant on November 3, 2021, and issued three certifications. In all three of his certifications Dr. L certified the claimant reached MMI on August 3, 2021, with a five percent IR. Dr. L explained in his attached narrative report that the first certification considered a right shoulder sprain/strain. As previously mentioned, the ALJ's determination that the compensable injury extends to right shoulder acromioclavicular joint separation, effusion/rotator cuff tear, rotator cuff tendonitis, impingement syndrome, flap tear, muscle wasting and atrophy, and periarticular bursitis has become final pursuant to Section 410.169. Dr. L's first certification does not consider and rate the entire compensable injury and cannot be adopted.

Dr. L explained that his second certification considered, among other conditions, right hand neurapraxia. We have affirmed the ALJ's determination that the compensable injury does not extend to right hand neurapraxia. Dr. L's second certification does not consider and rate the compensable injury and cannot be adopted.

Dr. L's narrative report reflects his third certification did not consider and rate right shoulder muscle wasting and atrophy or right shoulder periarticular bursitis, which are part of the compensable injury. Dr. L's third certification does not consider and rate the entire compensable injury and cannot be adopted.

None of Dr. L's certifications that the claimant reached MMI on August 3, 2021, with a five percent IR consider and rate the entire compensable injury in this case. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on August 3, 2021, with a five percent IR.

There is one other certification in evidence, which is from (Dr. H), a previously appointed designated doctor. Dr. H examined the claimant on April 13, 2021, and certified the claimant reached MMI on that same date with a six percent IR considering a right shoulder sprain/strain only. Dr. H's certification does not consider and rate the entire compensable injury and cannot be adopted.

There is no certification in evidence that can be adopted. 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 right hand neurapraxia or right hand nerve injury.

We reverse the ALJ's determination that the claimant reached MMI on August 3, 2021, and we remand the MMI issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is five percent, and we remand the IR issue 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 available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to right shoulder sprain/strain, acromioclavicular joint separation, effusion/rotator cuff tear, rotator cuff tendonitis, impingement syndrome, flap tear, muscle wasting and atrophy, and periarticular bursitis. The ALJ is also to inform the

designated doctor that the compensable injury does not extend to right hand neurapraxia or right hand nerve injury. The ALJ is to request the designated doctor to give an opinion on the claimant's MMI and rate the 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) considering the medical record and the certifying examination.

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 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 **THE TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY d/b/a
CSC-LAWYERS INCORPORATING 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