

APPEAL NO. 221428
FILED OCTOBER 20, 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 August 2, 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 first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) by (Dr. R), a referral doctor, on November 22, 2021, became final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (2) the appellant (claimant) reached MMI on October 11, 2021; and (3) the claimant's IR is 10%.

The claimant appealed, disputing the ALJ's determinations of finality, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed finality, MMI, and IR determinations.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of a left shoulder dislocation and a left shoulder type 2 acromion fracture; the date of statutory MMI is October 11, 2021; and on November 22, 2021, Dr. R, referral doctor, certified the claimant reached MMI on October 11, 2021, assigned a 10% IR, and he was the first doctor to certify MMI and assign an IR. The claimant testified that he was installing solar panels when he was injured on (date of injury).

FINALITY

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both. Section 408.123(f) provides, in part, that an employee's first certification of MMI or assignment of an IR may be disputed

after the period described in Subsection (e) if: (1) compelling medical evidence exists of: (A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the IR.

The ALJ found that the evidence failed to establish that any of the exceptions to the 90-day rule were applicable. On November 10, 2021, Dr. R examined the claimant and certified the claimant reached MMI on October 11, 2021, and assigned a 10% 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. R considered and rated a left shoulder displaced fracture of the acromion process, a left shoulder dislocation, and left shoulder sprain. We note that a left shoulder sprain has not yet been determined to be part of the compensable injury.

In his narrative report, Dr. R stated that the left shoulder should be rated using the range of motion (ROM) model of the AMA Guides. Dr. R noted that the ROM measurements were added for a total of a 17% upper extremity (UE) impairment which converts to a 10% whole person IR. Dr. R included two charts of ROM measurements in his narrative report. The chart which included prior ROM measurements from April 20, 2021, was labeled right shoulder motions. A second chart included in Dr. R's narrative was labeled left shoulder motions and included current ROMs along with ROMs "rounded to the nearest 10th degree" and the corresponding assigned UE impairment. The amounts rounded to the nearest 10th degree corresponded to the measurements from the ROM measurements taken on April 20, 2021, from the chart labeled right shoulder. In the second chart in his narrative report, Dr. R gave the following ROM figures rounded for the "left shoulder" and the UE impairment assigned for each: flexion 100° (5%), extension 40° (4%), abduction 70° (5%), adduction 30° (1%), internal rotation 50° (2%), and external rotation 60° (0%) provided in Figures 38, 41, and 44, on pages 3/43, 3/44, and 3/45, respectively, of the AMA Guides. The impairments Dr. R assigned for ROM measurements for left shoulder flexion, abduction, adduction, internal rotation, and external rotation were all made in accordance with the AMA Guides. However, Dr. R also assigned 4% UE impairment for 40° of extension. Figure 38 on page 3/43 of the AMA Guides does not provide that 40° of extension results in 4% UE impairment. Dr. R incorrectly assigned 4% impairment for loss of ROM for extension of the left shoulder.

As previously noted, the ROM measurements Dr. R used to determine the measurements he rounded and assessed impairment for were labeled for the right shoulder rather than the left.

There is compelling medical evidence of a significant error by Dr. R in calculating the claimant's IR, and therefore, the exception in Section 408.123(f)(1)(A) applies. Accordingly, we reverse the ALJ's determination that the first MMI/IR certification from Dr. R on November 22, 2021, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first MMI/IR certification from Dr. R on November 22, 2021, did not become final under Section 408.123 and Rule 130.12.

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. 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 evidence in the record indicates that there has not been a designated doctor appointed in this case to address MMI and IR. The ALJ adopted the certification from Dr. R, a referral doctor, in which he certified that the claimant reached MMI on October 11, 2021, and assigned a 10% IR.

Section 408.125(a) provides if an IR is disputed, the commissioner shall direct the employee to the next available doctor on the Division's list of designated doctors, as provided by Section 408.0041. In Appeals Panel Decision (APD) 020385, decided March 18, 2002, the Appeals Panel stated that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." In APD 132423, decided December 19, 2013, the ALJ mistakenly found that the treating doctor was the designated doctor appointed on the issues for MMI and IR; however, there was no designated doctor appointed on the issues of MMI/IR. In that case, the Appeals Panel reversed the ALJ's MMI and IR determinations and remanded the issues of MMI and IR. In this case, there was no designated doctor appointed on the issues of MMI and IR because of the finality issue.

However, we have rendered a decision that the first certification of MMI and assigned IR from Dr. R on November 22, 2021, did not become final under Section 408.123 and Rule 130.12. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on October 11, 2021, with a 10% IR, and remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the first certification of MMI and assigned IR by Dr. R on November 22, 2021, became final under Section 408.123 and Rule 130.12 and render a new decision that the first certification of MMI and assigned IR by Dr. R on November 22, 2021, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on October 11, 2021, and remand the MMI issue to the ALJ for further consideration based on the evidence.

We reverse the ALJ's determination that the claimant's IR is 10% and remand the IR issue to the ALJ for further consideration based on the evidence.

REMAND INSTRUCTIONS

On remand, the ALJ is to request the appointment of a designated doctor for the issues of MMI and IR. The ALJ is to advise the designated doctor that the claimant sustained a compensable injury on (date of injury), in the form of a left shoulder dislocation and a left shoulder type 2 acromion fracture. The ALJ is to advise the designated doctor that the date of statutory MMI on this claim is October 11, 2021, and that the date of MMI cannot be later than the statutory date. The ALJ is to request the designated doctor to give an opinion on MMI and IR 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 MMI and IR certification and are to be allowed an opportunity to respond. The ALJ is to consider the evidence on MMI and IR. 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 administrative law judge, 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge