APPEAL NO. 221456
FILED NOVEMBER 3, 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 March 23, 2022, with the record closing on August 4, 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 sustained on (date of injury), does not extend to left shoulder tendinosis of the supraspinatus, left shoulder tendinosis of the infraspinatus, left shoulder tendinosis of the subscapular, an aggravation of lumbar stenosis L3-4, aggravation of osteophytes at L3-4, lumbar radiculopathy, or aggravation of cervical osteophytes C6-7; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 16, 2021; and (3) the claimant's impairment rating (IR) is four percent. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed extent of injury, MMI, and IR 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); the accepted compensable injury is a strain of the neck and strain of the left shoulder; and the statutory date of MMI is October 18, 2021. (Dr. N) was initially appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor to address MMI, IR, and extent of injury. The ALJ stated in his decision that "[b]ecause [Dr. N] did not have all of the medical records placed into evidence" in relation to the claimant's treatment with doctors outside the workers' compensation system, the claimant was referred back to the designated doctor for a re-examination. A new designated doctor, (Dr. W), was appointed by the Division. The claimant testified he was injured on (date of injury), while pulling on duct work.

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 tendinosis of the supraspinatus, left shoulder tendinosis of the infraspinatus, left shoulder tendinosis of the subscapular, an aggravation of lumbar stenosis L3-4, aggravation of osteophytes at L3-4, lumbar radiculopathy, or aggravation of cervical osteophytes C6-7 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 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.

At the conclusion of the CCH, the ALJ issued a Presiding Officer's Directive to order a designated doctor examination informing the designated doctor that the date of statutory MMI is October 18, 2021. Dr. W examined the claimant on April 22, 2022. Dr. W certified that the claimant reached MMI on the statutory date of October 16, 2021. Dr. W noted in the narrative report that the claimant had not reached clinical MMI because the claimant stated he had not received physical therapy. Dr. W opined that for the strain of the neck and strain of the left shoulder the claimant reached MMI on the statutory date, October 16, 2021. As previously noted, the parties stipulated that the statutory date of MMI is October 18, 2021. However, Dr. W submitted a Report of Medical Evaluation (DWC-69) certifying the claimant reached MMI on the statutory date of October 16, 2021 (rather than October 18, 2021), with a four percent IR. There are no DWC-69s in evidence from Dr. W with the correct statutory MMI date, October 18, 2021, as agreed to by the parties.

Since Rule 130.1(c)(3) provides an assignment of IR shall be based on the claimant's condition as of the MMI date, Dr. W's four percent IR with the October 16, 2021, statutory MMI date cannot be adopted. We therefore reverse the ALJ's determination that the claimant reached MMI on October 16, 2021, the statutory date, and that the claimant's IR is four percent. *See* Appeals Panel Decision (APD) 130238, decided March 13, 2013.

There are two other MMI/IR certifications in evidence that rate the compensable injury. The first is that of Dr. N, the initial designated doctor. Dr. N examined the claimant on July 9, 2021, and certified that for the compensable conditions the claimant reached MMI on March 23, 2021, with a zero percent IR. However, as previously noted a second designated doctor was appointed in this case because Dr. N did not have the claimant's medical records of his treatment with doctors outside the workers' compensation system. Accordingly, Dr. N's certification of MMI and IR cannot be adopted. *See* APD 211980, decided January 21, 2022.

The other MMI/IR certification in evidence that rates the compensable injury was from (Dr. S), a required medical examination doctor. Dr. S examined the claimant on July 6, 2022. Dr. S certified that the claimant reached MMI on the statutory date of October 16, 2021, for a strain of the neck and strain of the left shoulder. Dr. S assessed zero percent IR. As previously noted, the parties stipulated that the statutory date of MMI in this case is October 18, 2021. Dr. S stated in his narrative report that he agreed the claimant had reached MMI on the statutory date. There are no DWC-69s in evidence from Dr. S with the correct statutory date of MMI, October 18, 2021, as agreed to by the parties. Accordingly, the certification from Dr. S cannot be adopted.

As there are no certifications of MMI and IR in evidence that can be adopted, 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 tendinosis of the supraspinatus, left shoulder tendinosis of the infraspinatus, left shoulder tendinosis of the subscapular, an aggravation of lumbar stenosis L3-4, aggravation of osteophytes at L3-4, lumbar radiculopathy, or aggravation of cervical osteophytes C6-7.

We reverse the ALJ's determination that the claimant reached MMI on October 16, 2021, and 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 four percent and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. W is still qualified and available to be the designated doctor. If Dr. W 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 for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the statutory date of MMI is October 18, 2021, as agreed to by the parties, and that the compensable injury of (date of injury), extends to a strain of the neck and a strain of the left shoulder but does not extend to left shoulder tendinosis of the supraspinatus, left shoulder tendinosis of the infraspinatus, left shoulder tendinosis of the subscapular, an aggravation of lumbar stenosis L3-4, an aggravation of osteophytes at L3-4, lumbar radiculopathy, or an aggravation of cervical osteophytes C6-7.

The ALJ is to request the designated doctor to give an opinion on the claimant's MMI, which can be no later than October 18, 2021, and rate the entire compensable injury, which extends to a strain of the neck and a strain of the left shoulder 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 of MMI and IR 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* 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