

APPEAL NO. 221463
FILED OCTOBER 13, 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 compensable injury of (date of injury), does not extend to cervical spine disc disorder at C3-4 and C4-5 with cervical radiculopathy, left shoulder impingement syndrome, or left hip labral tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 27, 2021; and (3) the claimant's impairment rating (IR) is five percent.

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

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that: (1) the carrier has accepted a (date of injury), compensable injury in the nature of cervical, thoracic, and lumbar spine sprains, lumbar radiculopathy, bilateral shoulder sprains and strains, bilateral elbow sprains and strains, and left wrist sprain and strain; and (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. W) as the designated doctor on the issues of MMI, IR, and return to work. The claimant testified that he was injured in a motor vehicle accident on (date of injury).

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 cervical spine disc disorder at C3-4 and C4-5 with cervical radiculopathy, left

shoulder impingement syndrome, or left hip labral tear is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on October 27, 2021, as certified by Dr. W is supported by sufficient evidence and is affirmed.

IR

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.

The ALJ determined that the claimant reached MMI on October 27, 2021, with a five percent IR as certified by Dr. W, the designated doctor appointed by the Division. Dr. W, 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), placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment and assigned five percent impairment. Dr. W placed the claimant in DRE Lumbosacral Category I: Complaints or Symptoms and assigned zero percent impairment. We note that Dr. W did not specifically identify the DRE spinal region in which she placed the claimant for the thoracic spine.

In Appeals Panel Decision (APD) 051306-s, decided August 3, 2005, the Appeals Panel discussed the application of the AMA Guides in rating cervical, thoracic, and lumbar injuries and held as follows:

Applying the language from the bottom of page 3/95 of the AMA Guides, if the injury is primarily to the cervical spine the rating would be under part 3.3h, page 3/103 cervicothoracic spine impairment, if the injury was primarily to the thoracic area of the spine the rating would be under part 3.3i page 3/106 for thoracolumbar spine impairment and if the injury is primarily to the lumbar portion of the spine, the impairment would be under part 3.3g page 3/101 lumbosacral spine impairment.

Pursuant to part 3.3f, page 3/101, paragraph 8, if more than one spine region is impaired, the doctor is to determine the impairment of the other regions and combine the regional impairments using the Combined Values Chart to express the patients (sic) total spine impairment.

In the narrative report, Dr. W noted the claimant would be assessed zero percent for loss of range of motion (ROM) of the upper extremity (UE) bilaterally referencing an attached Figure 1 that specified the ROM measurements relied on. Dr. W stated that “[t]here is a deficit noted for flexion of the left shoulder but noting Apley’s test, there is no impairment assigned.”

The Figure 1 Dr. W attached to the narrative provides the following ROM measurements for both the right and left wrist: flexion 50°, extension 50°, radial deviation 20°, and ulnar deviation 30°. Figure 26 on page 3/36 of the AMA Guides provides that 50° of flexion results in two percent UE impairment and 50° of extension also results in two percent UE impairment.

The Figure 1 Dr. W attached to the narrative provides the following ROM measurements for the right and left elbows: flexion 130°, extension 0°, pronation 80°, and supination 80°. Figure 32 on page 3/40 of the AMA Guides provides that 130° of flexion results in 1% UE impairment. We note that the AMA Guides provide on page 3/17 that if both limbs are involved, calculate the whole-person impairment for each on a separate chart and combine the percents of each limb. See APD 192264, decided February 6, 2020; APD 130633, decided April 24, 2013; and APD 220893, decided July 20, 2022.

The Appeals Panel has previously stated that, where the certifying doctor’s report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor’s report and render a new decision as to the correct IR. See APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011. However, as previously explained, Dr. W misapplied the AMA Guides in several instances regarding the claimant’s left wrist and right and left elbows. Dr. W specifically mentioned why she was not assigning impairment for the ROM deficit of the claimant’s left shoulder but did not explain why she was not assessing impairment for the measured loss of ROM of the claimant’s left wrist and right and left elbows.

Given that Dr. W's narrative report has numerous inaccuracies and discrepancies in applying the AMA Guides, we do not consider it appropriate to mathematically correct the IR. Dr. W's certification cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant's IR is five percent.

In evidence is a Report of Medical Evaluation (DWC-69) from (Dr. F), a doctor selected by the treating doctor to act in his place. Dr. F examined the claimant on May 19, 2022, and certified that the claimant had not yet reached MMI. As previously noted, the ALJ's determination that the claimant reached MMI on October 27, 2021, has been affirmed. Accordingly, Dr. F's certification that the claimant has not reached MMI cannot be adopted. There is no other certification of MMI/IR in evidence. As there is no MMI/IR certification in evidence that can be adopted, we remand the issue of IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determinations that the (date of injury), compensable injury does not extend to cervical spine disc disorder at C3-4 and C4-5 with cervical radiculopathy, left shoulder impingement syndrome, or left hip labral tear.

We affirm the ALJ's determination that the claimant reached MMI on October 27, 2021.

We reverse the ALJ's determination that the claimant's IR is five percent, and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. 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 IR.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to cervical, thoracic, and lumbar spine sprains, lumbar radiculopathy, bilateral shoulder sprains and strains, bilateral elbow sprains and strains, and left wrist sprain and strain but does not extend to cervical spine disc disorder at C3-4 and C4-5 with cervical radiculopathy, left shoulder impingement syndrome, or left hip labral tear.

The ALJ is to request the designated doctor to rate the entire compensable injury as of the date of MMI, which is October 27, 2021, in accordance with the AMA Guides and considering the medical record and the certifying examination. If Dr. W is still qualified and available to serve as designated doctor in this case, the ALJ is to point out

the errors in calculating the impairment for the left wrist and elbows or ask the doctor to explain why impairment for the left wrist and bilateral elbows was not assessed.

The parties are to be provided with the designated doctor's new MMI and IR certification, as of the MMI date of October 27, 2021, and are to be allowed an opportunity to respond. The ALJ is then to make a determination on the claimant's IR for the (date of injury), compensable injury as of the MMI date of October 27, 2021.

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 **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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge