

APPEAL NO. 221683  
FILED DECEMBER 19, 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 August 18, 2022, with the record closing on September 13, 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 respondent (claimant) reached maximum medical improvement (MMI) on February 22, 2022; (2) the claimant's impairment rating (IR) is 17%; and (3) the claimant had disability as a result of the compensable injury beginning on February 22, 2020, and continuing through the date of the CCH.

The appellant (carrier) appealed the ALJ's disability, MMI, and IR determinations. There was no response in the appeal file from the claimant to the carrier's appeal.

**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), in the form of a right shoulder contusion and Grade 1 sprain/strain, cervical sprain, crushed right wrist, right wrist partial thickness tear of the extensor carpi ulnaris, and tear of the triangular fibrocartilage of the right wrist. The evidence indicates that the claimant was injured on (date of injury), when a piece of equipment came loose and hit him, pushing him into a machine and injuring his neck, right wrist, and right shoulder.

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).

**DISABILITY**

The ALJ's determination that the claimant had disability as a result of the compensable injury beginning on February 22, 2020, and continuing through the date of the CCH 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, 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 the claimant reached MMI on the statutory date of February 22, 2022, with a 17% IR as certified by (Dr. S), the second designated doctor appointed by the Division. Dr. S examined the claimant on May 24, 2022, and his narrative report listed the following diagnoses: right shoulder contusion, right shoulder sprain/strain, cervical sprain, right wrist crushed (sic) injury, right wrist tear of extensor carpi ulnaris, and right wrist tear of triangular fibrocartilage. Dr. S explained that the claimant reached MMI on the statutory date because “[h]e had shoulder surgery in December and would not have been expected to have reached MMI less than 3-4 months post-op....”

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. S placed the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category I for the neck and assigned a 0% impairment. He additionally assigned a 16% upper extremity (UE) impairment for the right wrist based on range of motion (ROM) deficits. For the right shoulder, Dr. S assigned a 7% UE impairment based on ROM deficits. Dr. S then stated that the claimant has had a distal clavicular excision which yields an additional 10% UE impairment. Combining the 10% UE impairment with the 7% UE impairment resulted in a 16% UE impairment for the right shoulder. Combining the 16% UE impairment for the right shoulder with the 16% UE impairment for the right wrist resulted in a 29% UE impairment which converted to a 17% whole person impairment (WPI).

We note that Dr. S made a mistake in adding the impairments for the right shoulder ROM measurements. Based on his measurements, the right shoulder ROM would result in an 8% UE impairment, not a 7% UE impairment. Using the correct calculations would result in a WPI of 18%.

In Appeals Panel Decision (APD) 151158-s, decided August 4, 2015, the Appeals Panel held that impairment for a distal clavicle resection arthroplasty that was received as treatment for the compensable injury results in 10% UE impairment under Table 27 on page 3/61 of the AMA Guides. In evidence is an operative report dated April 28, 2020, that indicates the claimant underwent arthroscopy of the right shoulder with repair of the posterior and posterior superior labrum, excision of the distal clavicle, and biceps tendon tenodesis. The preoperative and postoperative diagnoses listed in the report are right shoulder with posterior superior and posterior labral tear, biceps tendinitis of the right shoulder, severe impingement of the right shoulder, and right acromioclavicular arthritis. As discussed above, the compensable right shoulder conditions in this case are a right shoulder contusion and a right shoulder Grade 1 sprain/strain. The distal clavicle resection the claimant received was not for treatment of the compensable injury. Therefore, Dr. S improperly included the 10% UE impairment from Table 27 in his assigned IR. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on February 22, 2022, with a 17% IR.

There are six other certifications in evidence. (Dr. B), the initial designated doctor appointed by the Division, examined the claimant on June 3, 2021, and issued three certifications all certifying the claimant reached MMI on September 14, 2020, with a 12% IR, and a fourth certification finding the claimant had not reached MMI. Dr. B's first, second, and fourth certifications all consider a right shoulder fracture in addition to other conditions. A right shoulder fracture has not been accepted or determined to be compensable in this case. Therefore, none of these certifications can be adopted. Furthermore, the date of statutory MMI has passed, so Dr. B's certification that determined the claimant has not reached MMI cannot be adopted for this additional reason.

Dr. B's third certification considers and rates a right shoulder sprain/strain and contusion, neck sprain, crushed right wrist, right wrist partial thickness tear of the extensor carpi ulnaris tendon, and a tear of the triangular fibrocartilage, which is the compensable injury in this case. Dr. B assigned a 10% UE impairment for ROM deficits in the right shoulder and an 11% UE impairment for ROM deficits in the right wrist. For the neck, Dr. B placed the claimant in Cervicothoracic DRE Category I and assigned a 0% impairment. Dr. B then combined the shoulder and wrist UE impairments which resulted in a 20% UE impairment and converted that to a 12% WPI. This certification correctly rates the entire compensable injury and is adoptable.

(Dr. L), a post-designated doctor required medical examination doctor, examined the claimant on August 17, 2022, and issued two certifications. In the first certification, Dr. L determined that the claimant reached MMI on February 22, 2022, and assigned a 17% IR. Dr. L based this certification on the compensable conditions of a right shoulder contusion and Grade 1 sprain/strain, cervical sprain, crushed right wrist, right wrist partial thickness tear of the extensor carpi ulnaris, and tear of the triangular fibrocartilage of the right wrist. However, like Dr. S, Dr. L improperly included a 10% UE impairment for a distal clavicle resection in the assigned IR. He also made the same mathematical error in the claimant's right shoulder ROM calculation as Dr. S. Therefore, this certification cannot be adopted.

In an addendum dated September 1, 2022, Dr. L certified that the claimant reached MMI on September 14, 2020, with a 12% IR based on the compensable conditions of a right shoulder contusion and Grade 1 sprain/strain, cervical sprain, crushed right wrist, right wrist partial thickness tear of the extensor carpi ulnaris, and tear of the triangular fibrocartilage of the right wrist. Dr. L assigned a 10% UE impairment for ROM deficits in the right shoulder and an 11% UE impairment for ROM deficits in the right wrist. He also placed the claimant in Cervicothoracic DRE Category I and assigned 0% impairment for the neck. Dr. L then combined the right wrist and shoulder UE impairments which resulted in a 20% UE impairment and converted that to a 12% WPI. This certification also properly rates the entire compensable injury and can be adopted.

Since there is more than one certification of MMI and IR in evidence that can be adopted, we do not consider it appropriate to render a decision on the issues of MMI and IR in this case. Therefore, 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 claimant had disability as a result of the compensable injury beginning on February 22, 2020, and continuing through the date of the CCH.

We reverse the ALJ's determination that the claimant reached MMI on February 22, 2022, 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 17%, and we remand the IR issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand, the ALJ is to make findings of fact, conclusions of law, and a decision on the issues of MMI and IR that are based on the evidence and 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 **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.**

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Cristina Beceiro  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge