

APPEAL NO. 221840
JANUARY 19, 2023

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 September 14, 2022, with the record closing on October 12, 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 high-grade partial thickness tear of the supraspinatus with a full thickness tear of the mid fibers, left shoulder high-grade bursal surface tear of the infraspinatus anterior insertional fibers, or left shoulder low-grade interstitial tear of the superior insertional fibers of the subscapularis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on March 19, 2021; and (3) the claimant's impairment rating (IR) is one percent.

The claimant appealed the ALJ's extent of injury, MMI, and IR determinations. The respondent (carrier) responded, urging affirmance of the ALJ's 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), at least in the form of a left wrist sprain, left hand and fingers sprain, and left hand contusion. The claimant was injured on (date of injury), when a box of meat she was trying to place on a rolling cart fell on her left hand.

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 sustained on (date of injury), does not extend to left shoulder high-grade partial thickness tear of the supraspinatus with a full thickness tear of the mid fibers, left shoulder high-grade bursal surface tear of the infraspinatus anterior insertional fibers, or left shoulder low-grade interstitial tear of

the superior insertional fibers of the subscapularis 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 March 19, 2021, with a one percent IR as assigned by (Dr. J), the designated doctor.

Dr. J initially examined the claimant on July 21, 2021, and issued alternate certifications on that date. In both certifications Dr. J opined the claimant had not reached MMI based on various conditions. The first certification considers only an injury of the left hand and pain in the left wrist. The second certification considers those conditions as well as left shoulder high-grade partial thickness tear of the supraspinatus with a full thickness tear of the mid fibers, left shoulder high-grade bursal surface tear of the infraspinatus anterior insertional fibers, and left shoulder low-grade interstitial tear of the superior insertional fibers of the subscapularis. We have affirmed the ALJ’s determination that the compensable injury does not extend to these conditions. Neither of Dr. J’s July 21, 2021, certifications consider the compensable injury.

Dr. J next examined the claimant on April 19, 2022, and certified the claimant reached MMI on March 19, 2021, with a one percent IR. The ALJ correctly noted in the discussion portion of the decision and order that Dr. J incorrectly dated the Report of Medical Evaluation (DWC-69) as April 19, 2021, rather than April 19, 2022. Dr. J did not

consider and rate left fingers sprain, a condition which the parties stipulated is part of the compensable injury.

Dr. J next examined on June 21, 2022, and again issued alternate certifications. In the first Dr. J opined the claimant had not reached MMI considering, in part, the noncompensable conditions of left shoulder high-grade partial thickness tear of the supraspinatus with a full thickness tear of the mid fibers, left shoulder high-grade bursal surface tear of the infraspinatus anterior insertional fibers, and left shoulder low-grade interstitial tear of the superior insertional fibers of the subscapularis. In the second Dr. J certified the claimant reached MMI on March 19, 2021, with a one percent IR; this certification does not consider and rate left fingers sprain, which is part of the compensable injury.

A letter of clarification was sent to Dr. J on September 22, 2022, by the ALJ, notifying Dr. J that pain in the left wrist, a condition considered and rated by Dr. J, had not specifically been determined to be part of the compensable injury and requested Dr. J to remove that condition from consideration. Dr. J did so, and again issued two certifications, one certifying the claimant had not reached MMI and the other certifying the claimant reached MMI on March 19, 2021, with a one percent IR. However, neither of these certifications consider the compensable injury. The first certification considered the noncompensable conditions of left shoulder high-grade partial thickness tear of the supraspinatus with a full thickness tear of the mid fibers, left shoulder high-grade bursal surface tear of the infraspinatus anterior insertional fibers, and left shoulder low-grade interstitial tear of the superior insertional fibers of the subscapularis. The second certification does not consider and rate left fingers sprain.

None of Dr. J's certifications in evidence consider and rate the compensable injury in this case. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on March 19, 2021, with a one percent IR.

There are other certifications in evidence; however, none consider and rate the compensable injury. (Dr. R-B), the treating doctor, examined the claimant on March 31, 2021, and certified the claimant reached MMI on that same date with no permanent impairment. Dr. R-B only considered an "[i]njury of [the] left hand." (Dr. C), the post-designated doctor required medical examination doctor, examined the claimant on September 15, 2021, and issued alternate certifications dated September 19, 2021. In the first certification Dr. C opined the claimant had not reached MMI in part based on conditions that were determined to be not part of the compensable injury. In the second certification Dr. C certified the claimant reached MMI on May 26, 2021, with a zero percent IR considering a left wrist sprain and left hand contusion. Although Dr. C noted decreased range of motion in the claimant's left index and middle fingers, he stated in his

narrative report that he opined any functional limitation in the digits were secondary to osteoarthritic degenerative change and inflammation and was not causally related to the compensable injury. Dr. C did not specifically consider and rate left hand and fingers sprain, which are part of the compensable injury.

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 left shoulder high-grade partial thickness tear of the supraspinatus with a full thickness tear of the mid fibers, left shoulder high-grade bursal surface tear of the infraspinatus anterior insertional fibers, or left shoulder low-grade interstitial tear of the superior insertional fibers of the subscapularis.

We reverse the ALJ's determination that the claimant reached MMI on March 19, 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 one percent and remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. J is the designated doctor in this case. The ALJ is to determine whether Dr. J is still qualified and available to be the designated doctor. If Dr. J is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Division rules to opine on the issues of MMI and IR. The ALJ is to inform the designated doctor that the compensable injury extends to a left wrist sprain, left hand and fingers sprain, and left hand contusion. The ALJ is to request that the designated doctor give an opinion on the claimant's date of MMI, which cannot be after the statutory date of 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) considering the medical record and the certifying examination.

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

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 **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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge