

APPEAL NO. 221860
FILED JANUARY 20, 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 8, 2022, and October 24, 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 an injury to the right shoulder, cervical spine, or lumbar spine; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 11, 2021; and (3) the claimant's impairment rating (IR) is eight 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), at least in the form of a left shoulder rotator cuff tear, left shoulder sprain, and left shoulder strain; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. W) to address whether the claimant reached MMI, and if so, to assign an IR; and that in this case, the date of statutory MMI is November 23, 2022. The claimant testified that he was injured when he fell while walking on a pipe.

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 an injury to the right shoulder, cervical spine, or lumbar spine 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.

The ALJ found that the October 11, 2021, date of MMI with an eight percent impairment assigned by Dr. W is not contrary to the preponderance of the evidence. Dr. W examined the claimant on June 22, 2022, and provided two certifications of MMI and IR. In both certifications, Dr. W certified that the claimant reached MMI on October 11, 2021, with an eight percent IR. In the first scenario, 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), considered and rated the following conditions: left shoulder sprain, left shoulder rotator cuff tear, and moderate tendinosis with diffuse partial thickness tearing. The impairment awarded was based on loss of range of motion of the claimant’s left shoulder. In the second scenario, Dr. W rated and considered the following conditions: sprain to the left shoulder, rotator cuff tear, moderate tendinosis with diffuse partial thickness tearing, minimal subscapularis tendinosis, and mild intraarticular long head of the biceps tendinosis. As noted above, the parties stipulated that the compensable injury extends to a left shoulder rotator cuff tear, a left shoulder sprain, and a left shoulder strain. In both scenarios, Dr. W failed to consider and rate a left shoulder strain which the parties have stipulated is part of the compensable injury. Additionally, in both scenarios, Dr. W considers and rates moderate tendinosis with diffuse partial thickness tearing which has not yet been determined to be a part of the claimant’s (date of injury), compensable injury.

Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on October 11, 2021, and that the claimant's IR is eight percent.

There is only one other certification of MMI/IR in evidence. (Dr. M), a referral doctor selected to act in place of the treating doctor, examined the claimant on October 8, 2021, and certified that the claimant reached MMI on August 30, 2021, with a seven percent IR. Dr. M considered and rated the following conditions: left shoulder sprain and sprain of the left rotator cuff capsule. As previously noted, the parties stipulated that the compensable injury extends to a left shoulder strain, left shoulder sprain, and left shoulder rotator cuff tear. Dr. M failed to rate the entire compensable injury and accordingly, his certification cannot be adopted.

There are no other certifications of MMI/IR in evidence. Consequently, 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 an injury to the right shoulder, cervical spine, or lumbar spine.

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 action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is eight 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 November 23, 2022, as agreed to by the parties, and that the compensable injury of (date of injury), extends to a left shoulder rotator cuff tear, left shoulder sprain, and left shoulder strain but does not extend to an injury to the right shoulder, cervical spine, or lumbar spine.

The ALJ is to request the designated doctor to give an opinion on the claimant's MMI date, which can be no later than November 23, 2022, and rate the entire compensable injury 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 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 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge