

APPEAL NO. 230023
FILED FEBRUARY 17, 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 November 17, 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 a left wrist triangular fibrocartilage complex (TFCC) tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 13, 2021; and (3) the claimant's impairment rating (IR) is four percent. The claimant appealed the ALJ's 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), in the form of at least left wrist tenosynovitis, and (Dr. Q) is the designated doctor selected by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR. The claimant testified he had experienced left wrist pain since 2020, but on (date of injury), while typing at work he noticed the pain in his left wrist became intense and radiated up his arm, causing him to become unable to type.

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

We note that Finding of Fact No. 3, Conclusion of Law No. 3, and the Decision section omit the word tear from the left wrist TFCC tear condition. We reform the ALJ's decision to reflect the correct disputed condition as left wrist TFCC tear. The ALJ's determination that the compensable injury sustained on (date of injury), does not extend to a left wrist TFCC tear 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 preponderance of the other medical evidence is not contrary to Dr. Q’s April 28, 2022, certification, and therefore determined the claimant reached MMI on July 13, 2021, with a four percent IR.

Dr. Q examined the claimant on March 27, 2022, and in a Report of Medical Evaluation (DWC-69) certified on April 28, 2022, that the claimant reached MMI on July 13, 2021, with a four percent IR considering tenosynovitis of the left wrist. However, in his attached narrative report Dr. Q stated “the claimant reached his [MMI] as of [July 13, 2022]. . . .” There is an internal inconsistency between the MMI date Dr. Q certified in his narrative report and the MMI date he certified on the DWC-69. Because the narrative report and DWC-69 list different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected. See Appeals Panel Decision (APD) 130739, dated May 7, 2013; APD 141281, decided August 7, 2014; and APD 162058, decided November 21, 2016. Accordingly, we reverse the ALJ’s determination that the claimant reached MMI on July 13, 2021.

With regard to the claimant’s IR, Rule 130.1(c)(3) provides that an assignment of IR shall be based on the claimant’s condition as of the MMI date. Given that we have reversed the ALJ’s MMI determination, we also reverse the ALJ’s determination that the claimant’s IR is four percent. Additionally, we note that Dr. Q’s four percent IR was not made 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).

Dr. Q noted in his narrative report that he found no sensory or motor deficits, and he assessed the following impairments based on range of motion (ROM) measurements of the claimant's left wrist: zero percent upper extremity (UE) impairment for 60° of flexion, two percent UE impairment for 50° of extension; two percent UE impairment for 20° of ulnar deviation, and three percent UE impairment for 5° of radial deviation.

Figure 29 on page 3/38 of the AMA Guides uses increments of 5°, whereas the general directions on page 3/37 state to round the measurements of radial deviation to the nearest 10°. This conflict is resolved by looking to the general directions of interpolating, measuring, and rounding off which are found on page 2/9 of the AMA Guides and which provide as follows in relevant part:

In general, an impairment value that falls between those appearing in a table or figure of the [AMA Guides] may be adjusted or interpolated to be proportional to the interval of the table or figure involved, unless the book gives other directions.

Here the AMA Guides do give other directions than applying the values given in Figure 29 on page 3/38. Those directions are on page 3/37 and provide that the measurements be rounded to the nearest 10°. Using the language cited above from page 2/9 of the AMA Guides, these directions control over Figure 29 and should have been applied in calculating the claimant's IR. See APD 022504-s, decided November 12, 2002; and APD 111384, decided November 23, 2011. See *also* APD 131541, decided August 29, 2013; and APD 220745, decided July 1, 2022. Dr. Q failed to round the measurements of radial deviation of the left wrist to the nearest 10° to determine the UE impairment.

There is only one other certification in evidence, which is from (Dr. N), a doctor acting in place of the treating doctor. Dr. N examined the claimant on June 21, 2022, and certified the claimant had not reached MMI but was expected to do so on or around September 5, 2022. Dr. N noted in his attached narrative report that the claimant was at that time pending additional sessions of a functional restoration program, which was anticipated to provide the claimant with further functional improvement. Dr. N also noted that he disagreed with Dr. Q's MMI opinion because Dr. Q's MMI date "was prior to the approved left wrist surgery, and the approved post-operative treatment including an (sic) injections and the functional restoration program." In evidence is an operative report dated July 15, 2021, which reflects the claimant underwent a left wrist arthroscopy for a "TFCC tear debridement" on that date. As previously discussed, we have affirmed the

ALJ's determination that the compensable injury does not extend to a left wrist TFCC tear. Dr. N's opinion that the claimant has not reached MMI as of his certification is based on treatment that is not for the compensable injury. Accordingly, his opinion that the claimant has not reached MMI cannot be adopted.

There is no certification in evidence that can be adopted. We therefore remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We reform the ALJ's decision to reflect the correct disputed condition as a left wrist TFCC tear.

We affirm the ALJ's determination that the compensable injury sustained on (date of injury), does not extend to a left wrist TFCC tear.

We reverse the ALJ's determination that the claimant reached MMI on July 13, 2021, 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 four percent, and we remand the issue of IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. Q is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. Q is still qualified and available to be the designated doctor. If Dr. Q is no longer qualified or is not 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 inform the designated doctor that the (date of injury), compensable injury extends to left wrist tenosynovitis but does not extend to a left wrist TFCC tear. The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination.

If Dr. Q is still qualified and available to serve as the designated doctor, the ALJ is to advise Dr. Q of the inconsistency between his narrative report and his DWC-69 and request that Dr. Q clarify the date he certified that the claimant reached MMI for the compensable injury. The ALJ is also to notify Dr. Q of his error in failing to round the radial deviation ROM figures as required by the AMA Guides.

The parties are to be provided the correspondence to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. The ALJ is then to make determinations on MMI, which cannot be after the statutory date of 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 **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge