

APPEAL NO. 230150
FILED MARCH 10, 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 October 12, 2022, and December 1, 2022, with the record closing on December 14, 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), extends to a cervical strain, thoracic strain, left shoulder upper arm strain, right upper arm strain, bilateral wrists sprains/strains, and bilateral hands and fingers sprains/strains; (2) the compensable injury of (date of injury), does not extend to a right shoulder rotator cuff tear or a left shoulder rotator cuff tear; (3) the appellant (claimant) reached maximum medical improvement (MMI) on July 8, 2020; and (4) the claimant's impairment rating (IR) is 4%.

The claimant appealed the ALJ's extent-of-injury determination that was adverse to her, as well as the ALJ's MMI and IR determination. The respondent (self-insured) responded, urging affirmance of the appealed determinations. The ALJ's determination that the compensable injury of (date of injury), extends to a cervical strain, thoracic strain, left shoulder upper arm strain, right upper arm strain, bilateral wrists sprains/strains, and bilateral hands and fingers sprains/strains was not appealed and has become final pursuant to Section 410.169.

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), that extends to a right shoulder strain, but does not extend to a lumbar strain, cervical radiculopathy, bilateral ankle strains, bilateral feet strains, bilateral elbow injury, or bilateral glenohumeral joint injury; (Dr. B) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to address MMI, IR, and extent of injury; and the claimant's date of statutory MMI is May 24, 2022. The claimant, a bus operator for the employer, was injured on (date of injury), while trying to control the steering wheel of a bus with faulty suspension.

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 a right shoulder rotator cuff tear or a left shoulder rotator cuff 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 determined the claimant reached MMI on July 8, 2020, with a 4% IR as certified by Dr. B, the designated doctor. Dr. B examined the claimant on July 21, 2021, and issued three certifications based on various conditions. In one certification Dr. B certified the claimant reached MMI on July 8, 2020, with a 5% IR considering only a right shoulder strain. In the second certification Dr. B certified the claimant reached MMI on July 8, 2021, with an 8% IR considering, among other conditions, a lumbar strain, cervical radiculopathy, bilateral ankle/foot strains, bilateral elbow injury, and bilateral glenohumeral joint injury. The compensable injury in this case is a right shoulder strain, cervical strain, thoracic strain, left shoulder upper arm strain, right upper arm strain, bilateral wrists sprains/strains, and bilateral hands and fingers sprains/strains. Neither of these two certifications considers and rates the compensable injury.

In his third certification Dr. B certified the claimant reached MMI on July 8, 2020, with an 8% IR. The ALJ sent a letter of clarification to Dr. B notifying him of an error in his IR calculation, and Dr. B responded on December 11, 2022, correcting his IR to 4%. Dr. B's report reflects that this certification considers a cervical strain, thoracic strain, left and right shoulder strains, a strain of muscle/tendon/fascia at the upper right and left arms, and bilateral wrist and hands injury. The ALJ's determination that the compensable injury extends to bilateral hands and fingers sprains/strains was not appealed has become final pursuant to Section 410.169. Dr. B did not consider and rate bilateral fingers sprain/strains. None of Dr. B's certifications consider and rate the compensable injury in this case. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on July 8, 2020, with a 4% IR as certified by Dr. B.

There are numerous other certifications in evidence. (Dr. S), the post-designated doctor required medical examination doctor, examined the claimant on September 8, 2022, and issued several alternate certifications certifying a date of MMI of July 8, 2020, with a 0% IR, based on various conditions. Dr. S also issued an alternate certification that the claimant reached MMI on May 6, 2021, with a 6% IR. However, none of Dr. S's certifications consider and rate bilateral fingers sprains/strains, which are part of the compensable injury. None of Dr. S's certifications are adoptable.

(Dr. F), a doctor acting in place of the treating doctor, examined the claimant on June 9, 2022, and issued two certifications. In the first Dr. F certified the claimant reached MMI on May 24, 2022, with a 9% IR. However, this certification is based only on a right shoulder and upper arm strain. Dr. F's alternate certification also certifies the claimant reached MMI on May 24, 2022, but assigns a 12% IR. Dr. F's narrative report reflects this second certification considered, among other conditions, unspecified injuries to the right and left wrists, hands, and fingers, and a cervical sprain rather than a cervical strain. Dr. F's certifications do not consider and rate the compensable injury and cannot be adopted.

Finally, (Dr. V), a doctor acting in place of the treating doctor, examined the claimant on February 3, 2021, and issued two certifications in which he opined the claimant had not reached MMI. The statutory date of MMI in this case is May 24, 2022; Dr. V's certifications cannot be adopted.

There is no certification in evidence that is adoptable. 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 a right shoulder rotator cuff tear or a left shoulder rotator cuff tear.

We reverse the ALJ's determination that the claimant reached MMI on July 8, 2020, 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 4%, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. The ALJ is to determine if Dr. B is still qualified and available to be the designated doctor. If Dr. B 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 date of MMI and IR.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a right shoulder strain, cervical strain, thoracic strain, left shoulder upper arm strain, right upper arm strain, bilateral wrists sprains/strains, and bilateral hands and fingers sprains/strains, but does not extend to a right shoulder rotator cuff tear or a left shoulder rotator cuff tear. The ALJ is also to inform the designated doctor that the date of statutory MMI in this case is May 24, 2022.

The ALJ is to request the designated doctor give an opinion on the claimant's date of MMI, which cannot be after May 24, 2022, the statutory date of MMI in this case, 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) (AMA Guides) considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's new certification and allowed an opportunity to respond. The ALJ is then to make a determination on the claimant's date of 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 **(a certified self-insured)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), (STATE) (ZIP CODE).

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge