

APPEAL NO. 230613  
FILED JUNE 1, 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 March 23, 2023, 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), does not extend to right shoulder rotator cuff tear, right shoulder impingement syndrome, or right shoulder glenohumeral synovitis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on May 10, 2022; and (3) the claimant's impairment rating (IR) is one percent. The claimant appealed the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded to the claimant's appeal, 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), that extends to a right biceps tendon rupture, right biceps strain, and unspecified right shoulder injury. The parties additionally stipulated that (Dr. R) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor on the issues of extent of injury, MMI, and IR. The evidence reflected that the claimant, while working as a truck driver on (date of injury), was injured while rolling up landing gear. The claimant testified that he felt a pinch in his right arm and later noticed a bump.

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, right shoulder impingement syndrome, or right shoulder glenohumeral synovitis is supported by sufficient evidence and is affirmed.

### **MMI**

The ALJ's determination that the claimant reached MMI on May 10, 2022, is supported by sufficient evidence and is affirmed.

### **IR**

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 shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
- (B) document specific laboratory or clinical findings of an impairment;
- (C) analyze specific clinical and laboratory findings of an impairment;
- (D) compare the results of the analysis with the impairment criteria and provide the following:
  - (i) [a] description and explanation of specific clinical findings related to each impairment, including zero percent [IRs]; and
  - (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of 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)]. The doctor's inability to obtain required measurements must be explained.

The ALJ determined that the claimant reached MMI on May 10, 2022, with a one percent IR in accordance with the certification of Dr. R, the designated doctor. The record indicates that the designated doctor examined the claimant on August 26, 2022.

He also issued an amended report on March 4, 2023, and certified the same MMI and IR. Dr. R assigned the one percent IR based on the carrier-accepted conditions of right biceps tendon rupture, right biceps strain, and unspecified right shoulder injury using the AMA Guides. Dr. R stated in both narrative reports that he used the right shoulder range of motion (ROM) measurements from the final exam of (Dr. T) on May 10, 2022, as well as the ROM measurements in the final physical therapy record by (Mr. O) on April 25, 2022. However, Dr. R did not provide all the claimant's right shoulder measurements to calculate the claimant's IR in his narrative report. Dr. R stated that Dr. T noted the claimant had 170° of forward flexion for a one percent upper extremity (UE) impairment. He then stated that on April 25, 2022, flexion and abduction were measured at 165° each, and internal and external rotation were 45° each, at that time. He concluded that these findings demonstrate a one percent whole person impairment (WPI) as well. Dr. R failed to list measurements for right shoulder extension or adduction. Additionally, Figure 44 on page 3/45 of the AMA Guides indicates that 45° of internal rotation should either be a two percent UE impairment or a three percent UE impairment, depending on whether it is rounded up to 50° or down to 40°. Figure 44 also indicates that 45° of external rotation should be a one percent UE impairment. These measurements would result in either a three percent UE impairment or a four percent UE impairment, both of which would convert to a two percent WPI, not a one percent IR.

The Appeals Panel has held that a mathematical correction to a certification of an IR may be made when doing so simply corrects an obvious mathematical error and does not involve the exercise of judgment as to what the proper figures were. See Appeals Panel Decision (APD) 101949, decided February 22, 2011. However, in the case on appeal, the ROM measurements that Dr. R used were incomplete and came, in part, from a physical therapy examination report that was not in evidence. As such, we cannot determine what the correct ROM measurements are regarding the right shoulder. Therefore, we reverse the ALJ's determination that the claimant's IR is one percent.

As there is no other certification in evidence that can be adopted, we remand the issue of 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 right shoulder rotator cuff tear, right shoulder impingement syndrome, or right shoulder glenohumeral synovitis.

We affirm the ALJ's determination that the claimant reached MMI on May 10, 2022.

We reverse the ALJ's determination that the claimant's IR is one percent, and we remand the issue of IR back to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. R is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. R is still qualified and available to be the designated doctor. If Dr. R is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issue of IR for the (date of injury), compensable injury.

On remand the ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to right biceps tendon rupture, right biceps strain, and unspecified right shoulder injury but does not include a right shoulder rotator cuff tear, right shoulder impingement syndrome, or right shoulder glenohumeral synovitis. The ALJ is then to request that the designated doctor assign an IR for the compensable injury based on the injured employee's condition as of the MMI date of May 10, 2022, considering the medical record and the certifying examination. The ALJ is to inform the designated doctor of the error in the IR calculation and instruct the designated doctor to provide all measurements that were used to calculate the IR per Rule 130.1(c)(3).

The parties are to be provided with the ALJ's letter to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. If another designated doctor is appointed, the parties are to be provided with the Presiding Officer's Directive to Order Designated Doctor Examination, the designated doctor's report, and are to be allowed an opportunity to respond. The ALJ is to make a determination on IR which is supported by 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 **LM INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE CO.  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701.**

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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