

APPEAL NO. 230710  
FILED JULY 5, 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 April 11, 2023, with the record closing on April 19, 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), extends to a cervical strain, cervical sprain, thoracic strain, and cervical radicular syndrome; (2) the compensable injury of (date of injury), does not extend to a thoracic sprain, lumbar strain, lumbar sprain, or a left shoulder rotator cuff tear; (3) the appellant (claimant) reached maximum medical improvement (MMI) on October 5, 2022; and (4) the claimant's impairment rating (IR) is five percent. The claimant appealed, disputing the ALJ's extent-of-injury determination that was not favorable to him, as well as the ALJ's MMI and IR determinations. The respondent (carrier) responded, urging affirmance of the disputed extent-of-injury, MMI, and IR determinations. The ALJ's determination that the compensable injury extends to a cervical strain, cervical sprain, thoracic strain, and cervical radicular syndrome 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), and the carrier accepted a left shoulder strain as the compensable injury. The claimant, a yard supervisor for the employer, was injured on (date of injury), while loading 96-pound bags of cement into a customer's vehicle.

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 thoracic sprain, lumbar strain, lumbar sprain, or a left shoulder rotator cuff tear is supported by sufficient evidence and is affirmed.

### **MMI**

The ALJ's determination that the claimant reached MMI on October 5, 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 Texas Department of Insurance, Division of Workers' Compensation (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 October 5, 2022, with a five percent IR as certified by (Dr. F), the designated doctor. Dr. F examined the claimant on October 5, 2022, and issued three alternate certifications. In the first certification Dr. F certified the claimant reached MMI on October 5, 2022, with a zero percent IR considering only a left shoulder strain. In the second certification Dr. F certified the claimant reached MMI on October 5, 2022, with a five percent IR considering, among other conditions, a thoracic sprain, a lumbar strain, a lumbar sprain, and a left shoulder rotator cuff tear. Neither of these two certifications considers and rates the compensable injury in this case, which is a left shoulder strain, a cervical strain, a cervical sprain, a thoracic strain, and cervical radicular syndrome, and as such neither can be adopted.

In the third certification, which was adopted by the ALJ, Dr. F certified the claimant reached MMI on October 5, 2022. Dr. F states in her narrative report that her choice of October 5, 2022, as the date of MMI for the third certification is based on a left shoulder strain, a cervical strain, a cervical sprain, a thoracic strain, and cervical radicular syndrome, which is the compensable injury. However, under the IR section of her narrative report, Dr. F states that her third certification considers a cervical strain, cervical radicular syndrome, and a left shoulder strain. 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), Dr. F assessed zero percent impairment for the claimant's left shoulder based on range of motion measurements, and placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment for five percent impairment for the claimant's cervical strain and cervical radicular syndrome. Although Dr. F placed the claimant in DRE Thoracolumbar Category I: Complaints or Symptoms for a thoracic sprain and thoracic strain in her second certification, Dr. F's narrative report reflects she did not include an IR for the compensable thoracic strain in the certification adopted by the ALJ. Neither of Dr. F's five percent IRs rates the compensable injury in this case. Accordingly, we reverse the ALJ's determination that the claimant's IR is five percent.

The only other certifications in evidence are from (Dr. H), a referral doctor acting in place of the treating doctor. Dr. H examined the claimant on November 30, 2022, and issued three certifications. In the first certification Dr. H certified the claimant reached MMI on October 20, 2022, with a two percent IR based only on a left shoulder strain. In the other two certifications Dr. H certified the claimant had not yet reached MMI considering various conditions. However, given that we have affirmed the ALJ's determination that the claimant reached MMI on October 5, 2022, none of these certifications can be adopted. As there is no certification in evidence that can be adopted, we remand the IR issue 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 thoracic sprain, lumbar strain, lumbar sprain, or a left shoulder rotator cuff tear.

We affirm the ALJ's determination that the claimant reached MMI on October 5, 2022.

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

### **REMAND INSTRUCTIONS**

Dr. F is the designated doctor in this case. On remand the ALJ is to determine if Dr. F is still qualified and available to be the designated doctor. If Dr. F 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 IR.

The ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to a left shoulder strain, cervical strain, cervical sprain, thoracic strain, and cervical radicular syndrome but does not extend to a thoracic sprain, lumbar strain, lumbar sprain, or a left shoulder rotator cuff tear. The ALJ is also to inform the designated doctor that the date of MMI in this case is October 5, 2022. The ALJ is to request the designated doctor to rate the entire compensable injury in accordance with the AMA Guides as of October 5, 2022, 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 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 **HARTFORD FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TEXAS 75201-3136.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Margaret L. Turner  
Appeals Judge