

APPEAL NO. 230873
FILED AUGUST 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 (CCH) was held on January 19, 2023, and May 4, 2023, with the record closing on May 4, 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 appellant (claimant) reached maximum medical improvement (MMI) on April 20, 2022; and (2) the claimant's impairment rating (IR) is 9%. The claimant appealed, disputing the ALJ's determinations. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that: the claimant sustained a compensable injury on (date of injury); the compensable injury for the purpose of determining MMI and IR is bilateral rotator cuff tears; the claimant's date of statutory MMI is June 8, 2022; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. B) as the designated doctor on the issues of MMI, IR, and ability to return to work. The evidence reflects the claimant performed repetitive motions in handling tortillas that led to injuries to her bilateral shoulders.

CLAIMANT'S REQUEST TO ADD EXTENT-OF-INJURY ISSUE

At the second CCH, the claimant's attorney requested the ALJ add an extent-of-injury issue because he contended the carrier was denying conditions not previously discussed. The issue was not raised at the benefit review conference, the parties did not consent to adding the issue, and the ALJ did not find good cause to add the issue. Under these circumstances, we perceive no abuse of discretion on the part of the ALJ in denying the request to add the issue. *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986).

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.

Dr. B initially examined the claimant on July 28, 2021, and opined that, considering bilateral shoulder rotator cuff tears, the claimant had not reached MMI at that time. Dr. B noted in his narrative report that on June 3, 2020, (Dr. W) recommended right shoulder rotator cuff repair surgery, but the claimant instead had surgery performed on her left shoulder because her left shoulder was worse at that time. Dr. B also noted that as of the date of his July 28, 2021, examination the claimant had not received any treatment on her right shoulder. Because the parties stipulated the date of statutory MMI in this case is June 8, 2022, this certification could not be adopted.

Dr. B next examined the claimant on April 20, 2022, and certified the claimant reached MMI on that date with a 9% IR considering bilateral shoulder rotator cuff tears. Dr. B noted in his narrative report that although the claimant had not received any surgery or treatments to her right shoulder, her range of motion (ROM) and strength had improved since his July 28, 2021, examination, and "[i]t seems, at this point, over two years post injury that any further intervention is unlikely to result in significant material improvement. Therefore, her [MMI] date is April 20, 2022."

As correctly noted by the ALJ, the claimant underwent three surgeries for the compensable injury: left shoulder surgery on October 15, 2020, left shoulder revision surgery on September 1, 2021, and right shoulder surgery on October 26, 2022. The October 26, 2022, operative report is in evidence, and it reflects the surgery performed on the right shoulder included a rotator cuff repair. Because the right shoulder surgery occurred after Dr. B's examination, the ALJ ordered a re-examination by the designated doctor to consider that surgery and continued the CCH.

Dr. B examined the claimant on March 22, 2023, and again certified the claimant reached MMI on April 20, 2022, with a 9% IR. Dr. B stated the following in his narrative report:

[s]ince [the April 20, 2022, examination], the statutory [MMI] date of June 8, 2022[,] had passed, and [the claimant] had right shoulder surgery, including distal clavicle resection, on October 26, 2022. . . . Physical therapy records document muscle guarding and restricted [ROM] and mobility in the right shoulder on each visit.

In my March 22, 2023[,] evaluation, [the claimant's] [ROM] in the right shoulder was significantly worse than my [April 20, 2022] examination. As she is approximately [five] months post-surgery, there is reasonable medical probability that additional physical therapy at this time will not result in significant improvement. The [MMI] date of April 20, 2022[,] is the earliest date that she had the best objective findings.

The ALJ stated in his discussion portion of the decision and order that Dr. B's certification the claimant reached MMI on April 20, 2022, was consistent with the definition of clinical MMI in Section 401.011(30)(A), and therefore adopted that certification.

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held that it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant's condition if improvement could reasonably be anticipated. *See also* APD 180872, decided June 5, 2018; APD 110670, decided July 8, 2011; and APD 120071, decided March 9, 2012.

In the case on appeal, Dr. B based his opinion that the claimant reached MMI on April 20, 2022, prior to the date of the October 26, 2022, right shoulder surgery because the ROM measurements taken during the March 22, 2023, examination were worse than the ROM measurements documented on April 20, 2022, and April 20, 2022, was the earliest date the claimant had the best objective findings. Dr. B considered whether the claimant actually recovered or improved between his prior examination and the October 26, 2022, right shoulder surgery rather than whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. Therefore, we reverse the ALJ's determinations that the claimant reached MMI on April 20, 2022, with a 9% IR.

There is one other certification in evidence, which is from (Dr. M), a referral doctor acting in place of the treating doctor. Dr. M examined the claimant on March 10, 2021, and certified the claimant reached MMI on that same date with a 10% IR.

However, Dr. M's narrative report reflects he considered only the claimant's left shoulder. As Dr. M's certification does not consider and rate the entire compensable injury, it cannot be adopted.

There is no other certification in evidence that can be adopted. Accordingly, we remand the issues of MMI and IR to the ALJ for further action considering this decision.

REMAND INSTRUCTIONS

Dr. B is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. B is still qualified and available to be the designated doctor. If Dr. B 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 bilateral shoulder rotator cuff tears, and that the date of statutory MMI is June 8, 2022.

If Dr. B is still qualified and available to serve as the designated doctor, the ALJ is to advise Dr. B of the date of statutory MMI, and that the compensable injury extends to bilateral shoulder rotator cuff tears. The ALJ is also to instruct Dr. B that MMI is 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, and does not require actual improvement. The ALJ is to request Dr. B rate the entire compensable injury, which cannot be after the June 8, 2022, statutory date of MMI, 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).

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 MMI and IR consistent with the evidence and 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 **SAFETY NATIONAL CASUALTY CORPORATION** 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge