

APPEAL NO. 230890  
FILED AUGUST 24, 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 May 8, 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 (date of injury), compensable injury extends to an aggravation of left shoulder osteoarthritis; (2) the respondent (claimant) reached maximum medical improvement (MMI) on July 27, 2022; (3) the claimant's impairment rating (IR) is 20%; and (4) the claimant had disability resulting from an injury sustained on (date of injury), from January 6, 2021, through July 27, 2022, but not from January 1, 2021, through January 5, 2021. The appellant (carrier) appeals the ALJ's determinations of extent of injury, MMI, and IR. The carrier additionally appeals that portion of the ALJ's determination that the claimant had disability from January 6, 2021, through July 27, 2022. The appeal file does not contain a response from the claimant. That portion of the ALJ's determination that the claimant did not have disability from January 1, 2021, through January 5, 2021, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to at least a left shoulder contusion, left shoulder sprain, and left biceps strain. The claimant testified he was injured when he was shoveling gravel out of the back of a pickup truck and lost his balance, fell out of the pickup truck and hit his left shoulder and arm on a concrete pad. The evidence reflects that the claimant had a left shoulder hemiarthroplasty on January 6, 2021. (Dr. M), a carrier-selected required medical examination (RME) doctor, testified at the CCH that a hemiarthroplasty occurs when one side of the joint of the shoulder is replaced. Dr. M further testified that a total shoulder implant arthroplasty is when both joints of the shoulder are replaced. The claimant testified that a second surgery has been recommended.

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 (date of injury), compensable injury extends to an aggravation of left shoulder osteoarthritis is supported by sufficient evidence and is affirmed.

### **DISABILITY**

The ALJ's determination that the claimant had disability resulting from an injury sustained on (date of injury), from January 6, 2021, through July 27, 2022, is supported by sufficient evidence and is affirmed.

### **MMI**

The ALJ's determination that the claimant reached MMI on July 27, 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 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 July 27, 2022, date of MMI and 20% IR certified by (Dr. B), the most recent designated doctor, is not contrary to the preponderance of the other medical evidence. Dr. B examined the claimant on December 20, 2022, and certified that the claimant reached MMI on July 27, 2022, and assessed a 20% IR. Dr. B assessed 9% upper extremity (UE) impairment based on loss of range of motion (ROM) of the left UE 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. B subtracted 3% UE impairment for the uninjured right UE from the 9% impairment based on loss of ROM of the left shoulder resulting in 6% UE impairment. Dr. B assessed 30% UE

impairment for the claimant's left shoulder utilizing Table 27, page 3/61 of the AMA Guides for a total shoulder implant arthroplasty. Dr. B combined the 6% UE impairment with the 30% UE impairment for a total of 36% left UE impairment. We note that according to the AMA Guides 30% UE impairment combined with 6% UE impairment results in 34% UE impairment. Dr. B then converted the 36% UE impairment to 20% whole person impairment using Table 3, on page 3/20 of the AMA Guides. We note that 34% UE impairment converts to 20% whole person impairment. As previously noted, the claimant had a hemiarthroplasty on January 6, 2021. The operative report in evidence did not reflect that the claimant had a total shoulder arthroplasty. Because Dr. B rated a procedure that the claimant did not undergo, his 20% IR cannot be adopted. See Appeals Panel Decision 120071, decided March 9, 2012. Accordingly, we reverse the ALJ's determination that the claimant's IR is 20%.

Dr. B provided an alternate certification in which he certified that the claimant reached MMI on October 29, 2020, with a 10% IR. This certification only considered and rated a left shoulder contusion, left shoulder sprain, and left bicep strain. This certification did not consider and rate aggravation of left shoulder osteoarthritis which has been determined to be part of the compensable injury. Further, the ALJ's determination that the claimant reached MMI on July 27, 2022, has been affirmed. Accordingly, this certification cannot be adopted.

(Dr. L), the initial designated doctor, examined the claimant on March 25, 2022, and certified that the claimant reached MMI on March 25, 2022, with a 26% IR. We have affirmed the ALJ's determination that the claimant reached MMI on July 27, 2022. Dr. L assessed 20% UE impairment for loss of ROM of the claimant's left shoulder which he combined with 30% UE impairment under Table 27, page 3/61 of the AMA Guides for a total shoulder implant arthroplasty. The medical records reflect that the claimant had an implant hemiarthroplasty rather than a total shoulder implant arthroplasty. Because Dr. L assessed impairment for a procedure the claimant did not undergo, this certification cannot be adopted.

(Dr. E), a carrier-selected RME doctor, examined the claimant on October 24, 2022, and certified that the claimant reached MMI on March 25, 2022, and assessed an 18% IR. We have affirmed the ALJ's determination that the claimant reached MMI on July 27, 2022. Dr. E's IR includes 30% UE impairment under Table 27, page 3/61 of the AMA Guides for a total shoulder implant arthroplasty. The medical records reflect that the claimant did not have a total shoulder implant arthroplasty but rather had a hemiarthroplasty. Therefore, this certification cannot be adopted.

(Dr. P), a treating doctor referral, examined the claimant on January 5, 2023, and provided alternate certifications. In the first certification, Dr. P certified that the claimant

reached MMI on October 29, 2020, and assessed a 10% IR for loss of ROM of the claimant's left shoulder. This certification did not consider and rate aggravation of left shoulder osteoarthritis. Additionally, we have affirmed the ALJ's determination that the claimant reached MMI on July 27, 2022. Accordingly, this certification cannot be adopted.

In his alternate certification, Dr. P certified that the claimant reached MMI on July 27, 2022, and assessed a 21% IR. Dr. P assessed 6% UE impairment for loss of ROM of the left shoulder. Dr. P combined the 6% UE impairment with 30% UE impairment under Table 27, page 3/61 of the AMA Guides for a total shoulder implant arthroplasty. We note that 6% UE impairment combined with 30% UE impairment results in 34% UE impairment which converts to 20% whole person impairment. As previously noted, the claimant did not have a total shoulder implant arthroplasty. Accordingly, this certification cannot be adopted.

Dr. M examined the claimant on April 14, 2023, and provided alternate certifications. In the first certification, Dr. M certified that the claimant reached MMI on April 8, 2021, and assessed a 10% IR. This certification did not consider and rate aggravation of left shoulder osteoarthritis which has been determined to be part of the compensable injury. Additionally, we have affirmed the ALJ's determination that the claimant reached MMI on July 27, 2022. Accordingly, this certification cannot be adopted.

Dr. M in his alternate certification, considered and rated a left shoulder contusion, left shoulder sprain, left biceps strain, and aggravation of left shoulder osteoarthritis. Dr. M certified that the claimant reached MMI on July 27, 2022, and assessed a 7% IR based on loss of ROM of the claimant's left shoulder. Dr. M's assigned 7% IR is based on the compensable injury in this case, is in compliance with the AMA Guides, and is supported by the evidence. Therefore, we render a new decision that the claimant's IR is 7%, as assigned by Dr. M.

## **SUMMARY**

We affirm the ALJ's determination that the (date of injury), compensable injury extends to an aggravation of left shoulder osteoarthritis.

We affirm the ALJ's determination that the claimant had disability resulting from an injury sustained on (date of injury), from January 6, 2021, through July 27, 2022.

We affirm the ALJ's determination that the claimant reached MMI on July 27, 2022.

We reverse the ALJ's determination that the claimant's IR is 20% and render a new decision that the claimant's IR is 7%.

The true corporate name of the insurance carrier is **MARKEL 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.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge