

APPEAL NO. 230904
FILED AUGUST 18, 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 May 9, 2023, with the record closing on May 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), does not extend to the following left shoulder conditions: a high grade supraspinatus tear, infraspinatus tendinopathy with partial tearing, or supra humeral rotator cuff abutment; (2) the appellant (claimant) reached maximum medical improvement (MMI) on August 4, 2022; and (3) the claimant's impairment rating (IR) is five percent. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, 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 at least a complete rotator cuff tear and rupture of right shoulder; strain of unspecified muscle, fascia, and tendon at shoulder and upper arm, left; lateral epicondylitis right elbow; and lateral epicondylitis left elbow. The claimant was injured on (date of injury), in a motor vehicle accident.

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 the following left shoulder conditions: a high grade supraspinatus tear, infraspinatus tendinopathy with partial tearing, or supra humeral rotator cuff abutment is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on August 4, 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's IR is five percent as certified by (Dr. H), the designated doctor appointed by the Division on the issues of MMI and IR. Dr. H examined the claimant on January 4, 2023, and certified the claimant reached MMI on August 4, 2022, considering a complete rotator cuff tear and rupture of right shoulder; strain of unspecified muscle, fascia, and tendon at shoulder and upper arm, left; lateral epicondylitis right elbow; and lateral epicondylitis left elbow, which is the compensable injury in this case. Dr. H noted in his narrative report that complete examination results were not provided in the records for the date of MMI, so he used the examination findings from (Dr. Hb), a treating doctor referral, for the left shoulder, left elbow, and right elbow. 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) and the range of motion (ROM) measurements provided by Dr. Hb, Dr. H assigned two percent upper extremity (UE) impairment for the claimant's left shoulder, zero percent UE impairment for the claimant's left elbow, and zero percent UE impairment for the claimant's right elbow. These UE impairments are in accordance with the AMA Guides.

Dr. Hb also provided ROM measurements of the claimant's right shoulder; however, Dr. H did not use those measurements in assigning impairment for the claimant's right shoulder. Dr. H noted in the IR section of his report the following right shoulder ROM measurements and impairments: four percent UE impairment for 120° of flexion; zero percent UE impairment for 50° of extension; four percent UE impairment for 90° of abduction; zero percent UE impairment for 50° of adduction; one percent UE impairment for 30° of external rotation; and one percent UE impairment for 70° of internal rotation. Dr. H does not specifically state where he obtained these right

shoulder ROM measurements, although he does point to ROM measurements documented by (Dr. D), an orthopedic surgeon, on August 4, 2022, which is the date of MMI chosen by Dr. H. In evidence is a medical report from Dr. D dated August 4, 2022, which reflects the claimant's right shoulder ROM measurements as 120° of flexion, 90° of abduction, 30° of external rotation, and "IR to back pocket." Dr. H did not explain in his narrative report where he obtained the right shoulder ROM measurements of 50° of extension, 50° of adduction, or 70° of internal rotation, and his narrative report documents no right shoulder ROM measurements that may have been taken during his January 4, 2023, examination.

Dr. H did not explain where he obtained the ROM measurements for the claimant's right shoulder. Additionally, Dr. H incorrectly calculated UE impairment for the claimant's right shoulder. Dr. H added the right shoulder UE impairments to result in six percent UE impairment; however, using those ROM measurements and UE impairments, the correct result is ten percent UE impairment. Also, Dr. H did not correctly apply the AMA Guides in assessing impairments for both limbs. The AMA Guides provide on page 3/17 that if both limbs are involved, calculate the whole person impairment (WPI) for each on a separate chart and combine the percents of each limb. See Appeals Panel Decision (APD) 192264, decided February 6, 2020; and APD 130633, decided April 24, 2013. Dr. H incorrectly combined two percent UE impairment for the left shoulder with six percent UE impairment for the right shoulder for eight percent UE, which he then converted to five percent WPI using Table 3 on page 3/20 of the AMA Guides.

The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the correct IR. See APD 171766, decided September 7, 2017; APD 172488, decided December 18, 2017; APD 152464, decided February 17, 2016; APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011. However, given that we do not know where Dr. H obtained some of his right shoulder ROM measurements and the errors in his IR calculation, we do not find it appropriate to mathematically correct his IR. Consequently, we reverse the ALJ's determination that the claimant's IR is five percent.

There is one other certification in evidence, which is from Dr. Hb. Dr. Hb examined the claimant on August 22, 2022, and certified the claimant reached MMI on August 4, 2022, with a four percent IR. In his narrative report Dr. Hb noted the following diagnoses considered in his certification: right shoulder injury, rotator cuff tear status

post arthroscopic rotator cuff repair; right elbow lateral epicondylitis, left shoulder strain, and left elbow lateral epicondylitis. As previously mentioned, the compensable injury in this case is a complete rotator cuff tear and rupture of right shoulder; strain of unspecified muscle, fascia, and tendon at shoulder and upper arm, left; lateral epicondylitis right elbow; and lateral epicondylitis left elbow. Dr. Hb did not consider and rate the entire compensable injury; therefore, his IR cannot be adopted.

There is no other certification in evidence. Accordingly, 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 the following left shoulder conditions: a high grade supraspinatus tear, infraspinatus tendinopathy with partial tearing, or supra humeral rotator cuff abutment.

We affirm the ALJ's determination that the claimant reached MMI on August 4, 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. H is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H is no longer qualified or available to serve as the designated doctor, then another doctor is to be appointed to determine the claimant's IR for the (date of injury), compensable injury as of August 4, 2022, the date of MMI. On remand, the ALJ is to inform the designated doctor that the compensable injury includes a complete rotator cuff tear and rupture of right shoulder; strain of unspecified muscle, fascia, and tendon at shoulder and upper arm, left; lateral epicondylitis right elbow; and lateral epicondylitis left elbow, and that the claimant's date of MMI is August 4, 2022.

If Dr. H is still qualified and available to be the designated doctor, the ALJ is to request Dr. H to clarify where he obtained the ROM measurements he used for the claimant's right shoulder, and to inform him of his error in calculating six percent UE impairment for the claimant's right shoulder. The ALJ is also to inform Dr. H that when rating the claimant's left UE and right UE, the WPI should be calculated for each limb and then combined as instructed on page 3/17 of the AMA Guides.

The ALJ is to request the designated doctor to consider and rate the compensable injury as of the August 4, 2022, date of MMI in accordance with the AMA Guides considering the medical record and the certifying examination. The parties are to be provided with the designated doctor's new certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination of IR 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 **THE CONTINENTAL 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge