

APPEAL NO. 231028
FILED SEPTEMBER 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 June 7, 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 sustained on (date of injury), does not extend to focal tear of the anterosuperior glenoid labrum, or supraspinatus or infraspinatus tendinosis of the left shoulder; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 8, 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 extent-of-injury, MMI, and IR 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), which includes at least a left shoulder sprain; and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. E) as designated doctor to address the issues of MMI, IR, and extent of injury. The claimant testified that he was injured on (date of injury), when unloading windows and doors from a dolly.

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 focal tear of the anterosuperior glenoid labrum, or supraspinatus or infraspinatus tendinosis of the left shoulder is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on December 8, 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 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 that the claimant reached MMI on December 8, 2022, with a five percent IR as certified by Dr. E, the designated doctor. Dr. E examined the claimant on January 10, 2023, and certified that for a left shoulder sprain, the claimant reached MMI on December 8, 2022, with a five percent IR 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. E assessed five percent IR based on loss of range of motion (ROM) of the left shoulder. In her narrative report under her explanation for the MMI date, Dr. E noted that physical therapy treatment notes from December 8, 2022, documented clear improvement in ROM as follows: flexion 130°, extension 45°, abduction 100°, adduction 35°, internal rotation 90°, and external rotation 70°. However, in the chart included in her narrative under the IR heading, Dr. E assessed impairment based on 90° of external rotation rather than 70°, and 70° of internal rotation rather than 90°. The physical therapy treatment note from December 8, 2022, was not in evidence. Because there is an inconsistency in the measurements reported by Dr. E for loss of ROM of the claimant's left shoulder, this certification cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant's IR is five percent.

Dr. E provided an alternate certification that the claimant had not yet reached MMI. However, that certification considered a left shoulder sprain, a focal tear of the anterosuperior glenoid labrum, and supraspinatus and infraspinatus tendinosis of the left shoulder. As previously noted, the ALJ's determinations that the claimant reached MMI on December 8, 2022, and that the compensable injury did not include a focal tear

of the anterosuperior glenoid labrum, or supraspinatus or infraspinatus tendinosis of the left shoulder has been affirmed. Accordingly, this certification cannot be adopted.

(Dr. P), a doctor selected by the treating doctor to act in his place, examined the claimant on February 16, 2023, and certified that the claimant reached MMI on December 8, 2022, with a five percent IR. In his narrative report, Dr. P states that he utilized the ROM measurements from Dr. E in assessing IR. As previously noted, the ROM measurements used by Dr. E to assess impairment for the claimant's left shoulder were inconsistent. Therefore, Dr. P's assessment of IR cannot be adopted.

Dr. P provided an alternate certification that the claimant had not yet reached MMI but it considers a condition that has been determined not to be part of the compensable injury. Additionally, the ALJ's determination that the claimant reached MMI on December 8, 2022, has been affirmed. Accordingly, this certification cannot be adopted.

There are no other certifications in evidence. Accordingly, 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 a focal tear of the anterosuperior glenoid labrum, or supraspinatus or infraspinatus tendinosis of the left shoulder.

We affirm the ALJ's determination that the claimant reached MMI on December 8, 2022.

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

REMAND INSTRUCTIONS

Dr. E is the designated doctor in this case. The ALJ is to determine whether Dr. E is still qualified and available to serve as designated doctor. If Dr. E is still qualified and available, the ALJ is to ask Dr. E to clarify her inconsistent statements regarding the ROM measurements for internal rotation and external rotation of the left shoulder and assess impairment for the (date of injury), compensable injury, as of the MMI date of December 8, 2022.

If Dr. E is no longer qualified or available, then another designated doctor is to be appointed to determine the claimant's IR for the compensable injury of (date of injury). The ALJ is to advise the designated doctor that the compensable injury of (date of

injury), includes a left shoulder sprain but does not extend to a focal tear of the anterosuperior glenoid labrum, or supraspinatus or infraspinatus tendinosis of the left shoulder. The assignment of IR is required to be based on the claimant's condition as of December 8, 2022, the date of MMI in this case, 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 MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** 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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge