

APPEAL NO. 231193  
FILED OCTOBER 12, 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 March 1, 2023, and July 6, 2023, with the record closing on July 13, 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 maximum medical improvement (MMI) is September 21, 2021; and (2) the respondent's (claimant) impairment rating (IR) is 24%. The appellant (carrier) appealed, disputing the ALJ's determination of the claimant's IR. The claimant responded, urging affirmance of the ALJ's determination. The ALJ's determination that the date of MMI is September 21, 2021, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to at least non-displaced fracture at C2; head contusion and laceration; acute injury at C5-6; contusion of spinal cord; tear of interspinous ligament at C5-6; and traumatic brain injury; (Dr. S) was appointed as designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) on the issues of extent of injury, MMI, and IR; and the statutory date of MMI is September 21, 2021. The record reflects that the parties additionally stipulated that the (date of injury), injury does not extend to a collar bone fracture; however, the ALJ failed to note this stipulation in the decision and order. The claimant testified he was injured on (date of injury), when he was hit in the back of his head by a pipe wrench that had been kicked by a machine when the machine's pressure was turned up. The claimant testified he lost consciousness and the next thing he remembered was waking up in a helicopter and being told by a paramedic that he had been injured.

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 found that the September 21, 2021, date of MMI and 24% IR certified by Dr. S, the designated doctor, is not contrary to the preponderance of the other medical evidence, and therefore determined the claimant reached MMI on September 21, 2021, with a 24% IR. Dr. S examined the claimant on December 13, 2022, for the issues of MMI and IR. Dr. S certified the claimant reached MMI on the statutory date of September 21, 2021, with a 24% 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. S noted in his narrative report that the compensable injury was as follows: nondisplaced bilateral C2 lamina fractures; superficial head contusion/laceration; acute injury at C5-6 with perched facet joints; contusion of spinal cord; tear of interspinous ligament at C5-6; traumatic brain injury; and collar bone fracture. Dr. S assigned 5% impairment for the cervical conditions by placing the claimant in Diagnosis-Related Estimate Category II: Minor Impairment, and assigned 0% impairment for the head contusion/laceration. Dr. S assigned 14% impairment using Table 2: Mental Status Impairments on page 4/142 of the AMA Guides, and 7% impairment using Table 3: Emotional or Behavioral Impairments on page 4/142 of the AMA Guides, and combined the two for 20% whole person impairment (WPI) for the traumatic brain injury. Dr. S additionally assigned 0% impairment for the collar bone fracture, which resulted in a 24% WPI.

A collar bone fracture has not been determined to be part of the compensable injury, and for that reason the ALJ issued a letter of clarification dated July 6, 2023, to Dr. S notifying him not to consider a collar bone fracture. In a response dated July 6, 2023, Dr. S stated his previous opinion that the claimant reached MMI on September 21, 2021, with a 24% IR did not change even when disregarding a collar bone fracture.

Section 4.1: The Central Nervous System – Cerebrum or Forebrain on page 4/140 of the AMA Guides provides that a patient may have more than one of nine types of cerebral dysfunction, which are identified as: (1) disturbances of consciousness and awareness; (2) aphasia or communication disturbances; (3) mental status and integrative functioning abnormalities; (4) emotional or behavioral disturbances; (5) special types of preoccupation or obsession; (6) major motor or sensory abnormalities; (7) movement disorders; (8) episodic neurologic disorders; and (9) sleep and arousal disorders. The AMA Guides state on page 4/140 that:

*[t]he most severe of the first five categories shown above should be used to represent the cerebral impairment. Any impairments in the last four categories may be combined with the most severe of the first five by means of the Combined Values Chart ([page] 322); the result would represent the estimate of total cerebral impairment [emphasis in original].*

Section 4.1b: Disturbances of Mental Status and Integrative Functioning on page 4/141 states, in part, that the criteria for evaluating mental status are shown in Table 2 on page 4/142. Table 2 rates mental status and integrative functioning abnormalities, which is number three of the nine listed types of cerebral function. Section 4.1c: Emotional or Behavioral Disturbances on page 4/142 states, in part, that the criteria for evaluating emotional or behavioral disturbances are shown in Table 3 on page 4/142, which relate to the criteria for mental and behavioral impairments. Table 3 rates emotional or behavioral disturbances, which is number four of the nine listed categories. As previously noted, the AMA Guides provide that the most severe of the first five of the nine categories of cerebral dysfunction should be used to represent the cerebral impairment, and any impairments in the last four categories may be combined with the most severe of the first five categories. Dr. S's 24% IR is based in part on his combining the 14% impairment he assigned for mental status impairments using Table 2 on page 4/142, with the 7% impairment he assigned for emotional or behavioral impairments using Table 3 on page 4/142. Both of these impairments fall under the first five categories listed above, and only the most severe of those impairments should have been used rather than combining the two. Dr. S's assigned 24% IR is not in accordance with the AMA Guides, and therefore cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant's IR is 24%.

There are other certifications in evidence; however, most of these certify a date of MMI other than September 21, 2021. These certifications are from (Dr. C), who certified the claimant reached MMI on July 20, 2020, with a 15% IR; (Dr. K), who certified the claimant reached MMI on September 25, 2021, with a 15% IR; and (Dr. H), who initially examined the claimant on June 7, 2021, and certified the claimant had not reached MMI. The date of MMI in this case is September 21, 2021; therefore, none of these certifications can be adopted.

Dr. H also examined the claimant on October 26, 2021, and in a certification dated January 12, 2023, certified the claimant reached MMI on September 21, 2021, with a 10% IR. Dr. H's narrative report reflects he considered, among other conditions, a laceration to left jaw, and noted "subluxed/perched facet joint at C5-6." The compensable injury in this case is non-displaced fracture at C2; head contusion and laceration; acute injury at C5-6; contusion of spinal cord; tear of interspinous ligament at C5-6; and traumatic brain injury. Dr. H considered and rated a laceration to left jaw, which is a condition that has not been determined to be part of the compensable injury. Dr. H also failed to consider and rate a contusion of spinal cord, and tear of interspinous ligament at C5-6. Therefore, this certification cannot be adopted.

Dr. H subsequently amended his certification on June 20, 2023, in which he certified the claimant reached MMI on September 21, 2021, but assigned a 9% IR. Dr.

H again considered and rated a laceration to left jaw, and failed to consider and rate a contusion of spinal cord, and tear of interspinous ligament at C5-6. Dr. H's amended certification cannot be adopted.

There is no certification in evidence that can be adopted. Accordingly, we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. S is the designated doctor in this case. On remand the ALJ is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S 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 non-displaced fracture at C2; head contusion and laceration; acute injury at C5-6; contusion of spinal cord; tear of interspinous ligament at C5-6; and traumatic brain injury, but does not extend to a collar bone fracture. The ALJ is also to inform the designated doctor that the date of MMI is September 21, 2021. If Dr. S is still qualified and available to serve as the designated doctor, the ALJ is to inform Dr. S that the AMA Guides provide that only the most severe of the first five of the nine categories of cerebral dysfunction, which includes the 14% impairment he assigned for mental status impairments and 7% impairment he assigned for emotional or behavioral impairments, can be used rather than combining the two impairments.

The ALJ is to request the designated doctor rate the entire compensable injury as of the September 21, 2021, MMI date 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 allowed an opportunity to respond. The ALJ is then to make a determination on the claimant's 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 **STARR INDEMNITY AND LIABILITY 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