

APPEAL NO. 231250  
FILED OCTOBER 26, 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 June 1, 2023, with the record closing on July 25, 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 post-concussion headaches, post-concussion vertigo, cervical sprain, thoracic sprain, or lumbar sprain; (2) the respondent (claimant) reached maximum medical improvement (MMI) on February 27, 2022; (3) the claimant's impairment rating (IR) is 13%; and (4) the claimant had disability from June 14, 2020, through January 11, 2022, resulting from the compensable injury of (date of injury). The appellant (carrier) appeals the ALJ's determination of disability, MMI, and IR. The appeal file does not contain a response from the claimant.

The ALJ's determination that the compensable injury does not extend to post-concussion headaches, post-concussion vertigo, cervical sprain, thoracic sprain, or lumbar sprain was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The carrier confirmed at the CCH that it accepted a right middle finger fracture, distal interphalangeal (DIP) dislocations of the right third and fourth digits, left wrist fracture, right wrist fracture, sprain of the right shoulder, lower lip laceration, and chipping of tooth number 8 as the compensable injury and that the date of statutory MMI is February 27, 2022. The medical records reflect that the claimant was injured on (date of injury), when he fell from a ladder while painting. We note that the carrier information sheet provided to the claimant with the 10-day letter that was sent because he failed to attend the CCH contained an incorrect name of the registered agent. The correct name of the registered agent is included in the decision and order.

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).

## **DISABILITY**

The ALJ's determination that the claimant had disability from June 14, 2020, through January 11, 2022, resulting from the compensable injury of (date of injury), is supported by sufficient evidence and is affirmed.

The carrier argues on appeal that the ALJ erroneously admitted a report from (Dr. C), the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) on the issues of disability and return to work. However, a review of the record reflects that the ALJ stated on the record of the CCH that she would obtain a report from Dr. C and admit the report as an ALJ exhibit. The ALJ asked whether the carrier had any objection and the carrier's attorney responded that he had no objection.

## **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.

The record indicates that the designated doctor appointed on the issues of MMI, IR, and extent of injury, (Dr. Co), examined the claimant on March 19, 2022, and in three scenarios certified that the claimant had not yet reached MMI. A Presiding Officer's Directive to Order Designated Doctor Exam (POD) was sent to Dr. Co to request that he re-examine the claimant because the parties agreed that the date of statutory MMI is February 27, 2022. Dr. Co examined the claimant again on July 23, 2022. Dr. Co provided two certifications of MMI/IR. In the first certification, Dr. Co certified that the claimant reached MMI on February 27, 2022, and assessed a 19% 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. Co considered and rated the following conditions: right middle finger fracture, left wrist fracture, right wrist fracture, chipping of tooth number 8, post-concussion headaches, post-concussion vertigo, thoracic sprain, lumbar sprain, and right shoulder sprain. This certification cannot be adopted because it considers and rates conditions that have been determined not to be part of the compensable injury and fails to consider DIP dislocations of the right third and fourth digits, and a lower lip laceration, which have been determined to be part of the compensable injury.

In the second scenario, Dr. Co certified that the claimant reached MMI on February 27, 2022, and assessed a 10% IR using the AMA Guides. Dr. Co considered and rated the following conditions: right middle finger fracture, left wrist fracture, right wrist fracture, and chipping of tooth number 8. This certification cannot be adopted because it fails to consider a right shoulder sprain, DIP dislocations of the right third and fourth digits, and a lower lip laceration, which have been determined to be part of the compensable injury.

On July 6, 2023, a letter of clarification (LOC) was sent to Dr. Co to inform him that it has been administratively determined that the claimant's compensable injury of (date of injury), consists of: right middle finger fracture, DIP dislocations of the right third and fourth digits, left wrist fracture, right wrist fracture, sprain of the right shoulder, lower lip laceration, and chipping of tooth number 8. The LOC requested that Dr. Co determine when the claimant reached MMI for the named conditions and calculate his IR. Dr. Co responded in correspondence dated July 15, 2023, and certified that the claimant reached MMI on February 27, 2022, and assessed a 13% IR using the AMA Guides. Dr. Co considered and rated the following conditions: right middle finger fracture, DIP dislocation of the right third and fourth digits, left wrist fracture, right wrist fracture, right shoulder sprain, and chipping of tooth number 8. However, in the amended certification, Dr. Co failed to consider and rate a lower lip laceration which is part of the compensable injury. Additionally, we note that in assessing impairment for the claimant's right wrist range of motion (ROM) deficits, Dr. Co failed to round the radial deviation measurements to the nearest 10° as required by the AMA Guides. See Appeals Panel Decision (APD) 022504-s, decided November 12, 2002; and APD 111384, decided November 23, 2011. Page 3/37 of the AMA Guides instructs that in measuring radial and ulnar deviation readings "[r]ound the figures to the nearest 10°." Radial deviation of 15° should either be rounded up to 20° for 0% upper extremity (UE) impairment, or down to 10° for 2% UE impairment. Accordingly, the amended certification from Dr. Co cannot be adopted. We reverse the ALJ's determinations that the claimant reached MMI on February 27, 2022, and that the claimant's IR is 13%.

The only other certifications in evidence are from the carrier-selected required medical examination doctor, (Dr. M). Dr. M examined the claimant on September 22, 2022. Dr. M provided three scenarios. In the first scenario, Dr. M certified that the claimant reached MMI on February 27, 2022, and assessed 0% impairment. In that scenario, Dr. M considered and rated the following conditions: right middle finger fracture, left wrist fracture, right wrist fracture, and chipping of tooth number 8. This certification could not be adopted because it does not consider the entire compensable injury.

In the second scenario, Dr. M certified that the claimant reached statutory MMI on February 27, 2022, and certified a 12% IR. Dr. M considered and rated the following conditions: right middle finger fracture, left wrist fracture, right wrist fracture, chipping of tooth number 8, post-concussion headaches, post-concussion vertigo, thoracic sprain, lumbar sprain, and right shoulder sprain. This certification cannot be adopted because Dr. M fails to rate and consider the entire compensable injury and rates conditions that have been determined not to be part of the compensable injury.

In the third scenario, Dr. M certified that the claimant reached MMI on February 27, 2022, and assessed a 2% IR. Dr. M considered and rated a right middle finger fracture, DIP dislocations of the right third and fourth digits, a left wrist fracture, a right wrist fracture, a right shoulder sprain, lower lip laceration, and chipping of tooth number 8. Dr. M notes that the claimant recovered full ROM of both wrists and hands. Dr. M further stated that the claimant's lip laceration had healed well and did not qualify for impairment and that there was no applicable impairment for his dental injury since it did not lead to any difficulty with speech or dietary limitations. Dr. M assessed 4% UE impairment for loss of ROM of the right shoulder, which converts to 2% whole person impairment. Dr. M provided ROM measurements of the claimant's right shoulder; however, Dr. M did not use those measurements in assigning impairment for the claimant's right shoulder. Dr. M stated in his narrative that he used ROM findings from the examination on March 14, 2022, and supplemented as needed by the designated doctor exam on July 23, 2022. Dr. M did not provide the claimant's ROM measurements used to calculate the claimant's IR in his narrative report. The ROM measurements that Dr. M used came, in part, from an examination report that was not in evidence. As such, we cannot determine what the correct ROM measurements are regarding the right shoulder and this certification cannot be adopted.

As there is no other certification in evidence that can be adopted, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

## **SUMMARY**

We affirm the ALJ's determination that the claimant had disability from June 14, 2020, through January 11, 2022, resulting from the compensable injury of (date of injury).

We reverse the ALJ's determinations that the claimant reached MMI on February 27, 2022, and that the claimant's IR is 13%, and we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. Co is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. Co is still qualified and available to be the designated doctor. If Dr. Co is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issues of MMI and IR for the (date of injury), compensable injury.

On remand the ALJ is to inform the designated doctor that the compensable injury of (date of injury), extends to right middle finger fracture, DIP dislocations of the right third and fourth digits, left wrist fracture, right wrist fracture, right shoulder sprain, lower lip laceration, and chipping of tooth number 8. The ALJ is to inform the designated doctor that the compensable injury does not extend to post-concussion headaches, post-concussion vertigo, cervical sprain, thoracic sprain, or lumbar sprain. The ALJ is to inform the designated doctor that the date of MMI can be no later than the statutory date of February 27, 2022. The ALJ is then to request that the designated doctor certify an MMI date and assign an IR for the compensable injury based on the injured employee's condition as of the MMI date, considering the medical record and the certifying examination. The ALJ is to advise the designated doctor to round ROM figures as required by the AMA Guides and instruct the designated doctor to provide all measurements that were used to calculate the IR per Rule 130.1(c)(3). The parties are to be provided with the ALJ's letter to the designated doctor, the designated doctor's response, and are to be allowed an opportunity to respond. If another designated doctor is appointed, the parties are to be provided with the POD, the designated doctor's report, and are to be allowed an opportunity to respond. The ALJ is to make a determination on MMI and IR which is supported by the evidence and 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JEANETTE WARD, PRESIDENT & CEO  
2200 ALDRICH STREET  
AUSTIN, TEXAS 78723.**

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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