

APPEAL NO. 231521  
FILED JANUARY 4, 2024

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 September 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 left shoulder partial thickness supraspinatus tear, left shoulder impingement syndrome, left knee sprain/strain, or left knee meniscus tear; (2) the appellant/cross-respondent (claimant) did not have disability from January 23, 2023, through the date of the CCH; (3) the claimant reached maximum medical improvement (MMI) on August 9, 2022; and (4) the claimant's impairment rating (IR) is 10%.

The claimant appealed, disputing the ALJ's determinations of extent of injury, disability, MMI, and IR. The respondent/cross-appellant (carrier) responded, urging affirmance of the ALJ's determinations of extent of injury and disability. The carrier cross-appealed, disputing the ALJ's determinations of MMI and IR. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that: (1) the claimant sustained a compensable injury on (date of injury), in the form of at least a left elbow sprain/strain, a left shoulder sprain/strain, and a neck sprain/strain; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. J) as designated doctor for the issues of MMI, IR, extent of injury, disability-direct result, and return to work; and (3) for purposes of MMI and IR and this case, sprain and strain are synonymous terms. The claimant testified that he was injured on (date of injury), while cleaning a dough machine.

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 left shoulder partial thickness supraspinatus tear, left shoulder impingement syndrome, left knee sprain/strain, or left knee meniscus tear is supported by sufficient evidence and is affirmed.

## **DISABILITY**

The ALJ's determination that the claimant did not have disability from January 23, 2023, through the date of the CCH is supported by sufficient evidence and is affirmed.

## **MMI**

The ALJ's determination that the claimant reached MMI on August 9, 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 found that the preponderance of the medical evidence was contrary to the certification of Dr. J, the designated doctor. That finding is supported by the evidence. The ALJ found that the preponderance of the evidence supported the certification from (Dr. C), a referral from the treating doctor. Dr. C examined the claimant on May 10, 2023, and provided three alternate certifications. One of the certifications considered and rated a left shoulder sprain and a cervical sprain. This certification did not consider and rate a left elbow sprain/strain, which the parties stipulated was part of the compensable injury. A second certification considered and rated numerous conditions which included the extent-of-injury conditions in dispute at the CCH. As previously noted, the ALJ's determination that the compensable injury of (date of injury), did not extend to the conditions in dispute at the CCH was affirmed.

The certification from Dr. C that was adopted by the ALJ considered and rated a left shoulder sprain, left elbow sprain, left elbow strain, and a cervical strain, 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). We note that the parties stipulated for purposes of MMI and IR in this case, sprain and strain are synonymous terms. Dr. C placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment for a 5% IR. Dr. C assessed 0% IR for the claimant's left elbow due to full range of motion (ROM). Dr. C assessed 5% whole person impairment for the claimant's left shoulder. Dr. C noted the following ROM measurements in his narrative report for determining shoulder impairment: flexion 120°, extension 40°, adduction 40°, abduction 110°, internal rotation 50°, and external rotation 70°. However, in an attached worksheet that assigns impairment for loss of ROM of the claimant's left shoulder, Dr. C utilized "45°" for left shoulder extension assigning 0% impairment rather than 40° noted earlier in his narrative. Page 3/42 of the AMA Guides provides that the measurements for flexion and extension should be rounded to the nearest 10°. Figure 38 of the AMA Guides on page 3/43 provides that 40° of extension would result in 1% upper extremity (UE) impairment and that 50° of extension would result in 0% UE impairment. In his narrative report, Dr. C stated that the ROM measurement for extension was 40° not 45°. The AMA Guides provide that the measurement for extension should be rounded but the measurement noted by Dr. C in his narrative was 40°. Because there is an inconsistency in the measurements reported by Dr. C for loss of ROM of extension of the claimant's left shoulder, the IR from Dr. C cannot be adopted. Accordingly, we reverse the ALJ's determination that the claimant's IR is 10%.

As noted above, the other certifications from Dr. C do not rate and consider the entire compensable injury or rate conditions that have been determined not to be part of the compensable injury and cannot be adopted.

The other certifications in evidence are from Dr. J. Dr. J examined the claimant on April 6, 2023. Dr. J provided three certifications. None of the certifications from Dr. J certified that the claimant reached MMI on August 9, 2022. As previously discussed, the ALJ's determination that the claimant reached MMI on August 9, 2022, has been affirmed. Consequently, none of the certifications from Dr. J can be adopted.

There are no other certifications in evidence. Consequently, 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 left shoulder partial thickness supraspinatus tear, left shoulder impingement syndrome, left knee sprain/strain, or left knee meniscus tear.

We affirm the ALJ's determination that the claimant did not have disability from January 23, 2023, through the date of the CCH.

We affirm the ALJ's determination that the claimant reached MMI on August 9, 2022.

We reverse the ALJ's determination that the claimant's IR is 10% and remand the IR issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. J is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. J is still qualified and available to be the designated doctor. If Dr. J is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's IR for the (date of injury), compensable injury as of the August 9, 2022, date of MMI.

The ALJ is to instruct the designated doctor that the date of MMI is August 9, 2022, and request that the designated doctor examine the claimant and assign an IR as of the date of MMI in accordance with Rule 130.1(c)(3) and the AMA Guides. The ALJ is to inform the designated doctor that the compensable injury extends to a left elbow sprain/strain, a left shoulder sprain/strain, and a neck sprain/strain but does not extend to left shoulder partial thickness supraspinatus tear, left shoulder impingement syndrome, left knee sprain/strain, or left knee meniscus tear. The parties are to be provided with the designated doctor's new IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on IR consistent with the evidence and 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 **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** 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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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge