

APPEAL NO. 231890
FILED FEBRUARY 14, 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 was held on November 2, 2023, with the record closing on November 27, 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 C5-6 herniated disc, multilevel central canal stenosis, concussion with loss of consciousness, loss of front tooth #7, neuropathy bilateral hands, neuropathy bilateral feet, chest wall contusion, left elbow olecranon bursitis, cervical myelopathy, left arm/elbow tendinopathy of the common flexor or extensor tendons, left wrist sprain or strain, bilateral carpal tunnel syndrome (CTS), right shoulder strain or sprain, right shoulder contusion, right ear tinnitus, or lumbar sprain or strain; (2) the appellant (claimant) reached maximum medical improvement (MMI) on April 7, 2022; and (3) the claimant's impairment rating (IR) is 7%. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed 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), in the form of at least the conditions accepted by the carrier of left elbow contusion, left triceps tendon strain and tear, and cervical sprain; the date of statutory MMI in this case is March 19, 2023; (Dr. S) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor on the issue of extent of injury; and (Dr. O) was appointed by the Division as designated doctor on the issues of MMI and IR. The claimant testified that he was injured on (date of injury), when he was exiting a van and the wind caused the door of the delivery van, which was being held by a magnet, to come loose and strike him, knocking him about 15 feet.

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 sustained on (date of injury), does not extend to C5-6 herniated disc, multilevel central canal stenosis, concussion with loss of consciousness, loss of front tooth #7, neuropathy bilateral hands, neuropathy bilateral feet, chest wall contusion, left elbow olecranon bursitis, cervical myelopathy, left arm/elbow tendinopathy of the common flexor or extensor tendons, left wrist sprain or strain, bilateral CTS, right shoulder strain or sprain, right shoulder contusion, right ear tinnitus, or lumbar sprain or strain is supported by sufficient evidence and is affirmed.

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 and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
- (B) document specific laboratory or clinical findings of an impairment;

(C) analyze specific clinical and laboratory findings of an impairment;

(D) compare the results of the analysis with the impairment criteria and provide the following:

(i) [a] description and explanation of specific clinical findings related to each impairment, including [0%] [IRs]; and

(ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter of 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)]. The doctor's inability to obtain required measurements must be explained.

The ALJ determined that the claimant reached MMI on April 7, 2022, with a 7% IR as certified by Dr. O, the designated doctor appointed on the issues of MMI and IR. Dr. O examined the claimant on October 3, 2022. Dr. O noted the following diagnoses in his narrative report: partial tear of the left triceps tendon, cervical sprain, contusion of the left elbow, and chest wall contusion. The parties stipulated that the compensable injury sustained on (date of injury), extends to at least the conditions accepted by the carrier of left elbow contusion, left triceps tendon strain and tear, and cervical sprain. As previously noted, the ALJ's determination that the compensable injury does not extend to a chest wall contusion has been affirmed. Dr. O considered a condition that has been determined not to be part of the compensable injury. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on April 7, 2022, with a 7% IR.

There is only one other certification in evidence. (Dr. F), a treating doctor referral, examined the claimant on October 19, 2023, and certified that the claimant reached MMI on March 19, 2023, and assessed a 25% IR using the AMA Guides. However, Dr. F considered and rated the disputed extent-of-injury conditions. The ALJ determined that the compensable injury of (date of injury), did not extend to the disputed conditions at issue and that determination has been affirmed. No other certification of MMI/IR is in evidence. Accordingly, we remand the issues of MMI and IR to the ALJ for further action in accordance with this decision.

Pursuant to Section 410.203(c), the Appeals Panel may not remand a case more than once. As noted earlier, Dr. O certified that the claimant reached MMI on April 7, 2022, and assessed a 7% IR. Dr. O placed the claimant in Cervicothoracic Diagnosis-Related Estimate Category II: Minor Impairment of the AMA Guides for 5% impairment. Dr. O noted in his narrative report dated October 3, 2022, that the claimant's left elbow range of motion (ROM) is decreased due to his left triceps strain and assessed

impairment based on loss of ROM of flexion and extension. Dr. O noted that ROM for left elbow flexion was 127° and ROM for left elbow extension was 16°. Using Figure 32, page 3/40 of the AMA Guides Dr. O assessed 2% whole person impairment for the left elbow. Dr. O then combined the 5% assessed for the cervical spine with the 2% assessed for the left elbow using the Combined Values Chart on page 322 of the AMA Guides for a total of 7% impairment. We note that Dr. O failed to list any measurements of ROM for supination and pronation of the left elbow pursuant to Figure 35 on page 3/41 of the AMA Guides.

SUMMARY

We affirm the ALJ's determination that the compensable injury sustained on (date of injury), does not extend to C5-6 herniated disc, multilevel central canal stenosis, concussion with loss of consciousness, loss of front tooth #7, neuropathy bilateral hands, neuropathy bilateral feet, chest wall contusion, left elbow olecranon bursitis, cervical myelopathy, left arm/elbow tendinopathy of the common flexor or extensor tendons, left wrist sprain or strain, bilateral CTS, right shoulder strain or sprain, right shoulder contusion, right ear tinnitus, or lumbar sprain or strain.

We reverse the ALJ's determination that the claimant reached MMI on April 7, 2022, and remand the MMI issue for further consideration consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is 7% and remand the IR issue for further consideration consistent with this decision.

REMAND INSTRUCTIONS

Dr. O is the designated doctor on the issues of MMI and IR in this case. On remand, the ALJ is to determine whether Dr. O is still qualified and available to be the designated doctor. If Dr. O 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 left elbow contusion, left triceps tendon strain and tear, and cervical sprain but does not include C5-6 herniated disc, multilevel central canal stenosis, concussion with loss of consciousness, loss of front tooth #7, neuropathy bilateral hands, neuropathy bilateral feet, chest wall contusion, left elbow olecranon bursitis, cervical myelopathy, left arm/elbow tendinopathy of the common flexor and extensor tendons, left wrist sprain or strain, bilateral CTS, right shoulder sprain or strain, right shoulder contusion, right ear tinnitus, or lumbar sprain or strain. The ALJ is then to request that the designated doctor rate the entire compensable injury

considering the medical record and the certifying examination. The ALJ is to instruct the designated doctor to provide all measurements that were used to calculate the IR per Rule 130.1(c)(3) and inform the designated doctor that the date of statutory MMI is March 19, 2023.

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 Presiding Officer's Directive to Order Designated Doctor Examination, the designated doctor's report, and are to be allowed an opportunity to respond. The ALJ is to make determinations of MMI and IR which are 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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **SAGAMORE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge