

APPEAL NO. 240115  
FILED APRIL 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 October 9, 2023, with the record closing on December 18, 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), extends to right shoulder supraspinatus and infraspinatus tendinosis, aggravation of the L4-5 disc bulge, aggravation of the L5-S1 herniated disc, aggravation of the C4-5, C5-6, and C6-7 disc bulges, and right shoulder impingement syndrome; (2) the respondent (claimant) reached maximum medical improvement (MMI) on August 13, 2023; and (3) the claimant's impairment rating (IR) is 13%. The appellant (carrier) appeals the ALJ's determinations of extent of injury, MMI and IR. The appeal file does not contain a response from the claimant.

**DECISION**

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that: on (date of injury), the claimant sustained a compensable injury that extends to at least a lumbar sprain, cervical sprain, concussion without loss of consciousness, lumbar contusion, right shoulder strain, right shoulder contusion, and right hip contusion; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. C) as designated doctor on the issues of extent of injury, MMI and IR; and that the statutory date of MMI was August 10, 2023. The claimant testified that he was injured when trying to retrieve a dead bird from a water tank and the ladder he was on fell to the right causing him to hit the bunkhouse. The claimant then testified he fell backwards to the ground, landing on his back.

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), extends to the right shoulder supraspinatus and infraspinatus tendinosis, aggravation of the L4-5 disc bulge, aggravation of the L5-S1 herniated disc, aggravation of the C4-5, C5-6, and C6-7 disc bulges, and right shoulder impingement syndrome 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.

The ALJ determined the claimant reached MMI on August 13, 2023, with a 13% IR as assigned by Dr. C. Dr. C initially examined the claimant on October 10, 2022, and certified that the claimant reached MMI on October 7, 2022, and assigned a 0% IR. Dr. C considered and rated a lumbar sprain, cervical sprain, and concussion.

Dr. C subsequently examined the claimant on May 30, 2023, and provided alternate certifications. On the first certification Dr. C again certified that the claimant reached MMI on October 7, 2022, with a 0% IR considering a lumbar sprain, cervical sprain, and concussion. In the alternate certification, Dr. C certified that the claimant reached MMI on October 7, 2022, with a 5% IR considering a lumbar sprain, lumbar contusion, cervical sprain, concussion, right shoulder contusion, right shoulder strain, and a right hip contusion. In a third certification, Dr. C certified that the claimant had not reached MMI considering cervical disc bulges C4-7, lumbar disc bulge L4-5, shoulder impingement, right supraspinatus and infraspinatus tendinosis, and post-traumatic stress disorder.

The ALJ correctly noted that there were no certifications in evidence that “determined the claimant reached [MMI] for the compensable injury” and sent a Presiding Officer’s Directive after the CCH. Dr. C re-examined the claimant on November 30, 2023, and in a Report of Medical Evaluation (DWC-69) certified that the claimant reached MMI on August 13, 2023, with a 13% IR considering a lumbar sprain, cervical sprain, concussion without loss of consciousness, lumbar contusion, right shoulder strain, right shoulder contusion, right hip contusion, right shoulder supraspinatus and infraspinatus tendinosis, aggravation of L4-5 disc bulge, aggravation of L5-S1 herniated disc, aggravation of C4-5, C5-6, C6-7 disc bulges, and right shoulder impingement syndrome. Dr. C’s accompanying narrative states the claimant continued to receive additional treatment expected to improve his condition through the date of this claimant’s statutory MMI date of August 10, 2023. The ALJ found that a preponderance of the other medical evidence was not contrary to this certification and determined that the claimant reached MMI on August 13, 2023, with a 13% IR. There is an internal inconsistency between the MMI date Dr. C certified on the DWC-69 and the MMI date Dr. C indicated in the accompanying narrative report. Because the narrative report and DWC-69 list completely different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected. See Appeals Panel Decision (APD) 140237, decided April 11, 2014. Additionally, as noted above, the parties stipulated that the statutory date of MMI in this case was August 10, 2023. Accordingly, we reverse the ALJ’s determination that the claimant reached MMI on August 13, 2023, and remand the MMI issue to the ALJ for further action consistent with this decision.

Given that we have reversed the ALJ’s MMI determination, we also reverse the ALJ’s determination that the claimant’s IR is 13% and remand the IR issue 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), extends to the right shoulder supraspinatus and infraspinatus tendinosis, aggravation of the L4-5 disc bulge, aggravation of the L5-S1 herniated disc, aggravation of the C4-5, C5-6, and C6-7 disc bulges, and right shoulder impingement syndrome.

We reverse the ALJ’s determination that the claimant reached MMI on August 13, 2023, and remand the MMI issue to the ALJ for further action consistent with this decision.

We reverse the ALJ’s determination that the claimant’s IR is 13% and remand the IR issue to the ALJ for further action consistent with this decision.

## REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C 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 MMI and IR for the (date of injury), compensable injury.

The ALJ is to inform the designated doctor that the (date of injury), compensable injury extends to lumbar sprain, cervical sprain, concussion without loss of consciousness, lumbar contusion, right shoulder strain, right shoulder contusion, right hip contusion, right shoulder supraspinatus and infraspinatus tendinosis, aggravation of the L4-5 disc bulge, aggravation of the L5-S1 herniated disc, aggravation of the C4-5, C5-6, and C6-7 disc bulges, and right shoulder impingement syndrome and that the date of statutory MMI is August 10, 2023.

The ALJ is to request Dr. C to determine the date of MMI, which cannot be after the August 10, 2023, statutory date of MMI, and to rate the entire compensable injury in accordance with 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 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 MMI and 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 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 78723-3474.**

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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