

APPEAL NO. 240159
FILED MARCH 28, 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 January 3, 2024, 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 L4-5 lumbar herniation with right L4 nerve root compression with lumbar radiculopathy, left shoulder superior labrum anterior to posterior (SLAP) tear, left distal subscapularis tendon tear, left acromioclavicular (AC) arthropathy, or adhesive capsulitis; (2) the appellant (claimant) reached maximum medical improvement (MMI) on February 21, 2023; and (3) the claimant's impairment rating (IR) is four percent. The claimant appealed, disputing the ALJ's determinations of extent of injury, MMI, and IR. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part, reformed 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 shoulder strain and lumbar strain; and (Dr. R) was appointed as designated doctor on the issues of MMI, IR, and extent of injury. The claimant was injured on (date of injury), while pulling cases of frozen pizza from the top of a pallet that was above his head.

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).

CLERICAL CORRECTIONS

The parties agreed at the CCH that the extent-of-injury conditions in issue are, in part, L4-5 lumbar herniation with right L4 nerve compression with radiculopathy and left adhesive capsulitis. Finding of Fact No. 3 correctly identifies these conditions. However, the decision section, Issue Statement No. 1, and Conclusion of Law No. 3 incorrectly identifies L4-5 lumbar herniation with right L4 nerve root compression with

lumbar radiculopathy. The decision section and Conclusion of Law No. 3 also incorrectly identify left adhesive capsulitis as adhesive capsulitis. We reform the ALJ's decision to reflect the misidentified extent-of-injury conditions as L4-5 lumbar herniation with right L4 nerve compression with radiculopathy and left adhesive capsulitis to conform with the extent-of-injury conditions agreed to by the parties at the CCH.

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to L4-5 lumbar herniation with right L4 nerve compression with radiculopathy, left shoulder SLAP tear, left distal subscapularis tendon tear, left AC arthropathy, or left adhesive capsulitis is supported by sufficient evidence and is affirmed as reformed.

MMI

The ALJ's determination that the claimant reached MMI on February 21, 2023, 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 Texas Department of Insurance, Division of Workers' Compensation (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 zero percent [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 the claimant reached MMI on February 21, 2023, with a four percent IR as assigned by (Dr. VH), the post-designated doctor required medical examination doctor. Dr. VH examined the claimant on October 5, 2023, and issued alternate certifications. Two of these certifications certify an MMI date of February 21, 2023, and consider and rate a left shoulder strain and lumbar strain, which is the compensable injury in this case; both assign a four percent IR. Using the AMA Guides, Dr. VH placed the claimant in Diagnosis-Related Estimate Lumbosacral Category I: Complaints or Symptoms for zero percent impairment. Regarding the claimant's left shoulder, Dr. VH explained in his narrative that, using the range of motion (ROM) "as documented by the therapist . . . there would be a [six percent] differential in the [ROM] for the right vs left shoulder which would be converted to a [four percent] whole person." Although he did not specifically state which therapist he derived the ROM measurements used, Dr. VH's narrative report lists ROM taken on February 21, 2023, at the claimant's final physical therapy appointment with (medical provider). These ROM measurements are as follows: right shoulder flexion 155°, left shoulder flexion 130°, right shoulder abduction 145°, and left shoulder abduction 90°. Dr. VH noted that neither extension nor adduction evaluations were performed, and that internal and external rotation interpolated from a February 28, 2023, examination with Ortho Texas were both normal.

The medical records from (medical provider) dated February 21, 2023, were in evidence. Those records reflect the same ROM measurements of the claimant's right and left shoulders referenced by Dr. VH in his narrative report, and also reflect that no extension or adduction measurements were taken.

The ROM measurements Dr. VH used were incomplete and do not comply with Rule 130.1(c)(3). Therefore, we reverse the ALJ's determination that the claimant's IR is four percent. See Appeals Panel Decision (APD) 230613, decided June 1, 2023.

There are other certifications in evidence from Dr. VH, as well as from Dr. R, the designated doctor. However, none of these certify a February 21, 2023, date of MMI. Accordingly, we remand the IR issue to the ALJ for further action consistent with this decision.

SUMMARY

We reform the ALJ's decision to reflect the misidentified extent-of-injury conditions as L4-5 lumbar herniation with right L4 nerve compression with radiculopathy and left adhesive capsulitis to conform with the extent-of-injury conditions agreed to by the parties at the CCH.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to L4-5 lumbar herniation with right L4 nerve compression with radiculopathy, left shoulder SLAP tear, left distal subscapularis tendon tear, left AC arthropathy, or left adhesive capsulitis, as reformed.

We affirm the ALJ's determination that the claimant reached MMI on February 21, 2023.

We reverse the ALJ's determination that the claimant's IR is four percent, and we remand the IR issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. R is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. R is still qualified and available to be the designated doctor. If Dr. R is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to opine on the issue of 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 a left shoulder strain and lumbar strain, but does not extend to L4-5 lumbar herniation with right L4 nerve compression with radiculopathy, left shoulder SLAP tear, left distal subscapularis tendon tear, left AC arthropathy, or left adhesive capsulitis. The ALJ is to request the designated doctor assign an IR for the compensable injury based on the claimant's condition as of the February 21, 2023, date of MMI, considering the medical record and the certifying examination.

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 a determination on 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 **AIU INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge