

APPEAL NO. 240492  
FILED MAY 17, 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 February 21, 2024, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues in (Docket No. 1) by deciding that: (1) the compensable injury of (date of injury), extends to the aggravation of the mild diffuse disc bulge at L3-4 with a superimposed left lateral broad-based foraminal disc extrusion and the aggravation of the asymmetric right diffuse disc bulge at L5-S1 causing mild right greater than left lateral recess stenosis and mild bilateral foraminal stenosis; (2) the compensable injury of (date of injury), does not extend to mild diffuse disc bulge at L4-5 causing mild bilateral lateral recess stenosis and mild bilateral foraminal stenosis or lumbar region radiculopathy; (3) the employer did not make any bona fide offers of employment (BFOE) to the respondent (claimant); (4) the claimant had disability from May 14, 2023, through December 1, 2023; (5) the claimant did not have disability from December 2, 2023, through the date of the CCH resulting from the compensable injury sustained on (date of injury). The ALJ resolved the disputed issues in (Docket No. 2) by deciding that: (1) the claimant has not reached maximum medical improvement (MMI); and (2) because the claimant has not reached MMI, no impairment rating (IR) can be assigned at this time.

The appellant (carrier) appealed Docket Nos. 1 and 2, disputing the ALJ's determinations in favor of the claimant in Docket No. 1 regarding extent of injury, BFOE, and disability, and the ALJ's determinations of MMI and IR in Docket No. 2. The claimant responded, urging affirmance of the ALJ's determinations.

The ALJ's determination that the compensable injury of (date of injury), does not extend to mild diffuse disc bulge at L4-5 causing mild bilateral lateral recess stenosis and mild bilateral foraminal stenosis or lumbar region radiculopathy was not appealed and has become final pursuant to Section 410.169.

## DECISION

Affirmed in part, reformed by striking in part, and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to at least a lumbar sprain; the current designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) on MMI and IR is (Dr. J); the previous designated doctor appointed by the Division on extent of injury and disability was (Dr. S); and for purposes of MMI and IR, the diagnoses of sprain, strain, and sprain/strain are used

interchangeably and are synonymous. The claimant was injured on (date of injury), while placing empty IV bags on an IV filling 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).

### **DISABILITY**

During the CCH the parties agreed to amend the disability issue to address whether the claimant had disability from May 14, 2023, through December 1, 2023. However, the ALJ determined the claimant had disability from May 14, 2023, through December 1, 2023, but did not have disability from December 2, 2023, through the date of the CCH. That part of the ALJ's determination that the claimant had disability from May 14, 2023, through December 1, 2023, is supported by sufficient evidence and is affirmed. That part of the ALJ's determination that the claimant did not have disability from December 2, 2023, through the date of the CCH exceeds the scope of the disability issue. Accordingly, we reform the ALJ's decision by striking that portion of the ALJ's determination that the claimant did not have disability from December 2, 2023, through the date of the CCH as exceeding the scope of the disability issue.

### **BFOE**

The ALJ's determination that the employer did not make any BFOEs to the claimant is supported by sufficient evidence and is affirmed.

### **EXTENT OF INJURY**

The ALJ's determination that the compensable injury of (date of injury), extends to the aggravation of the mild diffuse disc bulge at L3-4 with a superimposed left lateral broad-based foraminal disc extrusion and the aggravation of the asymmetric right diffuse disc bulge at L5-S1 causing mild right greater than left lateral recess stenosis and mild bilateral foraminal stenosis 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 that the claimant has not reached MMI and because the claimant has not reached MMI an IR cannot be assigned at this time based on the report of (Dr. St), a doctor selected by the treating doctor to act in the treating doctor’s place. Dr. St examined the claimant on October 25, 2023, and certified on that same date that the claimant had not reached MMI. Dr. St’s accompanying narrative report reflects he based his opinion on intervertebral disc disorders without myelopathy and lumbar region. Intervertebral disc disorders without myelopathy are conditions that have not at this time been determined to be part of the compensable injury. Dr. St did not consider the compensable injury in this case; therefore, his certification cannot be adopted. We reverse the ALJ’s determinations that the claimant has not reached MMI, and, because the claimant has not reached MMI, an IR cannot be assigned at this time.

There are two other certifications in evidence, the first of which is from Dr. J, the designated doctor. Dr. J examined the claimant on September 25, 2023, and certified the claimant reached MMI on May 8, 2023, with a zero percent IR. However, Dr. J’s accompanying narrative report reflects she only considered a lumbar sprain. As previously discussed, we have affirmed the ALJ’s determination that the compensable injury of (date of injury), extends to the aggravation of the mild diffuse disc bulge at L3-4 with a superimposed left lateral broad-based foraminal disc extrusion and the aggravation of the asymmetric right diffuse disc bulge at L5-S1 causing mild right greater than left lateral recess stenosis and mild bilateral foraminal stenosis. Dr. J’s certification does not consider the entire compensable injury and cannot be adopted.

The other certification is from (Dr. G), the post-designated doctor required medical examination doctor. Dr. G examined the claimant on November 15, 2023, and

certified the claimant reached MMI on May 8, 2023, with a zero percent IR. However, Dr. G's accompanying narrative report reflects he only considered a lumbar sprain and lumbar strain. Dr. G's certification does not consider the entire compensable injury and cannot be adopted.

There is no certification in evidence that considers and rates the compensable injury. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

### **SUMMARY**

We affirm that portion of the ALJ's determination that the claimant had disability from May 14, 2023, through December 1, 2023.

We reform the ALJ's decision by striking that portion of the ALJ's determination that the claimant did not have disability from December 2, 2023, through the date of the CCH as exceeding the scope of the disability issue.

We affirm the ALJ's determination that the employer did not make any BFOEs to the claimant.

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to the aggravation of the mild diffuse disc bulge at L3-4 with a superimposed left lateral broad-based foraminal disc extrusion and the aggravation of the asymmetric right diffuse disc bulge at L5-S1 causing mild right greater than left lateral recess stenosis and mild bilateral foraminal stenosis.

We reverse the ALJ's determinations that the claimant has not reached MMI, and, because the claimant has not reached MMI, an IR cannot be assigned at this time, and we remand the issues of MMI and IR 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 available to serve as the designated doctor, another designated doctor is to be appointed pursuant to Division rules to opine on the issues of MMI and IR.

The ALJ is to inform the designated doctor that the compensable injury extends to a lumbar sprain, aggravation of the mild diffuse disc bulge at L3-4 with a superimposed left lateral broad-based foraminal disc extrusion, and the aggravation of

the asymmetric right diffuse disc bulge at L5-S1 causing mild right greater than left lateral recess stenosis and mild bilateral foraminal stenosis. The ALJ is to request the designated doctor give an opinion on the claimant's date of MMI and 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) considering the medical record and the certifying examination.

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 Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **THE PHOENIX 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