

APPEAL NO. 240537  
FILED JUNE 6, 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 January 24, 2024, with the record closing on March 1, 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 sustained on (date of injury), does not extend to right shoulder biceps long head tendon partial tear, left shoulder full thickness rotator cuff tear with impingement, or long head biceps tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 28, 2022; (3) the claimant's impairment rating (IR) is 0%; and (4) the claimant had disability resulting from the compensable injury from August 30, 2023, through the date of the CCH. 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. The ALJ's determination that the claimant had disability resulting from the compensable injury from August 30, 2023, through the date of the CCH was not appealed and has become final pursuant to Section 410.169.

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, which extends to at least a right shoulder distal biceps tendon tear, right shoulder sprain and strain, and left shin abrasion; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. J) as the designated doctor to address the issues of extent of injury, MMI, and IR. The claimant testified that he was injured when he fell approximately three or four feet, while stepping down after climbing up to try and unlock the truck he was driving. We note the audio record reflects the carrier had 172 pages in its exhibits. However, the decision reflects the number of pages actually admitted into evidence on behalf of the carrier was 117 pages.

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 right shoulder biceps long head tendon partial tear, left shoulder full thickness rotator cuff tear with impingement, or long head biceps tear 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 found that the certification from Dr. J, the designated doctor appointed by the Division, that certified the claimant reached MMI on November 28, 2022, with a 0% IR, was not contrary to the preponderance of the other medical evidence.

Dr. J initially examined the claimant on July 12, 2023, and certified that the claimant had not yet reached MMI. Dr. J listed the following diagnoses in his narrative of July 12, 2023: other injury of muscle, fascia, and tendon of long head biceps right arm, traumatic partial tear of right biceps tendon; other injury of muscle, fascia, and tendon of long head of biceps left arm; and left subscapular full thickness tear. In his initial certification, Dr. J did not consider a right shoulder sprain/strain or a left shin abrasion. Dr. J based his determination that the claimant had not yet reached MMI in part on the fact that he had no post-surgical physical therapy on his left shoulder. The

left shoulder injury has not been determined to be part of the compensable injury. Accordingly, the initial certification from Dr. J cannot be adopted.

Dr. J subsequently examined the claimant on October 10, 2023, and certified that the claimant reached MMI on October 28, 2022, and assigned a 0% IR. Dr. J considered and rated a right shoulder distal biceps tendon tear, left shoulder sprain/strain, and left shin abrasion 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). However, Dr. J stated in his narrative report that “[b]ased on my examination today and review of submitted records, further material recovery or lasting improvement to the injury is no longer expected as of November 28, 2022.” In a letter of clarification (LOC) dated February 21, 2024, the ALJ noted the discrepancy between the narrative from Dr. J and his Report of Medical Evaluation (DWC-69). The LOC stated that the Presiding Officer’s Directive noted the accepted compensable injury was a “right shoulder proximal biceps tendon tear, a left shoulder sprain, a left shoulder strain, and a left shin abrasion.” The ALJ additionally requested that Dr. J clarify if the right shoulder biceps tendon tear is a proximal or distal tear. Dr. J responded to the LOC in correspondence dated February 26, 2024. Dr. J clarified that the right biceps tear was distal, noted that he made a typographical error on the DWC-69, and the correct date of MMI is November 28, 2022. Dr. J submitted an amended DWC-69, correcting the MMI date.

Dr. J assessed 0% impairment for the left shin abrasion and 0% impairment for the right upper extremity (UE). Dr. J then assessed 0% for the left UE. Dr. J noted there was decreased range of motion (ROM) in the left shoulder, but the decreased motion was not consistent with the compensable injury but was due to other non-compensable factors. Dr. J rated a left shoulder sprain/strain, instead of a right shoulder sprain/strain as stipulated by the parties. A left shoulder sprain/strain has not yet been determined to be part of the compensable injury. Further, Dr. J did not rate a right shoulder sprain/strain, which has been accepted as part of the compensable injury. Accordingly, the ALJ’s determination that the claimant reached MMI on November 28, 2022, with a 0% IR is reversed.

There are four other certifications in evidence. Dr. J provided an alternate certification based on his examination of October 10, 2023, in which he certified that the claimant had not yet reached MMI because the claimant had surgery on his left shoulder on June 20, 2023, and could benefit from additional physical therapy visits for his left shoulder. The record reflects that the surgery the claimant underwent on June 20, 2023, was for a left shoulder rotator cuff tear with impingement. This certification

considers a condition that was determined not to be part of the compensable injury. Accordingly, this certification cannot be adopted.

(Dr. M), a post-designated doctor required medical examination doctor, examined the claimant on August 30, 2023, and certified that the claimant reached MMI on August 3, 2022, with a 0% IR. The certification from Dr. M fails to consider and rate a left shin abrasion. As noted above, the parties stipulated that a left shin abrasion was part of the compensable injury. Dr. M did not consider and rate the entire compensable injury and his certification cannot be adopted.

There are two certifications from (Dr. P), a doctor selected by the treating doctor to act in his place. Dr. P examined the claimant on December 21, 2023. Dr. P certified that the claimant reached MMI on December 21, 2023, with a 12% IR. In his initial certification, Dr. P considered and rated a right shoulder distal biceps tear, left shoulder strain/sprain, left shin abrasion, and right shoulder sprain/strain. Dr. P assessed 11% UE impairment for loss of ROM and an additional 10% impairment UE impairment for resection of the distal clavicle. Dr. P rated a left shoulder sprain/strain which has not yet been determined to be part of the compensable injury. Accordingly, this certification cannot be adopted.

The second certification from Dr. P again certified that the claimant reached MMI on December 21, 2023, with a 12% IR. In this certification, Dr. P considered and rated a left subscapularis full thickness tear, injury to the long head of the right biceps, and traumatic tear of the right biceps tendon as well as a right shoulder distal biceps tear, left shoulder sprain/strain, and a left shin abrasion. This certification rates and considers conditions that were determined not to be part of the compensable injury and fails to consider conditions that were stipulated as compensable by the parties. Accordingly, this certification from Dr. P cannot be adopted.

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

## **SUMMARY**

We affirm the ALJ's determination that the compensable injury sustained on (date of injury), does not extend to right shoulder biceps long head tendon partial tear, left shoulder full thickness rotator cuff tear with impingement, or long head biceps tear.

We reverse the ALJ's determination that the claimant reached MMI on November 28, 2022, 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 0% 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. The ALJ is to determine whether Dr. J is still qualified and available to serve as designated doctor. If Dr. J is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to request that the designated doctor give an opinion on the claimant's date of MMI and rate the entire compensable injury, which includes a right shoulder distal biceps tendon tear, right shoulder sprain and strain, and left shin abrasion in accordance with the AMA Guides considering the medical record and the certifying examination. The ALJ is to inform the designated doctor that the compensable injury of (date of injury), does not extend to right shoulder biceps long head tendon partial tear, left shoulder full thickness rotator cuff tear with impingement, or long head biceps tear.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on MMI and IR 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 **ACE AMERICAN INSURANCE COMPANY** 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