

APPEAL NO. 110616  
FILED JUNE 17, 2011

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 October 21, 2010, and continued on April 14, 2011, with the record closing on that date. The hearing officer resolved the disputed issues by deciding that the compensable injury of \_\_\_\_\_, does not extend to cervical radiculopathy at C5-6 and that the appellant's (claimant) impairment rating (IR) is 8% as certified by (Dr. L), the Texas Department of Insurance, Division of Workers' Compensation (Division)-appointed designated doctor.

The claimant appealed, disputing the hearing officer's determinations of extent of injury and IR. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; the Division appointed Dr. L on the issues of maximum medical improvement (MMI), IR and extent of injury; and the date of MMI is March 26, 2007. The claimant testified that he was in a motor vehicle accident (MVA) and injured his back, neck, and right shoulder. Medical records in evidence also reflect that the claimant chipped some of his teeth in the MVA and had a concussion which resolved.

The hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to cervical radiculopathy at C5-6 is supported by sufficient evidence and is affirmed.

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.

Dr. L examined the claimant on March 26, 2007, and certified the claimant reached MMI on March 26, 2007, with a 17% IR 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). Dr. L placed the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category I: Complaints or Symptoms for 0%; DRE Cervicothoracic Category I: Complaints or Symptoms for 0%; and assessed 0% impairment for both the teeth and the head. Dr. L assessed 17% impairment for the claimant's right shoulder

combining 6% loss of range of motion (ROM) upper extremity (UE) impairment with 24% UE impairment for a total shoulder resection arthroplasty under Table 27 on page 3/61 of the AMA Guides.

The claimant had shoulder surgery on March 30, 2006, and the operative report of that date was in evidence. The procedures performed as listed in the operative report were: arthroscopy, right shoulder; arthroscopic Bankhart repair, right shoulder and Neer arthroscopic subacromial decompression, right shoulder. In evidence was a peer review from (Dr. B), which evaluated the IR assessed by Dr. L. Dr. B commented that no total shoulder resection arthroplasty was performed.

A letter of clarification was sent to Dr. L which included a copy of the report from Dr. B. In his response, Dr. L acknowledged that the subacromial arthroplasty was the procedure performed and that nothing in the AMA Guides provides for a rating of the acromioplasty. Dr. L stated that he "extrapolated and rated the acromioplasty as the clavicle resection" and therefore would remove 10% from the rating but allow 8% impairment for loss of ROM for the right shoulder. Dr. L submitted a new Report of Medical Evaluation (DWC-69) with the stipulated date of MMI and an 8% IR.

However, a review of Dr. L's initial rating provides that Dr. L did not assess 10% UE impairment for a resection of the distal clavicle but rather assessed 24% UE impairment for a total shoulder resection arthroplasty. Further, the worksheets attached to Dr. L's initial rating provide that the ROM measurements for loss of motion of the claimant's right shoulder resulted in 6% UE impairment which would result in 4% whole person impairment, using Table 3 on page 3/20 of the AMA Guides. In his subsequent assessment of impairment of 8%, Dr. L did not provide additional worksheets or further explain why impairment for the ROM of the right shoulder should be 8% rather than the 4% whole person impairment assessed in his evaluation of March 26, 2007. Accordingly, we reverse the hearing officer's determination that the claimant's IR is 8%.

As previously discussed, Dr. L also assessed a 17% IR but that rating cannot be adopted because it includes impairment assessed for a surgical procedure that the claimant did not have.

The only other certification in evidence is from the claimant's treating doctor, (Dr. A). Dr. A certified that the claimant reached MMI on March 26, 2007, based on an examination performed on June 29, 2010. Dr. A placed the claimant in DRE Cervicothoracic Category III: Radiculopathy for 15%; DRE Lumbosacral Category II: Minor Impairment 10%; and 8% for the right shoulder (which included 9% UE impairment for loss of ROM and 6% impairment for crepitation). As previously noted, the hearing officer's determination that the compensable injury does not extend to cervical radiculopathy at C5-6 is affirmed. Further, the report from Dr. A does not indicate that he considered any impairment for the head or teeth. For these reasons, the IR assessed by Dr. A cannot be adopted.

There is no other IR in evidence. Therefore, we remand the IR issue to the hearing officer. On remand, the hearing officer is to determine whether Dr. L is still qualified and available to be the designated doctor, and if so, request that Dr. L rate the compensable injury in accordance with the rating criteria in the AMA Guides based on the claimant's condition as of the stipulated date of MMI of March 26, 2007. The hearing officer should inform the designated doctor of the discrepancy of his ROM measurements for the right shoulder and assessment of impairment for ROM of the right shoulder. The hearing officer is to provide the designated doctor's response to the parties and allow the parties an opportunity to respond and then make a determination regarding the IR. If Dr. L is no longer qualified and available to serve as the designated doctor then another designated doctor is to be appointed pursuant to 28 TEX. ADMIN. CODE § 127.5(c) (Rule 127.5(c)) to determine the claimant's IR as of the MMI date of March 26, 2007.

### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of \_\_\_\_\_, does not extend to cervical radiculopathy at C5-6.

We reverse the hearing officer's determination that the claimant's IR is 8% and remand the IR issue to the hearing officer for further action 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 hearing officer, 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 **OLD REPUBLIC 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 78701-3232.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge