

APPEAL NO. 120517  
FILED MAY 25, 2012

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 convened on August 31, 2011, with the record closing on February 17, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The disputed issues were:

1. Does the compensable injury sustained on [date of injury], extend to internal derangement of the left knee, chondromalacia of the left patella, C5-6 bulge, temporal mandibular joint (TMJ) dysfunction, post-concussion syndrome, left elbow sprain, left shoulder adhesive capsulitis, and partial supraspinatus tendon tear of the left shoulder?
2. Does the [respondent/cross-appellant (claimant)] have disability from September 29, 2010, through June 2, 2011, as a result of the compensable injury sustained on [date of injury]?
3. What is the date of maximum medical improvement [(MMI)]?
4. What is the [c]laimant's impairment rating [(IR)]?

The hearing officer determined that: (1) the compensable injury of [date of injury], does extend to post-concussion syndrome but does not extend to internal derangement of the left knee, chondromalacia of the left patella, C5-6 bulge, TMJ dysfunction, left elbow sprain, left shoulder adhesive capsulitis, and partial supraspinatus tendon tear of the left shoulder; (2) the claimant reached MMI on January 16, 2012; and (3) the claimant's IR is 0%. The hearing officer did not make a conclusion of law or enter a decision on disability.

The appellant/cross-respondent (carrier) appealed the hearing officer's determination that the claimant's compensable injury of [date of injury], extends to post-concussion syndrome. The claimant cross-appealed the hearing officer's determinations on MMI/IR and those extent-of-injury determinations adverse to the claimant. The carrier filed a response to the claimant's cross-appeal. The appeal file does not contain a response from the claimant to the carrier's appeal

## DECISION

Affirmed in part, reversed and rendered in part and reversed and remanded in part.

It is undisputed that on [date of injury], the claimant was a cement truck driver and was involved in a single motor vehicle roll over accident. In a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11), dated June 16, 2011, the carrier accepted as compensable a left clavicle fracture, lacerations to the arms and face, a contusion to the chest wall, a contusion to the head and soft tissue myofascial strain of the paravertebral musculature of the cervical spine. The medical records in evidence include emergency medical records from a medical center as well as diagnostic tests and reports from several doctors. [Dr. O] testified for the carrier at the CCH.

## EXTENT OF INJURY

The hearing officer's determinations that the compensable injury of [date of injury], extends to the post-concussion syndrome but does not extend to internal derangement of the left knee, chondromalacia of the left patella, C5-6 bulge, TMJ dysfunction, left elbow sprain, left shoulder adhesive capsulitis, and partial supraspinatus tendon tear of the left shoulder are supported by sufficient evidence and are affirmed.

## DISABILITY

The hearing officer made an unappealed finding that the "compensable injury was a cause of [the] [c]laimant's inability to obtain and retain employment at wages equivalent to his pre-injury wage beginning on September 29, 2010, through June 2, 2011." The hearing officer did not make a conclusion of law on disability and did not include disability in the Decision portion of the decision and order. We reverse the hearing officer's decision as incomplete and render a new decision that the claimant had disability beginning on September 29, 2010, through June 2, 2011.

## MMI AND 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 Texas Department

of Insurance, Division of Workers' Compensation (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 pertinent part that the assignment of an IR shall be based on the injured worker's condition as of the MMI date considering the medical records 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 [0%] [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 claimant had surgery for a nonunion left clavicle fracture on March 22, 2010, when a rod was implanted in the clavicle.

[Dr. D] was the first designated doctor. Dr. D examined the claimant on September 28, 2010, certified that the claimant reached clinical MMI on that date and assessed an 11% IR. Dr. D noted an MRI scan of the left shoulder on September 20, 2010, and a partial tear of the supraspinatus tendon and a history that the claimant had surgery with internal fixation of the clavicle fracture on March 22, 2010. Dr. D rated the

claimant's injury using range of motion measurements of the left shoulder to arrive at an 18% upper extremity impairment which was converted in Table 3, page 3/20 of the AMA Guides to an 11% whole person IR. Dr. D's report cannot be adopted because he did not rate the entire compensable injury, to include lacerations of the arm and face, contusion to the head, contusion to the chest wall, a cervical strain and post-concussion syndrome.

The claimant had a second surgery for partial hardware removal of the clavicle on January 6, 2011.

In evidence is a Report of Medical Evaluation (DWC-69) and narrative dated June 2, 2011, from [Dr. Z], a doctor selected by the treating doctor acting in place of the treating doctor. Dr. Z examined the claimant on June 2, 2011, certified clinical MMI on that date and assessed a 15% IR. Dr. Z mentioned a number of conditions but did not rate the administratively determined compensable condition of post-concussion syndrome. Dr. Z combined the 11% IR as determined by Dr. D for the left shoulder with a 5% impairment for Diagnosis-Related Estimate Cervicothoracic Category II: Minor Impairment to arrive at the 15% IR. Dr. Z did not rate the entire compensable injury namely the post-concussion syndrome, and therefore his report cannot be adopted.

After the CCH, the hearing officer advised the parties that she was reopening the record in order to send the designated doctor, Dr. D, a letter of clarification (LOC). Dispute Resolution Information System notes in evidence establish that Dr. D was no longer available. Subsequently, [Dr. S] was appointed as the designated doctor. In a report dated November 28, 2011, Dr. S certified that the claimant was not at MMI. In the narrative portion of his report, Dr. S listed the records he had received and diagnosed a left clavicle injury, an abnormal TMJ and lacerations of the arms and face, contusions of the chest wall which Dr. S said were "of no significance." The hearing officer, in a LOC dated January 12, 2012, wrote Dr. S stating "that statutory [MMI] is January 16, 2012." The hearing officer sent another LOC asking for alternative ratings stating:

At the time of your examination, did the [c]laimant reach MMI for the following conditions: left clavicle fracture, lacerations of the arms and face, contusion to the chest wall, contusion to the head, soft tissue myofascial strain of the paravertebral musculature of the cervical spine, and post-concussion syndrome? If the [c]laimant reached MMI for these conditions, what is the [IR]? If you have found that [the] [c]laimant has reached MMI, a new DWC-69 will need to be submitted. Similarly, did the claimant reach MMI, as of the time of your

examination, for the following conditions: left clavicle fracture, lacerations of the arms and face, contusion to the chest wall, contusion to the head, soft tissue myofascial strain of the paravertebral musculature of the cervical spine, post-concussion syndrome, TMJ dysfunction, left shoulder adhesive capsulitis, and partial supraspinatus tendon tear of the left shoulder? If the [c]laimant has reached [MMI], what is the [IR] for those conditions? If the [c]laimant has reached MMI for those conditions, a new DWC-69 will need to be submitted.

Dr. S responded with an "Addendum" dated January 19, 2012, stating:

The claimant reached statutory MMI as of [January 16, 2012], for the diagnoses of left clavicle fracture, lacerations to arm and face, chest wall contusion, head contusion, cervical strain, post-concussion syndrome, TMJ dysfunction and left shoulder injuries.

The [IR] for these conditions is 0% whole person impairment.

An amended DWC-69 is in evidence again certifying that the claimant has not reached MMI but is expected to reach MMI on January 16, 2012, based on his examination of November 28, 2011. No alternative rating certifying an MMI date is in evidence. Nonetheless, the hearing officer found that the claimant reached MMI on January 16, 2012, with a 0% IR. The hearing officer erred in adopting the certification from Dr. S that the claimant reached MMI on January 16, 2012, with a 0% IR because there was no certification in evidence with this MMI date and IR and because the proposed MMI date is prospective based on Dr. S's examination of November 28, 2011. Dr. S's amended DWC-69 states that the claimant is not at MMI and only is projected to reach MMI "on or about [January 16, 2012]" based on his November 28, 2011, examination. Dr. S's statement that the claimant reached MMI as of January 16, 2012, with a 0% IR is not on a DWC-69 and includes a rating for TMJ dysfunction which the hearing officer found, and we have affirmed, was not part of the compensable injury. A statutory MMI date of January 16, 2012, based on an examination of November 28, 2011, would be a prospective. Further, Dr. S does not explain specific clinical findings related to each impairment including a 0% IR. See Rule 130.1(c)(3)(D)(i).

We reverse the hearing officer's determinations that the claimant reached MMI on January 16, 2012, with a 0% IR and remand the issues of MMI and IR for further action consistent with this decision.

## REMAND INSTRUCTIONS

The designated doctor for MMI and IR is Dr. S. On remand, the hearing officer is to determine if Dr. S is still qualified and available to serve as the designated doctor. If Dr. S is no longer qualified or available to serve as the designated doctor, another designated doctor is to be appointed pursuant to Rule 127.5(c). The hearing officer is to either obtain a stipulation on the date of statutory MMI or make a finding on what the date of statutory MMI is. The designated doctor is to give an opinion on MMI and IR for the compensable injury which includes the left clavicle fracture, lacerations of the arms and face, contusion to the chest wall, contusion to the head, soft tissue myofascial strain of the paravertebral musculature of the cervical spine, and post-concussion syndrome based on the claimant's conditions as of the date of MMI (which cannot be after the date of statutory MMI as determined by the hearing officer) in accordance with the AMA Guides and Rule 130.1(c). The hearing officer is then to make a determination on the MMI and IR that is supported by the evidence and is 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 **NEW HAMPSHIRE 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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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Cynthia A. Brown  
Appeals Judge

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Margaret L. Turner  
Appeals Judge