

APPEAL NO. 132235  
FILED NOVEMBER 26, 2013

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 July 29, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the issues before him, the hearing officer determined that: (1) the compensable injury of [date of injury], extends to a left shoulder rotator cuff syndrome/tear; (2) the compensable injury of [date of injury], does not extend to pain disorder associated with work related medical condition and psychological factors and depressive disorder; (3) the appellant/cross-respondent (claimant) did not have disability resulting from an injury sustained on [date of injury], from December 17, 2010, through July 20, 2012; (4) the date of maximum medical improvement (MMI) is December 16, 2010; and (5) the claimant's impairment rating (IR) is zero percent.

The claimant appealed the hearing officer's disability, MMI, and IR determinations, as well as the extent-of-injury determination adverse to him, contending that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be manifestly unjust. The respondent/cross-appellant (carrier) responded, urging affirmance of the hearing officer's determinations appealed by the claimant. The carrier cross-appealed the hearing officer's extent-of-injury determination adverse to it, contending that there was insufficient medical causation to support the hearing officer's determination that the compensable injury extends to left shoulder rotator cuff syndrome/tear. The appeal file does not contain a response to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The carrier represented at the CCH and the hearing officer found in an unappealed finding of fact that the accepted compensable injury is a left shoulder strain. The claimant testified the injury occurred when he tripped going upstairs and grabbed onto the stair rail with his left arm to prevent himself from falling.

**EXTENT OF INJURY, DISABILITY, AND MMI**

The hearing officer's determinations that the compensable injury of [date of injury], extends to a left shoulder rotator cuff syndrome/tear but not to pain disorder associated with work related medical condition and psychological factors and depressive disorder; that the claimant did not have disability resulting from an injury

sustained on [date of injury], from December 17, 2010, through July 20, 2012; and that the date of MMI is December 16, 2010, are supported by sufficient evidence and are 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 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 hearing officer determined that the claimant's IR is zero percent per [Dr. H], the Division-appointed designated doctor for MMI, IR, and the claimant's ability to return to work.

Dr. H examined the claimant on December 16, 2010, and certified in a Report of Medical Evaluation (DWC-69) dated the date of examination that the claimant reached clinical MMI on December 16, 2010, with a four percent IR. Dr. H's four percent IR is based on range of motion (ROM) measurements of the claimant's left shoulder. In an attached narrative report Dr. H stated that "[u]pon review of the medical records and physical examination, the [claimant] shows no diagnosis related impairment for the left shoulder that would be ratable."

On August 7, 2013, the hearing officer sent Dr. H a letter of clarification, notifying Dr. H that although he had assessed a rating for the claimant's left shoulder rotator tear, which the hearing officer had determined to be a part of the compensable injury, Dr. H omitted a left shoulder sprain/strain, which the carrier had accepted as compensable. The hearing officer requested Dr. H to include the left shoulder sprain/strain in his MMI/IR determination.

Dr. H responded on August 9, 2013. Dr. H stated in his response that "[i]ncluding the left shoulder sprain/strain into the diagnosis my opinion in regards to MMI/IR remains unchanged. The shoulder sprain/strain would have resolved before the rotator cuff tear which was part of the compensable injury." Dr. H attached an amended DWC-69 dated August 9, 2013, certifying the claimant reached clinical MMI on December 16, 2010, with a four percent IR.

The hearing officer discusses Dr. H's original and amended DWC-69 in the Background Information section of the decision. Regarding Dr. H's original DWC-69, the hearing officer correctly states that Dr. H rated the claimant based upon a left shoulder rotator cuff repair and placed the claimant at MMI as of December 16, 2010, with a four percent IR. However, regarding Dr. H's amended DWC-69, the hearing officer incorrectly states that Dr. H opined that the IR was zero percent as of the MMI date of December 16, 2010. The hearing officer states that Dr. H's certification is adoptable, and found that the December 16, 2010, date of MMI and zero percent IR by Dr. H is not contrary to the preponderance of the evidence. However, as discussed above, Dr. H assessed a four percent IR for the claimant's compensable injury, not a zero percent IR as determined by the hearing officer. There is not a DWC-69 in evidence from Dr. H or any other doctor certifying a zero percent IR.

The hearing officer is clear in his decision that he found Dr. H's amended DWC-69 was supported by a preponderance of the evidence, and mistakenly determined that the claimant's IR is zero percent rather than four percent, which is the IR Dr. H actually assessed. Accordingly, we reverse the hearing officer's determination that the claimant's IR is zero percent as being unsupported by the evidence, and we render a new decision that the claimant's IR is four percent.

### **SUMMARY**

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to a left shoulder rotator cuff syndrome/tear.

We affirm the hearing officer's determination that the compensable injury of [date of injury], does not extend to pain disorder associated with work related medical condition and psychological factors and depressive disorder.

We affirm the hearing officer's determination that the claimant did not have disability resulting from an injury sustained on [date of injury], from December 17, 2010, through July 20, 2012.

We affirm the hearing officer's determination that the date of MMI is December 16, 2010.

We reverse the hearing officer's determination that the claimant's IR is zero percent and we render a new decision that the claimant's IR is four percent.

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 78701-3218.**

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Carisa Space-Beam  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Margaret L. Turner  
Appeals Judge