

APPEAL NO. 160851  
FILED JUNE 22, 2016

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 April 4, 2016, in Austin, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the (date of injury), compensable injury does not extend to left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, or degenerative joint disease; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 23, 2014; and (3) the claimant's impairment rating (IR) is 9%.

The claimant appealed the hearing officer's determinations, arguing that the evidence established that the compensable injury extends to the disputed conditions and that the preponderance of the evidence is contrary to the MMI and IR certified by Dr. Abalihi (Dr. A), the Texas Department of Insurance, Division of Workers' Compensation (Division) designated doctor and adopted by the hearing officer.

The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

The parties stipulated that: (1) the claimant sustained a compensable injury on (date of injury); (2) the carrier has accepted as compensable a left shoulder rotator cuff tear; (3) the designated doctor, Dr. A, certified that the claimant reached MMI on June 23, 2014, and assigned an IR of 9%; (3) the treating doctor referral, Dr. Forster (Dr. F), certified that the claimant reached MMI on the statutory date of November 21, 2015, and assigned an IR of 15%; (4) the date of statutory MMI is November 21, 2015.

The claimant sustained a compensable left shoulder injury on (date of injury), when he was involved in a motor vehicle accident. The claimant underwent a surgical procedure to repair his left rotator cuff tear on January 29, 2014. Subsequently, the surgeon, Dr. Calvo (Dr. C), stated that the claimant's surgery was at least 50% unsuccessful and that the claimant would need a reverse total shoulder arthroplasty at some point in the future. On June 23, 2014, Dr. C indicated that there was nothing more he could do for the claimant and suggested reeducation because the claimant could no longer perform his pre-injury duties; however, on October 24, 2014, Dr. C indicated that the claimant should proceed with the reverse shoulder arthroplasty

because of his unrepairable rotator cuff. The claimant testified that, following delays obtaining pre-approval, he was finally able to obtain the reverse total shoulder arthroplasty on December 28, 2015.

### **EXTENT OF INJURY**

The hearing officer notes in the Discussion section of her decision that the preponderance of the evidence is contrary to the claimant's position that the compensable injury extends to left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, and degenerative joint disease.

The hearing officer states in Finding of Fact 4:

4. [The] [c]laimant's left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, and degenerative joint disease were not caused, enhanced, accelerated, or worsened by the compensable injury.

The hearing officer states further in Conclusion of Law 3:

3. The compensable injury of (date of injury), does not extend to or include left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, and degenerative joint disease.

However, in the Decision section, the hearing officer mistakenly states, in part:

The compensable injury of (date of injury), extend to or include left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, and degenerative joint disease.

The hearing officer's Finding of Fact 4 and Conclusion of Law 3 are supported by sufficient evidence; however, she inadvertently omitted the words "does not" from the decision section. We accordingly reform the hearing officer's decision to provide that the compensable injury of (date of injury), does not extend to left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, or degenerative joint disease.

## 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 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.

Dr. A, the designated doctor in this case, examined the claimant on August 22, 2014, and determined that the claimant reached MMI on June 23, 2014, in accordance with Dr. C’s report of that date indicating that the claimant’s condition had plateaued. Dr. A noted that Dr. C had indicated additional surgery may be necessary, but that no surgery was pending at that time. 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. A assigned a whole person IR of 9% based upon a 15% upper extremity (UE) impairment for range of motion (ROM) loss of the left UE.

We note that Dr. A did not include a 10% UE IR for a distal clavicle resection under Table 27 on page 3/61 of the AMA Guides. It was undisputed by the parties that the claimant underwent a distal clavicle resection on January 29, 2014, for repair of his torn left rotator cuff. The Appeals Panel has previously held that impairment for a distal clavicle resection that was received as treatment for the compensable injury results in 10% UE impairment under Table 27 of the AMA Guides, which is then combined with ROM impairment, if any, as provided by the AMA Guides. See Appeals Panel Decision 151158-s, decided August 4, 2015. Because Dr. A failed to rate the distal clavicle resection, which the claimant received as treatment for the compensable injury, and as directed by the AMA Guides, we reverse the hearing officer’s determination that the claimant reached MMI on June 23, 2014, with a 9% IR.

There is one other certification of MMI/IR in evidence. Dr. F, who examined the claimant on December 21, 2015, at the instance of the claimant's treating doctor, certified that the claimant reached MMI on the statutory date of November 21, 2015, with a whole person IR of 15%, resulting from a 25% UE impairment obtained by combining 17% UE impairment for ROM loss with 10% UE impairment for the distal clavicle resection under Table 27 of the AMA Guides. In certifying MMI on the statutory date, Dr. F points out that although Dr. C indicated the claimant was at MMI in his report of June 23, 2014, he determined on follow-up that the recommended reverse total shoulder arthroplasty should be performed as soon as practicable rather than several years later as he had originally suggested. Dr. F's certification of MMI/IR was performed in accordance with the AMA Guides and is adoptable.

Accordingly, we render a new decision that the claimant reached MMI on November 21, 2015, with an IR of 15% as determined by Dr. F.

### **SUMMARY**

We reform the hearing officer's determination that the compensable injury of (date of injury), extend to or include left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, and degenerative joint disease to provide that the compensable injury of (date of injury), does not extend to left shoulder degenerative changes and osteoarthritis, grade 3 degeneration of the articular surface of the humeral head and glenoid surface, or degenerative joint disease. The hearing officer's decision is affirmed as reformed.

We reverse the hearing officer's determination that the claimant reached MMI on June 23, 2014, and render a new decision that the claimant reached MMI on November 21, 2015.

We reverse the hearing officer's determination that the claimant's IR is 9% and render a new decision that the claimant's IR is 15%.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TX 75201.**

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K. Eugene Kraft  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge