

APPEAL NO. 181194  
FILED JUNE 28, 2018

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 November 13, 2017, and continued on April 16, 2018, 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 of (date of injury), does not extend to left shoulder rotator cuff tear and disc herniations at L3-4 and L4-5; (2) the appellant (claimant) reached maximum medical improvement (MMI) on December 7, 2016; and (3) the claimant's impairment rating (IR) is 5%.

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

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that on (date of injury), the claimant sustained an injury in a motor vehicle accident while in the course and scope of his employment. The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that consisted of a thoracic strain, lumbar strain, head contusion, left shoulder strain, resolved left rotator cuff tear, facial laceration, left arm laceration and left leg laceration. The claimant had surgery to repair the left shoulder rotator cuff tear on April 22, 2016. In a medical report dated July 26, 2016, the claimant's treating doctor, (Dr. L), states that the claimant is at three months post left shoulder surgery, and notes that the claimant is undergoing therapy and complaining of left shoulder crackling, popping and pain. The parties stipulated that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. CL) as the designated doctor to address the issues of extent of injury, MMI and IR.

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

That portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to disc herniations at L3-4 and L4-5 is supported by sufficient evidence and is affirmed.

That portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear is against the great weight and preponderance of the evidence.

As previously mentioned, the parties stipulated, in part, that the compensable injury of (date of injury), extends to a "resolved" left shoulder rotator cuff tear. We note that the extent-of-injury issue was not amended or limited to a new or recurrent left shoulder rotator cuff tear injury, but rather the issue was broadly worded to address a left shoulder rotator cuff tear injury. The parties stipulated that this condition is part of the compensable injury.

The ALJ made a finding of fact that the claimant's condition of "a (new) left shoulder rotator cuff tear" did not arise out of or naturally flow from the compensable injury, nor was the condition, if pre-existing, enhanced, worsened, or accelerated by the work injury of (date of injury). However, the ALJ made a conclusion of law and decision which states, in part, that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear. The ALJ's conclusion of law and decision does not address a new or recurrent left shoulder rotator cuff tear.

In Appeals Panel Decision 150844, decided June 18, 2015, the parties stipulated the compensable injury extended to status post right triceps repair. At issue was whether the compensable injury extended, in part, to a right arm triceps tendon tear. An operative report in evidence showed a repair of the right triceps muscle and pre- and post-operative diagnosis of a rupture of the triceps tendon of the right elbow. The Appeals Panel reversed the ALJ's extent-of-injury determination as against the great weight and preponderance of the evidence and rendered a new decision based on the parties' stipulation and the operative report that the compensable injury extends to right arm triceps tendon tear.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See *Cain v. Bain*, *supra*.

The parties stipulated that the compensable injury extends to a resolved left shoulder rotator cuff tear. The extent-of-injury issue was not limited to a new or recurrent left shoulder rotator cuff tear; therefore, we hold that the ALJ's determination that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear is against the great weight and preponderance of the evidence. Accordingly, we reverse the ALJ's determination that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear, and we render a new decision that the compensable injury extends to a left shoulder rotator cuff tear.

### **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 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. CL, the designated doctor, examined the claimant on January 19, 2018, and certified on that same date that the claimant reached MMI on December 7, 2016, with a 10% 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. CL considered and rated the claimant's compensable injury with the exception of the left arm laceration and facial laceration. Also, Dr. CL considered and rated a left shoulder impingement with a SLAP tear, which was not part of the compensable injury.

On February 13, 2018, the ALJ sent a letter of clarification (LOC) to Dr. CL informing her that she did not consider and rate the left arm and facial lacerations, which are part of the compensable injury. Also, the ALJ informed Dr. CL that the left shoulder impingement with a SLAP tear had not been identified, agreed to, or adjudicated to be part of the compensable injury.

On February 19, 2018, Dr. CL responded to the LOC explaining that the claimant had no residual issues and/or impairments associated with the left arm and facial lacerations, and that these lacerations would not alter the overall impairment. Dr. CL assessed an 8% impairment based on loss of range of motion for the left shoulder which converts to a 5% whole person impairment using Table 3 of the AMA Guides. Dr. CL certified that the claimant reached MMI on December 7, 2016, with a 5% IR using the AMA Guides. Dr. CL considered and rated the entire compensable injury in this certification. The ALJ's determinations that the claimant reached MMI on December 7, 2016, with a 5% IR are supported by sufficient evidence and are affirmed.

### **SUMMARY**

We affirm that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to disc herniations at L3-4 and L4-5.

We reverse that portion of the ALJ's determination that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear, and we render a new decision that the compensable injury extends to a left shoulder rotator cuff tear.

We affirm the ALJ's determinations that the claimant reached MMI on December 7, 2016, with a 5% IR.

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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Veronica L. Ruberto  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge