

APPEAL NO. 182544
FILED JANUARY 16, 2019

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 October 11, 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 appellant (claimant) reached maximum medical improvement (MMI) on November 16, 2017; (2) the claimant's impairment rating (IR) is three percent; and (3) the claimant did not have disability from November 17, 2017, through the date of the CCH resulting from an injury sustained on (date of injury). The ALJ also determined that the compensable injury of (date of injury), does not extend to a right shoulder rotator cuff tear, right shoulder tendon tears, right shoulder labral tears, or right shoulder impingement.

The claimant appealed the ALJ's MMI, IR, and disability determinations. The claimant also contends that the ALJ erred in issuing a decision regarding extent of the compensable injury because that issue was not actually litigated based on the ALJ granting the respondent's (carrier) motion to remove that issue. The carrier responded, urging affirmance of the appealed determinations. The carrier also noted in its response that the claimant agreed at the CCH to withdraw the extent-of-injury issue.

DECISION

Affirmed in part and reversed by striking in part.

The parties stipulated, in part, that the claimant sustained a compensable injury in the form of at least a right shoulder contusion. The claimant testified he was injured when metal exhaust piping fell on him from the top of a pallet he was pulling.

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

The record reflects that whether the (date of injury), compensable injury extended to a right shoulder rotator cuff tear, right shoulder tendon tears, right shoulder labral tears, and right shoulder impingement, MMI, IR, and whether the claimant had disability from November 17, 2017, to the present were issues to be discussed at a benefit review conference (BRC). The carrier timely responded to the BRC Report, which included the extent-of-injury issue, and requested that issue be removed because the claimant did not appear for either BRC setting and extent of injury was not discussed. The carrier's request was granted. On October 10, 2018, the day before the CCH, the claimant filed a motion to add the issue of extent of injury and for a continuance. However, at the CCH the claimant through his ombudsman agreed to withdraw the extent-of-injury issue and request for continuance and proceed only on the issues of MMI, IR, and disability.

Although the parties agreed at the CCH that the extent-of-injury issue was withdrawn, the ALJ made a determination on that issue. The claimant contended on appeal that the parties did not litigate that issue, and requested the case be remanded to the ALJ so the parties could litigate the extent-of-injury issue. However, as noted above the claimant at the CCH withdrew his motion to add the extent-of-injury issue and agreed to proceed on the issues of MMI, IR, and disability. Therefore, the extent-of-injury issue was no longer before the ALJ to determine. In her Decision and Order the ALJ determined that the compensable injury of (date of injury), does not extend to a right shoulder rotator cuff tear, right shoulder tendon tears, right shoulder labral tears, and right shoulder impingement. Because the extent-of-injury issue was withdrawn and no longer before the ALJ to determine, the ALJ exceeded the scope of the disputed issues. Accordingly, we reverse by striking the ALJ's determination that the compensable injury of (date of injury), does not extend to a right shoulder rotator cuff tear, right shoulder tendon tears, right shoulder labral tears, and right shoulder impingement.

MMI/IR

The ALJ determined that the claimant reached MMI on November 16, 2017, with a three percent IR as opined by (Dr. H), the post-designated doctor required medical examination doctor. Dr. H examined the claimant on (date), and made clear in his attached narrative report that he based his MMI and IR opinion on a right shoulder contusion. As noted above, the parties stipulated that the compensable injury extends to "at least a right shoulder contusion." Dr. H considered and rated the compensable injury in this case. The ALJ's determinations that the claimant reached MMI on November 16, 2017, with a three percent IR are supported by sufficient evidence and are affirmed.

DISABILITY

The ALJ's determination that the claimant did not have disability from November 17, 2017, through the date of the CCH resulting from an injury sustained on (date of injury), is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the ALJ's determination that the claimant reached MMI on November 16, 2017, as certified by Dr. H.

We affirm the ALJ's determination that the claimant's IR is three percent as certified by Dr. H.

We affirm the ALJ's determination that the claimant did not have disability from November 17, 2017, through the date of the CCH resulting from an injury sustained on (date of injury).

We reverse by striking the ALJ's determination that the compensable injury of (date of injury), does not extend to a right shoulder rotator cuff tear, right shoulder tendon tears, right shoulder labral tears, and right shoulder impingement as exceeding the scope of the issues before the ALJ to determine.

The true corporate name of the insurance carrier is **SECURITY NATIONAL 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.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge