

APPEAL NO. 191655  
FILED NOVEMBER 6, 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 August 13, 2019, in (city), Texas, with (administrative law judge) 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 a left shoulder rotator cuff tear; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 18, 2018; (3) the claimant's impairment rating (IR) is zero percent; and (4) the claimant did not have disability resulting from a compensable injury sustained on (date of injury), from December 13, 2018, through the date of the CCH.

The claimant appealed the ALJ's determinations regarding extent of the compensable injury, MMI, IR, and disability. The respondent (carrier) responded to the claimant's appeal, urging affirmance on the issues of extent of injury, IR, and disability. The carrier additionally requested a clerical correction on the issue of MMI.

#### DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the accepted compensable injury is a left shoulder strain. The evidence indicates that the claimant, a car hauler truck driver, was injured when a loose tow hitch skidded and bounced on the highway, and came through the claimant's windshield while he was driving.

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 AND DISABILITY

The ALJ's determinations that: (1) the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear; and (2) the claimant did not have disability resulting from a compensable injury sustained on (date of injury), from

December 13, 2018, through the date of the CCH are supported by sufficient evidence and are affirmed.

### **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 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 part, 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 ALJ determined that the claimant reached MMI on October 18, 2018, with a zero percent IR based on a certification by (Dr. W), the post-designated doctor required medical examination doctor. Dr. W examined the claimant on April 18, 2019, and issued alternate certifications. In the certification that was adopted by the ALJ, Dr. W’s narrative report indicates that she considered the left shoulder strain and a full thickness rotator cuff tear of the left shoulder, a condition that we have affirmed is not compensable. As this certification is based on a condition that is not compensable, the ALJ’s determinations that the claimant reached MMI on October 18, 2018, with a zero percent IR is not supported by the evidence. Accordingly, we reverse the ALJ’s determinations on MMI and IR.

There are three other certifications of MMI/IR in evidence. (Dr. A), the first designated doctor assigned to determine MMI/IR, examined the claimant on October 18, 2018, and found that the claimant had not reached MMI but was expected to on or about January 18, 2019. In his narrative report, Dr. A stated that the claimant needs a specialist referral for evaluation of a left inguinal lesion, a condition that has not been determined to be part of the compensable injury, was not stipulated to as compensable by the parties, and was not actually litigated as part of the extent-of-injury issue in the CCH. He additionally stated that the claimant continues to have significant dysfunction

with the left shoulder and has been recommended for surgical intervention. As this certification considers conditions that are not part of the compensable injury, it cannot be adopted.

(Dr. G), the second designated doctor to determine MMI/IR, examined the claimant on July 13, 2019, and certified that the claimant reached MMI on October 18, 2018, with a zero percent IR. Dr. G's narrative report indicates that he considered a left shoulder strain and a full thickness rotator cuff tear of the left shoulder, a condition that we have affirmed is not compensable. As Dr. G's certification considers a condition that is not part of the compensable injury, it cannot be adopted.

Dr. W's alternate certification considered only the left shoulder strain and placed the claimant at MMI on July 26, 2018, with a zero percent IR. In her narrative report, Dr. W explained that the claimant completed six visits of physical therapy and neither an MRI nor surgical consult would be necessary for a shoulder strain. Regarding IR, Dr. W stated she invalidated the range-of-motion measurements and assigned a zero percent 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), because she felt there was pain inhibition and poor effort due to non-injury related factors. This certification by Dr. W considered and rated the compensable injury and is supported by the evidence. Accordingly, we render a new decision that the claimant reached MMI on July 26, 2018, with a zero percent IR.

### **SUMMARY**

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a left shoulder rotator cuff tear.

We affirm the ALJ's determination that the claimant did not have disability resulting from a compensable injury sustained on (date of injury), from December 13, 2018, through the date of the CCH.

We reverse the ALJ's determination that the claimant reached MMI on October 18, 2018, with a zero percent IR, and we render a new decision that the claimant reached MMI on July 26, 2018, with a zero percent IR.

The true corporate name of the insurance carrier is **VANLINER 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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Cristina Beceiro  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge