

APPEAL NO. 200263
FILED APRIL 8, 2020

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 January 15, 2020, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the sole disputed issue by deciding that the compensable injury of (date of injury), does not extend to "right shoulder; full thickness rotator cuff tear with tendon retraction and atrophy of the supraspinatus and infraspinatus muscle, full thickness tear of the subscapularis tendon, or the subacromial subdeltoid bursa communicating with joint effusion." The appellant (claimant) appealed the ALJ's determination. The respondent (carrier) responded, urging affirmance of the ALJ's determination.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to a right shoulder contusion, right shoulder strain, and right shoulder sprain, and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. D) as the designated doctor to determine extent of injury, among other things. The claimant testified he injured his right shoulder when a nut he was trying to loosen suddenly released and caused him to fall on the ground.

The Benefit Review Conference (BRC) Report listed the disputed extent-of-injury issue as follows: Does the compensable injury of (date of injury), extend to the following conditions in the right shoulder: full thickness rotator cuff tear with tendon retraction and atrophy of the supraspinatus and infraspinatus muscle; full thickness tear of the subscapularis tendon, and fluid in the subacromial/subdeltoid bursa communicating with joint effusion? The parties agreed at the CCH on the record that the disputed extent-of-injury issue was as listed on the BRC Report. The ALJ inadvertently left off "the following conditions in the" right shoulder, and "fluid in" the subacromial/subdeltoid bursa communicating with joint effusion throughout his decision when referencing these conditions.

In explaining his rationale for his extent-of-injury determination, the ALJ stated the following:

[Dr. D] examined [the] [c]laimant on May 21, 2019, and determined that the accident or incident that resulted in the compensable injury was a substantial factor in bringing about all of the disputed conditions. [Dr. D]

described the diagnosis of the disputed conditions. In his report he opined: “[i]t is within medical probability that the mechanism of injury resulted in [the claimant] who was pain free and working normally prior to his fall, has a current condition related to his mechanism of injury”(emphasis added). [Dr. D] does not identify which condition or conditions is “a current condition” that he is referring to; nor does he explain how the mechanism of injury caused the disputed conditions.

However, the evidence reflects that the quote referenced by the ALJ and emphasized above was not made by Dr. D, but rather was made by (Dr. M), in a letter dated April 9, 2019. In that letter Dr. M stated the following: “[i]t is within medical probability that the mechanism of injury resulted in [the claimant] who was pain free and working normally prior to his fall has a current condition related to the mechanism of injury.”

We note that Dr. D responded to a letter of clarification on November 27, 2019; however, Dr. D does not make the statement referenced by the ALJ, nor is there any other report in evidence from Dr. D that contains the statement attributed to him by the ALJ. An Approval of Request for Designated Doctor Examination (OA32A) from the Division in evidence states that a designated doctor examination was scheduled to occur on May 21, 2019, with Dr. D; however, the evidence reflects that the examination actually occurred on June 4, 2019, not May 21, 2019, and there is no report from Dr. D dated May 21, 2019, or any report reflecting an exam date of May 21, 2019, in evidence. Dr. D discusses in a report dated June 24, 2019, his understanding of the mechanism of injury and “right shoulder full-thickness rotator cuff tear with tendon retraction and atrophy of the supraspinatus and infraspinatus muscles and full-thickness tear of the subscapularis tendon in the subacromial/subdeltoid bursa communicating with joint effusion.” Dr. D also stated the following:

. . . it is my medical opinion (based upon my education, training and experience), and within reasonable medical probability that the work related accident/incident/[mechanism of injury] caused, and was a substantial factor in bringing about . . . right shoulder full-thickness rotator cuff tear with tendon retraction and atrophy of the supraspinatus and infraspinatus muscles and full-thickness tear of the subscapularis tendon in the subacromial/subdeltoid bursa communicating with joint effusion, and without it, the additional injury or condition would not have occurred.

It is clear from the evidence that the ALJ incorrectly attributed a statement that was made by Dr. M to Dr. D. The ALJ has misstated the evidence in this case

regarding the opinion of Dr. D, the designated doctor who is entitled to presumptive weight, and based his determination in part on that misstatement of evidence. Because the ALJ's determination that the compensable injury does not extend to the claimed conditions is based in part on a misstatement of the evidence, we reverse the ALJ's determination that the compensable injury of (date of injury), does not extend to "right shoulder; full thickness rotator cuff tear with tendon retraction and atrophy of the supraspinatus and infraspinatus muscle, full thickness tear of the subscapularis tendon, or the subacromial subdeltoid bursa communicating with joint effusion."

As previously noted, the ALJ's extent-of-injury determination omits portions of the extent-of-injury issue as reflected on the BRC Report and agreed to by the parties at the CCH. We remand the issue of whether the compensable injury of (date of injury), extends to the following conditions in the right shoulder: full thickness rotator cuff tear with tendon retraction and atrophy of the supraspinatus and infraspinatus muscle; full thickness tear of the subscapularis tendon; and fluid in the subacromial/subdeltoid bursa communicating with joint effusion, to comply with the extent-of-injury issue that was properly before the ALJ.

REMAND INSTRUCTIONS

On remand the ALJ is to correct his misstatement of the evidence regarding Dr. D's extent-of-injury opinion. The ALJ shall consider all of the evidence and make a determination of whether the compensable injury of (date of injury), extends to the following conditions in the right shoulder: full thickness rotator cuff tear with tendon retraction and atrophy of the supraspinatus and infraspinatus muscle; full thickness tear of the subscapularis tendon; and fluid in the subacromial/subdeltoid bursa communicating with joint effusion.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **GRANITE STATE 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:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge