

APPEAL NO. 201175  
FILED SEPTEMBER 29, 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 was held on June 30, 2020, 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 post-traumatic stress disorder (PTSD), depression, anxiety, a lumbar disc herniation at L5-S1, or cervical disc herniations at C5-6 and C6-7; (2) the appellant (claimant) reached maximum medical improvement (MMI) on October 1, 2019; and (3) the claimant's impairment rating (IR) is three percent.

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

DECISION

Affirmed in part and reversed and rendered in part.

The claimant sustained multiple injuries on (date of injury), when he was riding in a company truck and it was involved in a head-on collision with a tractor-trailer. The parties stipulated, in part, that: (1) the carrier accepted a grade 1 cervical sprain/strain, grade 1 left shoulder sprain/strain, grade 1 lumbosacral sprain/strain, chest wall contusion, left rib contusion, right ear laceration, head contusion, and a mild traumatic brain injury as the compensable injury; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. L) as the designated doctor to determine MMI, IR, and the claimant's ability to return to work; and (3) the date of statutory MMI is August 19, 2020.

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).

**NEWLY DISCOVERED EVIDENCE**

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; *Black v. Wills*, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See APD 051405, decided August 9, 2005. The claimant submits for the first time on appeal various pictures of himself receiving treatment and of the damaged truck. We do not agree that the documents submitted by the claimant for the first time on appeal meet the requirements for newly discovered evidence. Therefore, the documents attached to the claimant's appeal were not considered by the Appeals Panel.

### **EXTENT OF INJURY**

The ALJ's determination that the compensable injury of (date of injury), does not extend to PTSD, depression, anxiety, a lumbar disc herniation at L5-S1, or cervical disc herniations at C5-6 and C6-7 is supported by sufficient evidence and is affirmed.

### **MMI**

The ALJ's determination that the claimant reached MMI on October 1, 2019, is supported by sufficient evidence and is affirmed.

### **IR**

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.

The ALJ determined that the claimant reached MMI on October 1, 2019, with a three percent IR in accordance with the certification of Dr. L, the designated doctor. Dr. L initially examined the claimant on February 20, 2019, and determined that the claimant was not at MMI due to still requiring treatment for the compensable injury. Dr.

L subsequently examined the claimant on September 25, 2019, and certified on November 13, 2019, that the claimant reached MMI on October 1, 2019, with a three 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).

Dr. L considered and rated the compensable conditions of a grade 1 cervical sprain/strain, grade 1 left shoulder sprain/strain, grade 1 lumbosacral sprain/strain, chest wall contusion, left rib contusion, right ear laceration, head contusion, and a mild traumatic brain injury. Dr. L's narrative report reflects that he assessed zero percent impairment for the cervical spine, placing the claimant in Cervicothoracic Diagnosis-Related Estimate (DRE) Category I: Complaints or Symptoms of the AMA Guides and zero percent impairment for the lumbar spine, placing the claimant in Lumbosacral DRE Category I: Complaints or Symptoms of the AMA Guides. Dr. L additionally assessed a zero percent impairment for the chest wall contusion, left rib contusion, right ear laceration, head contusion, and mild traumatic brain injury.

For the compensable injury to the left shoulder, Dr. L assessed a three percent upper extremity (UE) impairment based on range of motion deficits. Dr. L referenced figures found in the AMA Guides, Section 3.1j to calculate impairment for the shoulder. Dr. L's narrative report shows that he measured for the left shoulder 160° of flexion resulting in one percent impairment (Figure 38, page 3/43), 42° of extension resulting in one percent impairment (Figure 38, page 3/43), 160° of abduction resulting in one percent impairment (Figure 41, page 3/44), 40° of adduction resulting in zero percent impairment (Figure 41, page 3/44), 90° of external rotation resulting in zero percent impairment (Figure 44, page 3/45), and 70° of internal rotation resulting in zero percent impairment (Figure 44, page 3/45), which Dr. L calculated to be a three percent UE impairment. Dr. L incorrectly noted 70° of internal rotation results in zero percent impairment. Figure 44 on page 3/45 of the AMA Guides provides that 70° of internal rotation results in one percent UE impairment which would result in a four percent UE impairment instead of a three percent UE impairment. Both a three percent UE impairment and a four percent UE impairment convert to a two percent whole person impairment (WPI) as stated in Table 3 on page 3/20 of the AMA Guides. However, Dr. L incorrectly noted on the Report of Medical Evaluation (DWC-69) that the IR is three percent rather than two percent.

The Appeals Panel has previously stated that, where the certifying doctor's report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor's report and render a new decision as to the

correct IR. See APD 171766, decided September 7, 2017; APD 172488, decided December 18, 2017; APD 152464, decided February 17, 2016; APD 121194, decided September 6, 2012; APD 041413, decided July 30, 2004; APD 100111, decided March 22, 2010; and APD 101949, decided February 22, 2011.

In this case, Dr. L incorrectly assessed a three percent UE impairment for the left shoulder instead of a four percent UE impairment; however, Table 3 on page 3/20 provides that both a three percent UE impairment and a four percent UE impairment convert to a two percent WPI. Combining a two percent WPI for the left shoulder with the zero percent WPI assessed for the remaining compensable injuries results in a two percent IR for the compensable injury. The ALJ found that Dr. L's assessment of IR is not contrary to the preponderance of the other medical evidence. After a mathematical correction, that finding is supported by the evidence. Accordingly, we reverse the ALJ's determination that the claimant's IR is three percent and we render a new decision that the claimant's IR is two percent as mathematically corrected.

#### **SUMMARY**

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to PTSD, depression, anxiety, a lumbar disc herniation at L5-S1, or cervical disc herniations at C5-6 and C6-7.

We affirm the ALJ's determination that the claimant reached MMI on October 1, 2019.

We reverse the ALJ's determination that the claimant's IR is three percent and render a new decision that the claimant's IR is two percent as mathematically corrected.

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 78701-3218.**

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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