

APPEAL NO. 181768
FILED OCTOBER 29, 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 (CCH) was held on June 27, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), does not extend to a right wrist scaphoid fracture or avascular necrosis of the right scaphoid bone; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. P) on March 24, 2017, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) the appellant/cross-respondent (claimant) reached MMI on March 24, 2017, with a zero percent IR as certified by (Dr. D). The claimant appealed the ALJ's extent of injury, MMI, and IR determinations. The respondent/cross-appellant (carrier) responded, urging affirmance of the ALJ's extent-of-injury determination. The carrier cross-appealed the ALJ's finality, MMI, and IR determinations. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed as reformed.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to bilateral hand contusions, and that Dr. P's MMI/IR certification is the first certification of MMI and IR and is valid for purposes of Rule 130.12(c). We note that the stipulation in Finding of Fact No.1.E. inadvertently omits "improvement" from "maximum medical improvement."

The claimant testified that he was injured while he and a coworker were unloading a large lawnmower from a truck. The claimant testified his coworker dropped his end of the lawnmower which caused the claimant to fall backwards. The claimant braced his fall with his left hand and the lawnmower fell on his right hand.

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 ALJ's determination that the compensable injury of (date of injury), does not extend to a right wrist scaphoid fracture or avascular necrosis of the right scaphoid bone is supported by sufficient evidence and is affirmed.

MMI/IR

The ALJ's determinations that the claimant reached MMI on March 24, 2017, with a zero percent IR are supported by sufficient evidence and are affirmed.

FINALITY

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Rule 130.12(b) provides, in part, that the first MMI/IR certification must be disputed within 90 days of delivery of written notice through verifiable means; that the notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c); and that the 90-day period begins on the day after the written notice is delivered to the party wishing to dispute a certification of MMI or an IR assignment, or both.

Section 408.123 also provides in part:

(f) An employee's first certification of [MMI] or assignment of an [IR] may be disputed after the period described by Subsection (e) if:

(1) compelling medical evidence exists of:

(A) a significant error by the certifying doctor in applying the appropriate American Medical Association guidelines or in calculating the [IR];

(B) a clearly mistaken diagnosis or a previously undiagnosed medical condition; or

(C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid.

The ALJ found in Finding of Fact No. 5 that Dr. P's MMI/IR certification was not delivered to the claimant through verifiable means on a date certain, and on that basis determined that the first MMI/IR certification from Dr. P on March 24, 2017, did not become final under Section 408.123 and Rule 130.12. Finding of Fact No. 5 is supported by sufficient evidence and is affirmed. Given that we have affirmed this finding, we affirm the ALJ's determination that the first MMI/IR certification from Dr. P on March 24, 2017, did not become final under Section 408.123 and Rule 130.12.

The ALJ noted the following in his discussion:

If [the] [c]arrier's evidence were viewed as sufficient to establish finality of [Dr. P's] certification under Rule 130.12, there was an exception to finality under [Section 408.123(f)(1)(B)], in that there was compelling medical evidence of a clearly mistaken diagnosis. [Dr. P] rated localized swelling, mass, or lump right upper limb (diagnosis code R22.31) and right wrist contusion (diagnosis code S60.211A). She did not rate any injury to the left upper extremity, although the parties stipulated the compensable injury extends to include bilateral hand contusions.

Based on the foregoing, the ALJ found in Finding of Fact No. 6 that there was an exception to finality of Dr. P's MMI/IR certification under Section 408.123(f)(1)(B), in that there was compelling medical evidence of a clearly mistaken diagnosis.

(Dr. F) examined the claimant on (date of injury), the date of injury. In a medical record dated that same date Dr. F diagnosed, in part, a contusion of multiple sites of the left hand and wrist and a contusion of multiple sites of the right hand and wrist. Dr. P initially examined the claimant on March 21, 2017, and in a medical record dated that same date Dr. P noted diagnoses of contusion of multiple sites of the left hand and wrist and contusion of multiple sites of the right hand and wrist.

In evidence is Dr. P's DWC-69 dated March 24, 2017, in which Dr. P certified the claimant reached MMI on March 24, 2017, with no permanent impairment. In her attached narrative report, Dr. P noted findings of right localized swelling and mass and lump, and that the claimant does not have any permanent impairment as a result of the compensable injury. Although Dr. P noted the claimant's statement that a machine fell on his right wrist and he fell and injured his left wrist, Dr. P's narrative report did not contain any indication an examination of the claimant's left upper extremity was performed.

In Appeals Panel Decision (APD) 150457-s, decided April 16, 2015, the ALJ found the certifying doctor's failure to rate a medical condition that the parties stipulated was included in the compensable injury constituted compelling medical evidence of a

significant error in applying the appropriate 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) in calculating the claimant's IR pursuant to Section 408.123(f)(1)(A). The Appeals Panel, citing APD 132117, decided November 4, 2013, and APD 132594-s, decided January 3, 2014, noted that neither Section 408.123 nor Rule 130.12 provide that the mere inclusion or exclusion of a condition in an assignment of IR constitutes an exception to finality. The Appeals Panel held in APD 150457-s that the certifying doctor's failure to rate a medical condition to which the parties have stipulated at a CCH to be included in the compensable injury does not, by itself, constitute compelling medical evidence of a significant error in applying the appropriate AMA Guides under Section 408.123(f)(1)(A).

The ALJ in the case on appeal found that Dr. P's failure to rate any injury to the left upper extremity when the parties stipulated the compensable injury extends to bilateral hand contusions constituted compelling medical evidence of a clearly mistaken diagnosis and was therefore an exception to finality under Section 408.123(f)(1)(B). However, Dr. P's failure to rate the left upper extremity when the parties stipulated that the compensable injury extends to bilateral hand contusions is not a clearly mistaken diagnosis under Section 408.123(f)(1)(B). As noted above, on the date of injury Dr. F diagnosed, in part, a contusion of multiple sites of the left hand and wrist and a contusion of multiple sites of the right hand and wrist, and on March 21, 2017, Dr. P noted those same diagnoses. Additionally, various medical records in evidence indicate that the claimant was diagnosed with and treated for right and left hand contusions prior to Dr. P's March 24, 2017, examination. Based on the evidence in the record the claimant did not have an undiagnosed or clearly mistaken diagnosed condition of right and left hand contusions. The clearly mistaken diagnosis exception found in Section 408.123(f)(1)(B) does not apply in this case.

Furthermore, in line with our holding in APD 150457-s, *supra*, we hold that a certifying doctor's failure to rate a condition to which the parties have stipulated at a CCH, by itself, is not an exception to finality under Section 408.123(f). Accordingly, we reform the ALJ's findings of fact by striking Finding of Fact No. 6.

SUMMARY

We affirm the ALJ's decision as reformed by striking Finding of Fact No. 6.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a right wrist scaphoid fracture or avascular necrosis of the right scaphoid bone.

We affirm the ALJ's determination that the first MMI/IR certification by Dr. P on March 24, 2017, did not become final under Section 408.123 and Rule 130.12.

We affirm the ALJ's determination that the claimant reached MMI on March 24, 2017.

We affirm the ALJ's determination that the claimant's IR is zero percent.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge