APPEAL NO. 191919
FILED DECEMBER 11, 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 March 6, 2019, and September 3, 2019, with the record closing on September 12, 2019, 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 a C3-4 moderate left foraminal stenosis from uncovertebral joint spur and mild facet arthrosis; and (2) the compensable injury of (date of injury), extends to C5-6 and C6-7 central left side disc herniations, cervical spondylosis, C4-5 mild to moderate circumference central canal stenosis from a disc osteophyte complex, and C4-5 moderate facet arthrosis with moderate bilateral neural foraminal stenosis. The appellant (carrier) appeals that portion of the ALJ's extent-of-injury determination that was favorable to the respondent (claimant). The carrier contends, in part, that the ALJ's determination on the C5-6 and C6-7 herniations is based on evidence outside the record and the ALJ adjudicated a waiver issue that was neither certified nor actually litigated by the parties. The claimant responded, urging affirmance.

The ALJ's determination that the compensable injury does not extend to C3-4 moderate left foraminal stenosis from uncovertebral joint spur and mild facet arthrosis was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated, in part, that on (date of injury), the claimant sustained a compensable injury in the form of a grade I cervical sprain/strain; (Dr. S) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor to address extent of injury; and initially, the Division selected (Dr. C) as designated doctor to address maximum medical improvement (MMI) and impairment rating (IR). We note that the ALJ inadvertently stated in the Evidence Presented portion of her decision that during the CCH setting on September 3, 2019, no witnesses testified. A review of the record reflects that (Dr. D), a carrier-selected required medical examination doctor, testified during the September 3, 2019, CCH setting. The claimant testified that he injured his neck when he was screwing a piece of sheet metal into the underside of a frame. The evidence reflects that on May 20, 2002, the claimant underwent a cervical spinal fusion at C5-6 and C6-7. The sole issue before the ALJ was the extent of the compensable injury. In evidence is a letter of causation signed by the claimant's treating doctor and two narrative reports from Dr. S. Dr. S opined, in part,

that the conditions of cervical spondylosis, C4-5 mild to moderate circumference central canal stenosis from a disc osteophyte complex, and C4-5 moderate facet arthrosis with moderate bilateral neural foraminal stenosis were related to the compensable injury due to the fusion of the C5-6 and C6-7 levels.

Section 410.151(b) provides, in part, that an issue not raised at the benefit review conference (BRC) may not be considered at a CCH except in limited circumstances. 28 TEX. ADMIN. CODE § 142.7(a) (Rule 142.7(a)) states, in part, that disputes not expressly included in the statement of disputes will not be considered by the ALJ. Rule 142.7(c) provides, in part, that a party may submit a response to the disputes identified as unresolved in the BRC Report. Rule 142.7(e) is a provision for adding disputes by permission of the ALJ. Rule 130.102(h) provides that if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter of supplemental income benefits (SIBs), the date of MMI and the IR shall be final and binding.

In her discussion of the evidence, the ALJ stated that Dr. C certified that the claimant reached MMI on June 17, 2002, with a 15% IR, considering the claimant's cervical strain with herniated disc status post anterior cervical discectomy and fusion at C5-6 and C6-7. The ALJ further stated that there was no dispute regarding the MMI date or IR assessed by Dr. C prior to the expiration of the first quarter of SIBs and therefore, "it is determined that the compensable injury extends to C5-6 and C6-7 central left side disc herniation." The ALJ found in Finding of Fact No. 3 that on August 1, 2002, Dr. C certified that the claimant reached MMI on June 17, 2002. The ALJ found in Finding of Fact No. 4 that the 15% IR assigned by Dr. C was an IR for the conditions of herniated disc status post anterior cervical discectomy and fusion at C5-6 and C6-7. The ALJ found in Finding of Fact No. 5 that there was no dispute of the MMI date or IR assessed by Dr. C before the expiration of the first quarter SIBs period.

However, there was no finality issue before the ALJ to decide. The BRC Report does not list an issue of finality pursuant to Rule 130.102(h). Neither party at the CCH requested the addition of an issue regarding finality pursuant to Rule 130.102(h). Although the ALJ did not expressly add the issue in her decision and order, her extent-of-injury determination was premised on her determination that the certification of Dr. C became final pursuant to Rule 130.102(h) and that Dr. C's certification considered and rated herniated disc status post anterior cervical discectomy and fusion at C5-6 and C6-7.

We note that the MMI/IR certification from Dr. C was not in evidence. There was no certification of MMI/IR from any doctor in evidence. There was no stipulation or testimony regarding the date of MMI or the IR based on the claimant's compensable

injury. No SIBs applications were in evidence. Further, there was no stipulation as to the dates of the SIBs quarters applicable to the claimant. No testimony or documentary evidence was provided regarding whether or not a dispute of the claimant's MMI and IR occurred prior to the expiration of the first quarter of SIBs. Neither party argued that the certification that assigned a 15% IR for the compensable injury considering the claimant's cervical fusion became final. It is clear from her discussion and the above-referenced Findings of Fact that the ALJ's determination of the extent of the compensable injury was based on facts that were not in evidence and the adjudication of an issue that was not before her to decide. Accordingly, we strike Finding of Fact Nos. 3, 4, and 5. Additionally, we reverse the ALJ's determination that the compensable injury extends to C5-6 and C6-7 central left side disc herniations and cervical spondylosis, C4-5 mild to moderate circumference central canal stenosis from a disc osteophyte complex, and C4-5 moderate facet arthrosis with moderate bilateral neural foraminal stenosis and remand the extent-of-injury issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to determine whether the compensable injury extends to C5-6 and C6-7 central left side disc herniations and cervical spondylosis, C4-5 mild to moderate circumference central canal stenosis from a disc osteophyte complex, and C4-5 moderate facet arthrosis with moderate bilateral neural foraminal stenosis consistent with the evidence.

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 **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION (TPCIGA) for Colonial Casualty Insurance Company, an impaired carrier, ESTATE NO. 510** and the name and address of its registered agent for service of process is

MARVIN KELLY
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

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Margaret L. Turner
Appeals Judge

CONCUR:

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Cristina Beceiro
Appeals Judge

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Carisa Space-Beam
Appeals Judge