

APPEAL NO. 210317
FILED MAY 5, 2021

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 January 28, 2021, 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 sustained on (date of injury), does not extend to cervical stenosis from C3-7, left shoulder sprain, left shoulder strain, lumbar disc bulge at L4-5, or left knee derangement; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. K), on January 15, 2020, 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 January 15, 2020; and (4) the claimant's impairment rating (IR) is five percent.

The claimant appealed, disputing the ALJ's determination that the compensable injury did not extend to any of the claimed conditions, as well as the ALJ's determinations of MMI and IR. The respondent/cross-appellant (carrier) responded, urging affirmance of those determinations. The carrier also filed a cross-appeal, disputing the ALJ's determination that the first certification of MMI and assignment of IR from Dr. K on January 15, 2020, did not become final under Section 408.123 and Rule 130.12. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that consisted of a cervical sprain, cervical strain, left arm contusion, left hip contusion, left knee contusion, lumbar sprain, and lumbar strain. The claimant testified she was injured on (date of injury), when she slipped and fell on ice on the floor.

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).

FINALITY OF DR. K'S JANUARY 15, 2020, CERTIFICATION

The ALJ's determination that the first certification of MMI and assigned IR from Dr. K on January 15, 2020, did not become final under Section 408.123 and Rule 130.12 is supported by sufficient evidence and is affirmed. We note that Dr. K's January 15, 2020, certification contains a significant error in applying 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), under Section 408.123(f)(1)(A), which is discussed in detail below.

EXTENT OF INJURY

That portion of the ALJ's determination that the compensable injury does not extend to cervical stenosis from C3-7, a lumbar disc bulge at L4-5, or left knee derangement is supported by sufficient evidence and is affirmed.

The ALJ also determined that the compensable injury does not extend to a left shoulder sprain or a left shoulder strain. The ALJ commented in her discussion that causation of the disputed conditions falls outside the common knowledge and experience of a layperson, and that the claimant was required to present expert medical causation evidence. The ALJ noted that the claimant's treating doctor did not provide the necessary opinion that the claimant's compensable injury extends to the disputed conditions, and that the claimant's credible testimony alone is not legally sufficient to prove by a preponderance of the evidence that her compensable injury extends to the disputed conditions.

The Appeals Panel has, on numerous occasions, rejected the contention that a sprain/strain requires expert medical evidence to establish causation. See Appeals Panel Decision (APD) 130160, decided March 18, 2013; APD 120383, decided April 20, 2012; APD 992946, decided February 14, 2000; APD 952129, decided January 31, 1996. See *also* APD 130808, decided May 20, 2013. In the case on appeal, the ALJ is requiring expert medical evidence to establish causation between the compensable injury and a left shoulder sprain and a left shoulder strain. The ALJ is requiring a higher standard than that required under the law, as cited in this decision, to establish causation. See APD 140651, decided May 19, 2014, and 130915, decided May 20, 2013. Accordingly, we reverse that portion of the ALJ's determination that the compensable injury does not extend to a left shoulder sprain and a left shoulder strain, and we remand that portion of the extent-of-injury issue to the ALJ to make a determination using the proper legal standard consistent with this decision.

MMI/IR

The ALJ determined that the claimant reached MMI on January 15, 2020, with a five percent IR as certified by Dr. K, the designated doctor. However, given that we have reversed and remanded a portion of the ALJ's determination on the extent of the claimant's compensable injury, we also reverse the ALJ's determinations that the claimant reached MMI on January 15, 2020, and that the claimant's IR is five percent. We remand the issues of the claimant's date of MMI and IR to the ALJ for further action consistent with this decision.

As noted above, Dr. K's five percent IR contains an error. Dr. K stated in his attached narrative report that he placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category I: Complaints or Symptoms of the AMA Guides for zero percent impairment for the claimant's cervical spine, and DRE Lumbosacral Category II: Minor Impairment of the AMA Guides for five percent impairment for the claimant's lumbar spine. Dr. K also assigned zero percent impairment for the claimant's left hip and left knee based on range of motion (ROM) measurements, as well as zero percent impairment for the claimant's left arm and shoulder. In his narrative report Dr. K noted ROM measurements of the claimant's left shoulder as follows: 180° flexion; 50° extension; 170° abduction; 50° adduction; 80° external rotation; and 70° internal rotation. Using Figures 38, 41, and 44 on pages 3/43, 3/44, and 3/45, respectively, of the AMA Guides, Dr. K assigned zero percent impairment for each of those planes of motion. However, Figure 44 on page 3/45 of the AMA Guides provides that 70° of internal rotation results in one percent impairment, not zero percent impairment as assigned by Dr. K.

SUMMARY

We affirm the ALJ's determination that the first certification of MMI and assigned IR from Dr. K on January 15, 2020, did not become final under Section 408.123 and Rule 130.12.

We affirm that portion of the ALJ's extent-of-injury determination that the compensable injury sustained on (date of injury), does not extend to cervical stenosis from C3-7, lumbar disc bulge at L4-5, or left knee derangement.

We reverse that portion of the ALJ's extent-of-injury determination that the compensable injury sustained on (date of injury), does not extend to a left shoulder sprain or a left shoulder strain, and remand that portion of the ALJ's extent-of-injury determination for further action consistent with this decision.

We reverse the ALJ's determination that the claimant reached MMI on January 15, 2020, and we remand the issue of the claimant's date of MMI to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is five percent, and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. K is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. K is still qualified and available to be the designated doctor. If Dr. K is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine MMI and IR.

The ALJ is to make a determination whether the compensable injury extends to a left shoulder sprain and/or a left shoulder strain. Based on the ALJ's determination regarding the left shoulder sprain and left shoulder strain, the ALJ is then to determine whether a certification of MMI and IR that rates the entire injury is in evidence or whether a new certification of MMI and IR by the designated doctor is necessary.

If a new certification of MMI and IR is necessary, the ALJ is to inform the designated doctor that the compensable injury extends to a cervical sprain, a cervical strain, left arm contusion, left hip contusion, left knee contusion, lumbar sprain, and lumbar strain, and/or a left shoulder sprain and/or a left shoulder strain, depending upon the ALJ's determination on the left shoulder conditions. If Dr. K is still qualified and available to be the designated doctor, the ALJ is to inform Dr. K of his error in assigning zero percent impairment for 70° of internal rotation in his January 15, 2020, narrative report.

The parties are to be provided with the ALJ's letter to the designated doctor, the designated doctor's response, and allowed an opportunity to respond. The ALJ is to make determinations which are supported by the evidence on extent of injury, MMI, and IR consistent with this decision.

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 Texas Department of Insurance, Division of Workers' Compensation, 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 APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **EXECUTIVE RISK INDEMNITY, INC.** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-4284.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge