

APPEAL NO. 211982
FILED JANUARY 27, 2022

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 November 15, 2021, 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 right hand post-traumatic osteoarthritis or a right hand degenerative cyst in the radial side of the second and third metacarpal; (2) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. S) on February 1, 2021, became final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (3) the appellant (claimant) reached MMI on October 29, 2020; and (4) the claimant's IR is one percent. The claimant appealed the ALJ's determinations. The respondent (self-insured) responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was injured on (date of injury), when opening a door while carrying a coffee pot full of water in her right hand and an empty coffee pot in her left hand. At the CCH the parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that the self-insured accepted sprains of the right hand, index finger, middle finger, and right wrist, a sprain of the metacarpal phalangeal joint of the right index finger, and a right index finger collateral radial ligament tear. We note the stipulation in Finding of Fact No. 1.E. of the ALJ's decision regarding the conditions accepted by the self-insured does not include a right index finger collateral radial ligament tear. We therefore reform the decision and order by adding that condition to Finding of Fact No. 1.E. to conform to the stipulation made by the parties at the CCH.

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 right hand post-traumatic osteoarthritis or a right hand degenerative cyst in the radial side of the second and third metacarpal is supported by sufficient evidence and is 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.

The ALJ found that Dr. S's certification was the first certification of MMI and assigned IR in this case and is valid for the purposes of Rule 130.12(c), and that written notice of Dr. S's certification was provided to the claimant by verifiable means on February 9, 2021. These findings are supported by the evidence.

The evidence established that the claimant filed a Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (DWC-45) on May 14, 2021, to dispute Dr. S's certification. The ALJ found that none of the exceptions to 90-day finality in Section 408.123(f) apply in this case, and determined that Dr. S's February 1, 2021, certification became final under Section 408.123.

The Governor of the State of Texas issued a disaster proclamation on February 12, 2021, in all 254 counties due to severe winter weather. On February 23, 2021, the Commissioner of Workers' Compensation issued Commissioner's Bulletin # B-0008-21, which provides, in pertinent part:

The Texas Department of Insurance, Division of Workers' Compensation (Division) is tolling the following Texas workers' compensation deadlines, effective February 12, 2021, through February 23, 2021:

- Medical and income benefit dispute deadlines.

Commissioner's Bulletin # B-0008-21 was in effect during the time the claimant had to dispute Dr. S's certification. Pursuant to Commissioner's Bulletin # B-0008-21,

the 90-day deadlines found in Section 408.123 and Rule 130.12 were tolled effective February 12, 2021, through February 23, 2021. As previously noted, the ALJ's finding that written notice of Dr. S's certification was provided to the claimant by verifiable means on February 9, 2021, is supported by the evidence. Considering Commissioner's Bulletin # B-0008-21, the 90th day after February 9, 2021, is May 24, 2021. The claimant filed her DWC-45 disputing Dr. S's certification on May 14, 2021. Therefore, the claimant timely disputed Dr. S's certification. We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. S on February 1, 2021, became final under Section 408.123 and Rule 130.12. We render a new decision that the first certification of MMI and assigned IR from Dr. S on February 1, 2021, did not become final under Section 408.123 and Rule 130.12.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

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. Rule 130.1(c)(3) provides, in part, 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 based her determinations that the claimant reached MMI on October 29, 2020, with a one percent IR solely on her determination that Dr. S's February 1, 2021, certification became final under Section 408.123 and Rule 130.12. However, we have reversed that determination and rendered a new decision that Dr. S's February 1, 2021, certification did not become final under Section 408.123 and Rule 130.12.

Dr. S, the designated doctor appointed to determine MMI and IR, examined the claimant on January 21, 2021. Dr. S noted in her attached narrative report that she considered and rated a tear and sprain of the collateral ligament of the right index finger at the metacarpophalangeal joint and a sprain of the other part of the right hand. The parties stipulated, in part, that the compensable injury extends to a sprain of the right

middle finger. Dr. S's report reflects she did not consider and rate the claimant's right middle finger. Dr. S did not consider and rate the entire compensable injury, and therefore her certification cannot be adopted. We reverse the ALJ's determinations that the claimant reached MMI on October 29, 2020, and that the claimant's IR is one percent.

There are two other certifications in evidence, both from (Dr. H), a doctor acting in place of the claimant's treating doctor. Dr. H initially examined the claimant on January 28, 2020, and certified that the claimant had not reached MMI but was expected to do so on March 13, 2020. Dr. H next examined the claimant on February 2, 2021, and certified the claimant reached MMI on September 16, 2020, with a three percent IR. Dr. H's three percent IR is based on range of motion measurements of the claimant's right wrist, index, and middle fingers and was made in accordance with 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). As previously discussed, the compensable injury in this case is sprains of the right hand, index finger, middle finger, and right wrist, a sprain of the metacarpal phalangeal joint of the right index finger, and a right index finger collateral radial ligament tear. Dr. H's narrative report reflects she considered and rated the compensable injury and her assigned IR complies with the AMA Guides. We therefore render a new decision that the claimant reached MMI on September 16, 2020, with a three percent IR as certified by Dr. H.

SUMMARY

We reform Finding of Fact No. 1.E. to add a right index finger collateral radial ligament tear as a condition accepted by the self-insured to conform to the stipulation made by the parties at the CCH.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to right hand post-traumatic osteoarthritis or a right hand degenerative cyst in the radial side of the second and third metacarpal.

We reverse the ALJ's determination that the first certification of MMI and assigned IR from Dr. S on February 1, 2021, became final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and assigned IR from Dr. S on February 1, 2021, did not become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determination that the claimant reached MMI on October 29, 2020, and we render a new decision that the claimant reached MMI on September 16, 2020.

We reverse the ALJ's determination that the claimant's IR is one percent, and we render a new decision that the claimant's IR is three percent.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**STEPHEN S. VOLLBRECHT, EXECUTIVE DIRECTOR
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.**

For service by mail the address is:

**STEPHEN S. VOLLBRECHT, EXECUTIVE DIRECTOR
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge