

APPEAL NO. 231595
FILED JANUARY 2, 2024

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 October 9, 2023, 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 first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. K) on December 8, 2021, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (2) the respondent/cross-appellant (claimant) reached MMI on August 10, 2023; and (3) the claimant's IR is 12%. The appellant/cross-respondent (carrier) appealed the ALJ's determinations of finality, MMI, and IR. There was no response from the claimant to the carrier's appeal in the appeal file. The claimant cross-appealed disputing the ALJ's determinations of MMI and IR. We note that although the claimant's attorney states in the cross-appeal that there is an extent-of-injury issue that needs to be addressed, he specifically stated at the October 9, 2023, CCH that he was not asking for the issue to be added. The carrier responded to the claimant's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that: (1) on (date of injury), the claimant sustained a compensable injury that extends to at least a cervical strain, head concussion, left wrist strain, left elbow sprain involving the ulnar collateral ligament, and fracture involving the left radial head and capitellum; (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) selected Dr. K as designated doctor to determine MMI and IR; and (3) sprain and strain are used interchangeably and have the same meaning for the purposes of MMI and IR. The claimant, a phlebotomist, was injured on (date of injury), when she tripped and fell, hitting her head and losing consciousness.

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).

ABUSE OF DISCRETION

The carrier contends that the ALJ abused his discretion in admitting a letter dated October 9, 2023, from (Dr. M), the claimant's orthopedic surgeon. In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the ALJ acted without reference to any guiding rules or principles. *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). Under the circumstances of this case, we do not find the ALJ's actions an abuse of discretion.

FINALITY

The ALJ's determination that the first certification of MMI and assigned IR from Dr. K on December 8, 2021, did not become final under Section 408.123 and Rule 130.12 is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on August 10, 2023, 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. 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 determined that the claimant reached MMI on August 10, 2023, with a 12% IR in accordance with the certification of (Dr. R), a treating doctor referral. Dr. R examined the claimant on August 10, 2023, and assigned the 12% IR based on the compensable conditions of a concussion, cervical sprain, left wrist strain, left elbow sprain, and a non-displaced fracture of the left radial head. 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. R assessed 0% impairment for the concussion. He then placed the claimant in Diagnosis-Related Estimate Cervicothoracic Category I: Complaints or Symptoms and assessed 0% impairment for the cervical sprain.

For the left upper extremity (UE), Dr. R assessed a 4% UE impairment for the left elbow and a 7% UE impairment for the left wrist based on range of motion (ROM) deficits. He additionally assigned a 10% UE impairment based on Table 27 on page 3/61 of the AMA Guides for the compensable left radial head implant arthroplasty. Combining the UE impairments results in a 20% UE impairment which converts to a 12% whole person impairment (WPI).

However, there were mistakes in Dr. R's left elbow UE impairment calculation. Dr. R noted the following left elbow ROM measurements (rounded to the nearest 10th degree) and resulting impairments in his narrative report: flexion 130° (1%), extension 20° (0%), pronation 80° (0%), and supination 70° (1%). Dr. R states in his narrative report that these impairments add up to 4% UE impairment for the left elbow, instead of 2% UE impairment. Additionally, according to Figure 32 on page 3/40 of the AMA Guides, a lack of 20° of extension results in 2% UE impairment instead of 0% UE impairment as calculated by Dr. R. Furthermore, according to Figure 35 on page 3/41 of the AMA Guides, 70° of supination results in 0% UE impairment, instead of 1% UE impairment as calculated by Dr. R. Therefore, the total UE impairment for the left elbow is 3%, not 4% as stated by Dr. R.

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 Appeals Panel Decision (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. Dr. R's assigned IR can be mathematically corrected based on the documented measurements for the left elbow.

Combining 3% UE impairment for the left elbow with 7% UE impairment for the left wrist results in 10% UE impairment. Combining the 10% UE impairment with 10% UE impairment for the left radial head implant arthroplasty results in a total UE impairment of 19% which converts to 11% WPI, not 12% as assigned by Dr. R.

The ALJ found that the preponderance of the other medical evidence is not contrary to the certification of Dr. R. After a mathematical correction, that finding is supported by the evidence. Accordingly, we reverse the ALJ's determination that the claimant's IR is 12%, and we render a new decision that the claimant's IR is 11%, as mathematically corrected.

SUMMARY

We affirm the ALJ's determination that the first certification of MMI and assigned IR from Dr. K on December 8, 2021, did not become final under Section 408.123 and Rule 130.12.

We affirm the ALJ's determination that the claimant reached MMI on August 10, 2023.

We reverse the ALJ's determination that the claimant's IR is 12%, and we render a new decision that the claimant's IR is 11%, as mathematically corrected.

The true corporate name of the insurance carrier is **SENTRY CASUALTY COMPANY** 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.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge