

APPEAL NO. 211091-s  
FILED SEPTEMBER 10, 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 June 1, 2021, with the record closing on June 16, 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), extends to right hip sprain and right knee sprain; (2) the compensable injury of (date of injury), does not extend to aggravation of right knee osteoarthritis; (3) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. H) on January 3, 2020, did not become final under Section 408.123 and 28 Tex. Admin. Code § 130.12 (Rule 130.12); (4) the date of MMI is November 23, 2018; and (5) appellant's (claimant) IR is 0%.

The claimant appealed that portion of the ALJ's extent-of-injury determination that was adverse to her, as well as the ALJ's determinations regarding finality, MMI, and IR. Respondent 1 (self-insured) responded, urging affirmance of the ALJ's determinations. There was no response in the file from respondent 2 (subclaimant) to the claimant's appeal. The ALJ's determination that the compensable injury of (date of injury), extends to right hip sprain and right knee sprain was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), at least in the form of a right hip contusion and right knee contusion; the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed Dr. H as designated doctor to determine extent of injury, MMI, and IR; and the Division appointed (Dr. Hm) as designated doctor to determine MMI and IR. The claimant was injured while working on (date of injury), when she tripped over a box in the freezer and fell onto her right side.

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 aggravation of right knee osteoarthritis 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, including IRs related to extent-of-injury disputes. The notice must contain a copy of a valid Report of Medical Evaluation (DWC-69), as described in Rule 130.12(c).

Section 408.123(f) 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.

Dr. H examined the claimant on January 3, 2020, and issued two certifications. In the first one, Dr. H certified the claimant reached MMI on January 3, 2020, and, 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), assigned a 20% IR. Dr. H's second certification found that the claimant had not reached MMI and did not assign an IR. Therefore, as the ALJ correctly noted in her decision, Dr. H's first certification is the only valid certification subject to finality. See Appeals Panel Decision (APD) 190180, decided March 28, 2019.

Dr. H's 20% IR is comprised of range of motion (ROM) measurements for the claimant's right hip and right knee. Dr. H noted that in the claimant's right hip, the flexion measurement resulted in a 4% impairment and the external rotation measurement resulted in a 2% impairment. Dr. H then combined these for a 6% IR for the hip. Dr. H noted that in the claimant's right knee, the flexion measurement resulted in an 8% impairment and the flexion contracture measurement also resulted in an 8% IR. Dr. H combined the knee measurements for a total 15% IR for the right knee. She then combined the 6% IR for the right hip with the 15% IR for the right knee for a total 20% IR.

The ALJ found that Dr. H's assigned IR was the first valid rating and the self-insured disputed Dr. H's IR on February 1, 2021, after the 90-day deadline. Those findings are supported by sufficient evidence. The ALJ also found that compelling medical evidence exists of a significant error in applying the appropriate AMA Guides or in calculating the IR. The ALJ stated in her decision, "[s]pecifically, the designated doctor miscalculated the [IR] by combining instead of adding the [ROM] measurements for the right knee."

However, in Section 3.2, The Lower Extremity, on page 3/75 of the AMA Guides, it states, "[i]f the patient has several impairments of the same lower extremity part, such as the leg, or impairments of different parts, such as the ankle and toe, the whole-person estimates for the impairments are *combined* [emphasis in original] (Combined Values Chart, p. 322)." Accordingly, Dr. H correctly combined the impairments from the right knee. The ALJ's finding that there was compelling medical evidence of a significant error in applying the appropriate AMA Guides or in calculating the IR was legal error. Therefore, we reverse the ALJ's determination that the first certification of MMI and IR from Dr. H on January 3, 2020, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and IR from Dr. H on January 3, 2020, did become final under Section 408.123 and Rule 130.12.

To the extent that prior Appeals Panel decisions can be read as allowing impairments in the same lower extremity part to be added rather than combined, those decisions are now overruled. See APD 110741, decided July 25, 2011.

### **MMI/IR**

As we have rendered a new decision that the first certification of MMI and IR from Dr. H on January 3, 2020, did become final under Section 408.123 and Rule 130.12, we also must reverse the ALJ's determinations that the date of MMI is November 23, 2018, and the claimant's IR is 0%. We render a new decision that the claimant reached MMI on January 3, 2020, with a 20% IR in accordance with Dr. H's certification that became final.

### **SUMMARY**

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to aggravation of right knee osteoarthritis.

We reverse the ALJ's determination that the first certification of MMI and IR from Dr. H on January 3, 2020, did not become final under Section 408.123 and Rule 130.12, and we render a new decision that the first certification of MMI and IR from Dr. H on January 3, 2020, did become final under Section 408.123 and Rule 130.12.

We reverse the ALJ's determinations that the date of MMI is November 23, 2018, and the claimant's IR is 0%, and we render a new decision that the claimant reached MMI on January 3, 2020, with a 20% IR.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**NAME  
ADDRESS  
CITY, TEXAS ZIP CODE.**

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Cristina Beceiro  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge