APPEAL NO. 172582
FILED DECEMBER 27, 2017

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 July 19, 2017, and September 19, 2017, 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 (date of injury), compensable injury extends to reactive airway disease; (2) the respondent (claimant) reached maximum medical improvement (MMI) on May 13, 2016; (3) the claimant's impairment rating (IR) is 67%; and (4) the claimant's average weekly wage (AWW) is $775.90.

The appellant (carrier) appealed the ALJ's determinations. The carrier contends that the evidence does not support the ALJ's determinations. The claimant responded, urging affirmance of the ALJ's determinations.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that the carrier has accepted an (date of injury), compensable injury in the form of upper airways irritation. The evidence established that the claimant worked as a truck driver and was injured when he was exposed to smoke and chemicals while attempting to extinguish a fire in his truck.

AWW

The ALJ's determination that the claimant's AWW is $775.90 is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

Exposure to toxic chemicals through inhalation, and the resultant effect on the body, are matters beyond common experience, and medical evidence should be submitted which establishes the connection as a matter of reasonable medical probability as opposed to a possibility, speculation, or guess. *See* Appeals Panel Decision (APD) 170329, decided April 19, 2017; APD 110404, decided May 31, 2011; and APD 080787, decided August 12, 2008. The fact that the proof of causation may be difficult does not relieve the claimant of the burden of proof. APD 93665, decided September 15, 1993, citing *Schaefer v. Texas Employers' Insurance Association*, 612 S.W.2d 199, 205 (Tex. 1980), and *Parker v. Mutual Liability Insurance Company*, 440

S.W.2d 43, 46 (Tex. 1969). In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986).

The ALJ found the claimant's evidence persuasive to establish that the compensable injury extends to reactive airway disease. In evidence are records showing that the claimant sought treatment with Care Now on October 29, 2015, for complaints of shortness of breath and dizziness. The claimant returned to Care Now in November 2015, and December 2015, with increased complaints. The claimant was referred to (Dr. B), who examined the claimant on January 21, 2016. Dr. B diagnosed the claimant with reactive airway disease post exposure to smoke and chemicals when his truck caught on fire on (date of injury). Also in evidence is a medical report from (Dr. D), dated December 20, 2016, in which Dr. D noted that the claimant had inhaled smoke while extinguishing the fire on (date of injury).

Although the medical records in evidence contain a diagnosis of reactive airway disease and show the claimant inhaled smoke and chemicals, there was no evidence establishing the chemicals to which the claimant inhaled, nor was there an explanation as to how the inhalation of the chemicals and smoke from the truck fire caused reactive airway disease. Without an explanation of causation these records are merely conclusory in nature and insufficient to establish that reactive airway disease was caused by the (date of injury), compensable injury. The ALJ's determination that the (date of injury), compensable injury extends to reactive airway disease is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we reverse the ALJ's determination that the (date of injury), compensable injury extends to reactive airway disease and we render a new decision that the (date of injury), compensable injury does not extend to reactive airway disease.

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 Texas Department of Insurance, Division of Workers' Compensation (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. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides 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 May 13, 2016, with a 67% IR as certified by (Dr. K), the designated doctor. Dr. K examined the claimant on November 11, 2016, and on January 9, 2017, certified that the claimant reached MMI on May 13, 2016, with a 67% IR. Dr. K noted in his attached narrative report that based on a pulmonary function test dated May 13, 2016, the claimant qualifies for a Class 4 Respiratory Impairment based on the criteria in Table 8 on page 5/162 of 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. K stated that the claimant had previously been assigned a 67% IR and saw no reason to alter that IR based on the results of the pulmonary function test. We note that in a medical record dated May 13, 2016, the same date as the pulmonary function test referenced and relied upon by Dr. K, Dr. B stated the claimant had an oxygen level of 98% during his examination on that date.

The carrier argued Dr. K did not comply with the AMA Guides in assessing the claimant's IR and presented evidence that the claimant's pulmonary function test was inaccurate, there were not three consecutive measurements as defined in the AMA Guides, and the results of the two best forced vital capacity (FVC) efforts were not within 5% of each other as required. We note that the test itself shows that further examinations of the claimant were recommended and that the maneuvers were not reproducible and should be interpreted with care.

It is clear from Dr. K's report that he considered and rated reactive airway disease. Given that we have reversed the ALJ's determination that the (date of injury), compensable injury extends to reactive airway disease and have rendered a new determination that the (date of injury), compensable injury does not extend to reactive airway disease, Dr. K's MMI/IR certification cannot be adopted. Accordingly, we reverse the ALJ's determinations that the claimant reached MMI on May 13, 2016, with a 67% IR.

There are two other MMI/IR certifications in evidence. The first is from (Dr. Z), the previously-appointed designated doctor. Dr. Z examined the claimant on April 19,

2016, and certified that the claimant reached MMI on February 20, 2016, with a 67% IR. However, Dr. Z also considered and rated reactive airway disease, and therefore his MMI/IR certification cannot be adopted.

The other MMI/IR certification in evidence is from (Dr. E), the post-designated doctor required medical examination doctor. Dr. E examined the claimant on March 31, 2017, and certified on May 16, 2017, that the claimant reached MMI on October 29, 2015, with a 0% IR. However, Dr. E also considered and rated reactive airway disease, and therefore his MMI/IR certification cannot be adopted.

There is no MMI/IR certification in evidence that can be adopted. Accordingly, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the claimant's AWW is $775.90.

We reverse the ALJ's determination that the (date of injury), compensable injury extends to reactive airway disease and we render a new decision that the (date of injury), compensable injury does not extend to reactive airway disease.

We reverse the ALJ's determination that the claimant reached MMI on May 13, 2016, 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 67% and we remand the issue of the claimant's IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to request the parties to stipulate to the date of statutory MMI. If the parties are unable to stipulate, the ALJ is to make a finding of fact of that date.

Dr. K is the most recent 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 still qualified and available to be the designated doctor the ALJ is to request Dr. K to determine the claimant's date of MMI for the (date of injury), compensable injury, which cannot be after the statutory date of MMI, and to rate the claimant's IR in accordance with the AMA Guides. The required methodology for rating pulmonary function as stated on pages 5/159-163 of the AMA Guides includes, in part,

measurements made from at least three acceptable spirometric tracings of forced expiration: FVC, forced expiratory volume in the first second (FEV1), and the ratio of these measurements (FEV1/FVC), a predicted normal single-breath Dco Value for a man according to age, and utilization of Table 8 (page 5/162) for estimating the extent of permanent impairment. The AMA Guides also provide on page 5/159 that "a forced expiratory maneuver must be performed during the examination and evaluation of each patient for permanent pulmonary impairment."

The ALJ is to notify Dr. K that the compensable injury is an upper airways irritation, and that the compensable injury does not extend to reactive airway disease. The ALJ is to request Dr. K explain his assessment of the claimant's IR and how it complies with the AMA Guides. As previously noted, in a medical record dated May 13, 2016, the same date as the pulmonary function test referenced and relied upon by Dr. K in his IR assessment, Dr. B stated that the claimant had an oxygen level of 98% during his examination on that date. The ALJ is to request Dr. K to explain the basis for pulmonary function impairment given the claimant's 98% oxygen level on the date of the pulmonary test.

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 the claimant's date of MMI, which cannot be after the statutory date of MMI, and the claimant's IR for the (date of injury), compensable injury. The ALJ is to notify the designated doctor that the (date of injury), compensable injury is an upper airways irritation, but does not extend to reactive airway disease.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on 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 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* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge