

APPEAL NO. 051040
FILED JUNE 21, 2005

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 March 8, 2005. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on June 13, 2003, with a 26% impairment rating (IR); that the compensable injury of _____, extends to include the diagnosis of pulmonary fibrosis because the compensable injury is pulmonary fibrosis by operation of law; and that the appellant (carrier) waived the right to dispute the compensability of the claimant's pulmonary fibrosis and evidence of the claimant's pulmonary fibrosis was available and discoverable within the 60-day time period. The carrier appealed, arguing that the hearing officer erred by allowing the waiver issue to be determined at the CCH and further argued that the carrier did not waive the right to dispute the extent of the injury. Additionally, the carrier contended that because the pulmonary fibrosis condition was rated and is not compensable, the designated doctor's rating is in error and presumptive weight should not attach to it. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant was examined by the designated doctor on June 13, 2003; and that the designated doctor certified that the claimant was at MMI on June 13, 2003, with a 26% IR. We note that the decision and order contains a typographical error regarding the date the parties agreed that the designated doctor certified the claimant to be at MMI. The record reflects that the date the designated doctor certified the claimant to be at MMI was June 13, 2003, not January 13, 2003, as stated in stipulation 1.E. of the decision and order.

WAIVER

Two benefit review conference (BRC) reports were in evidence. The BRC report signed by the benefit review officer on April 8, 2004, listed three disputed issues: (1) What is the date of MMI?; (2) What is the whole person IR?; and (3) Does the compensable injury of _____, extend to and include the diagnosis of pulmonary fibrosis? The BRC report signed by the benefit review officer on January 19, 2005, listed the three disputed issues above as well as a fourth disputed issue: Did the carrier contest compensability on or before the 60th day after being notified of the injury, and if not, is the carrier's contest based on newly discovered evidence that could not reasonably have been discovered at an earlier date? The carrier filed a response to the second BRC report objecting to the addition of the fourth issue. The carrier also objected to the waiver issue at the CCH. There is evidence that the waiver issue was

discussed at the BRC which took place in April of 2004. The benefit review officer's recommendation regarding the extent of injury discusses Section 409.021 and noted that the carrier may not avoid the mandates of Section 409.021 by recasting the primary injury as an extent-of-injury issue.

At the carrier's request, the hearing officer took official notice of the Dispute Resolution Information System (DRIS) entries regarding this case. The DRIS entries reflect that a prior CCH was scheduled for June 23, 2004, but was cancelled because the claimant was in the hospital. The disputed issues for the June 23, 2004, CCH were listed as MMI, IR, and carrier waiver. In the instant case, the hearing officer did not add an issue but rather decided the disputed issues identified by the BRC reports. Both of the BRC reports in evidence indicate that the carrier waiver was discussed and remained unresolved. We find no error in the hearing officer's ruling regarding the allowance of the disputed waiver issue to proceed to the CCH.

The hearing officer found that the carrier did not timely dispute the compensability of the claimant's pulmonary fibrosis. It was undisputed that the carrier received first written notice of the claim on _____. In evidence was a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed on January 8, 2003, disputing the compensability of the claimant's pulmonary fibrosis. In evidence were medical records from 2000, prior to the date of the compensable injury that revealed that the claimant had an inflammatory lung condition and discussed the possibility of pulmonary fibrosis. However, there were no medical records in evidence dated within the 60-day time frame specified in the waiver issue, which referenced pulmonary fibrosis or alleged a causal connection between the compensable injury which occurred on _____, and the condition of pulmonary fibrosis. The waiver provisions of Section 409.021 do not apply to disputes of extent of injury. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) and Texas Workers' Compensation Commission Appeal No. 042048-s, decided October 11, 2004. The hearing officer's determination that the carrier waived the right to dispute the compensability of the claimant's pulmonary fibrosis is against the great weight and preponderance of the evidence. We reverse the hearing officer's determination that the compensable injury of _____, extends to include the diagnosis of pulmonary fibrosis because the compensable injury is pulmonary fibrosis by operation of law and that the carrier waived the right to dispute the compensability of the claimant's pulmonary fibrosis and render a new determination that the carrier did not waive the right to dispute the compensability of the claimant's pulmonary fibrosis.

EXTENT OF INJURY

The hearing officer's finding that the claimant's pulmonary fibrosis was not caused by the claimant's work-related activities was not appealed. Because we have rendered a determination that the carrier did not waive the right to contest the compensability of the claimant's pulmonary fibrosis, we render a determination that the compensable injury of _____, does not extend to include the diagnosis of pulmonary fibrosis.

MMI AND IR

The designated doctor certified that the claimant reached MMI on June 13, 2003, with a 26% IR, utilizing 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). The designated doctor explained the 26% IR as follows: "if [the designated doctor] use[s] Table 1, Page 154 of the [AMA Guides], [the claimant] becomes breathless after walking only two meters and unable to climb one flight of stairs, and under Table 9 of page 163 regarding the respiratory system of the [AMA Guides], [the claimant] is unable to perform any arduous work, [the designated doctor] would have to state that [the claimant] is probably at 16 to 20 mL/kg or 5 to 6 mets. This would place [the claimant] Class III, Respiratory Impairment, Table 8, page 162 of the [AMA Guides]." The designated doctor concluded that based upon the above referenced statements and the claimant's pulmonary function tests he would assess a 26% IR. The pulmonary function tests referenced in the designated doctor's reports were performed on December 18, 2001, approximately a year and a half prior to the date of MMI and were not performed by the designated doctor. The AMA Guides provide that "a forced expiratory maneuver must be performed during the examination and evaluation of each patient for permanent pulmonary impairment," page 5/159. The evidence does not reflect that the testing required by the AMA Guides was performed during, or as a part of the examination by the designated doctor. We note that the designated doctor is not prohibited from relying on other testing in determining an IR, as there may be circumstances in which the designated doctor may not be able to complete the required testing. However, such circumstances should be explained so they can be taken into consideration at the CCH. See Texas Workers' Compensation Commission Appeal No. 970774, decided June 11, 1997.

Additionally, it is clear from the designated doctor's report that he is taking into consideration in his rating the fact that the claimant suffers from pulmonary fibrosis. Given our determination that the compensable injury does not extend to pulmonary fibrosis, we reverse the hearing officer's determination that the claimant reached MMI on June 13, 2003, with a 26% IR and remand this case back to the hearing officer. On remand, a letter of clarification is to be sent to the designated doctor informing him that pulmonary fibrosis is not part of the compensable injury and should not be considered in determining the claimant's impairment. If the designated doctor is no longer qualified or refuses to respond to the clarification, a second designated doctor should be appointed. After the designated doctor has responded or impairment is certified from a second designated doctor if necessary, the hearing officer should allow comment by the parties. The hearing officer should then issue a new decision regarding the IR and date of MMI 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 hearing officer, 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 Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge