APPEAL NO. 100984
FILED SEPTEMBER 23, 2010

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 June 22, 2010. The hearing officer resolved the disputed issues before him by determining that respondent 1's (claimant) compensable injury of _____, extends to the left median nerve neuropathy and that the claimant had disability resulting from a compensable injury beginning May 25, 2007, through April 13, 2009.

The appellant (carrier) appealed the hearing officer's extent of injury and disability determinations. The appeal file does not contain a response from the claimant or from respondent 2 (subclaimant).

DECISION

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

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he was injured at work on that date when he suffered a chemical burn on the dorsal aspect of his left forearm. It was undisputed that the chemical contained chlorine although the exact chemical composition was unknown. The carrier has accepted a burn injury to the left forearm. On April 1, 2009, the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. G) as the designated doctor to determine among other things the ability of the employee to return to work, the extent of the employee's compensable injury, and whether the employee's disability is a direct result of the work-related injury.

EXTENT OF INJURY

Presumptive Weight of the Designated Doctor's Opinion

Section 408.0041(a) provides in pertinent part that at the request of an insurance carrier or an employee, or on the Commissioner's own order, the Commissioner may order a medical examination to resolve any question about: (3) the extent of the employee's compensable injury; (4) whether the injured employee's disability is a direct result of the work-related injury; (5) the ability of the employee to return to work. 28 TEX. ADMIN. CODE § 126.7(c) (Rule 126.7(c)) provides that a designated doctor examination shall be used to resolve questions about the following: (1) the impairment caused by the employee's compensable injury; (2) the attainment of MMI; (3) the extent of the employee's compensable injury; (4) whether the employee's disability is a direct result of the work-related injury; (5) the ability of the employee to return to work; or (6) issues similar to those described above. Rule 126.7(d) provides that the report of the

designated doctor is given presumptive weight regarding the issue(s) in question and/or dispute, unless the preponderance of the evidence is to the contrary.[1]

Based on the designated doctor's opinion, the hearing officer found that the chemical burns suffered by the claimant on _____, were a producing cause of the left median nerve neuropathy and that the preponderance of the other medical evidence is not contrary to the conclusion of the designated doctor regarding the extent of injury and the claimant's work status. In its appeal, the carrier contends that the conclusions of the designated doctor are not supported by science or by the preponderance of the medical evidence.

Causation

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence when the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. Appeals Panel Decision (APD) 022301, decided October 23, 2002. *See also* City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007).

The fact that the proof of causation may be difficult does not relieve the claimant of the burden of proof. Opinion testimony does not establish any material fact as a matter of law and is not binding on the trier of fact. American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). Moreover, expert evidence based upon inaccurate underlying facts cannot support a verdict. *See* Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995); APD 023106, decided January 22, 2003.

2007 Medical Records

The claimant was assessed and treated at the (TM Clinic) beginning _____, and continuing through June 20, 2007. During that time period the claimant was diagnosed with first and second degree superficial burns to the top of the left forearm. The claimant subsequently developed superficial ulcers on the top of his left forearm and was diagnosed with chemical exposure, left arm, chemical burn/dermatitis, and cellulitis.

The claimant was referred to (Dr. M) at the dermatology center with TM Clinic. On June 15, 2007, Dr. M assessed the claimant with a chemical burn complicated by cellulites/lymphangitis. In a record dated June 20, 2007, Dr. M noted that the forearm had improved and that several of the crusted ulcers had healed with scarring. Other ulcers were still open but shallow.

[1] Rule 126.7 became effective on January 1, 2007, and provides in subsection (w) that a request for a designated doctor under its provisions may be made on or after January 1, 2007.

There is no documentation in TM Clinic's medical records or those of the dermatology clinic admitted into evidence that the chemical burn of the left forearm extended to deep tissues in the forearm, resulting in tendon exposure or extended to an injury to the palmar aspect of the left forearm.

CCH Testimony

At the CCH, (Dr. D), a board certified orthopedic surgeon, testified that he performed a peer review of the claimant's medical records and that his understanding of the work injury was that the claimant sustained a chlorine chemical burn to the top of the left forearm. In his opinion, Dr. D found nothing in the medical records indicating that the palmar aspect of the forearm was involved. Dr. D further opined that it was highly unlikely that a median nerve injury was caused by the chemical burn to the claimant's forearm. Dr. D stated, after reviewing the claimant's medical records, especially those of the dermatology clinic, that there was no scientific explanation as to how the chemical burn could have damaged the median nerve.

Medical Records Gap

There are no medical records in evidence following June 20, 2007, until the claimant was initially seen by (Dr. F) on January 24, 2009. The claimant testified that during this time period he was only treated at hospital emergency rooms. There are no medical records in evidence pertaining to these visits.

Medical Records from Dr. F, Treating Doctor

Dr. F in his initial examination of January 24, 2009, noted that the claimant had sustained a left forearm third degree chemical burn measuring less than one percent of total body surface. The wounds were completely healed. Dr. F's report states that there is no sign of infection. The report further states that the claimant complained of numbness on the dorsal aspect of his lower left forearm, hand and third and fourth fingers with intermittent twitching and cramping of his left forearm extensor muscle groups. He had complaints of wrist pain radiating into the palmar aspect of his hand in a numbing manner. Also there were complaints of tingling, radiating into his second to third fingers and a weakened hand grip, dropping objects frequently. Dr. F found mild forearm myospasm, sensation intact proximal to the burns, and hypesthesia along the dorsal aspect of the arm distal to the burns, extending to the base of the claimant's wrist.

Dr. F referred the claimant for an EMG/NCV for the upper extremities, which was performed on March 18, 2009. The EMG/NCV was not in evidence, but in a record dated April 18, 2009, Dr. F states that the EMG/NCV demonstrated a moderately severe left carpal tunnel syndrome (CTS) and a mild right CTS. Dr. F noted in part mild median nerve hypesthesia, a positive Phalen's test, and a negative Tinel's sign. Dr. F diagnosed and treated the claimant for left CTS at least through December 11, 2009.

In a document dated March 8, 2010, entitled "Response to a deposition on written questions regarding the [claimant] and his left [CTS] in relationship to a work-related injury" Dr. F was asked to "[e]xplain in your medical opinion, [the] mechanism of injury that the claimant sustained resulting in a median nerve injury." Dr. F replied:

> [The claimant] worked as a demolition expert for numerous years requiring flexion and extension, repetitive motions of bilateral wrist. His left [CTS], which is a compression phenomena of repetitive motion is a consequence of his job performance over a period of years.

Additionally, Dr. F was asked to explain in his medical opinion whether the chemical burns resulted in a median nerve injury, Dr. F replied:

> The chemical burn injury to [the claimant] occurred on the dorsal aspect of his left forearm with the median nerve running over the ventral aspect of the arm. There is no known scientific reason to support the selective peripheral nerve injury at a location far removed from the anatomic course of a nerve. In essence there is no relation.

Designated Doctor and Post-Designated Doctor Required Medical Examination (RME)

Dr. G, the designated doctor, examined the claimant on April 13, 2009, and in a report of that same date stated:

> The [claimant] came under the care of the [TM Clinic] and then [Dr. M] and was treated locally with debridement. The wound extended deep into the tissues to the point where he had tendon exposure.
>
> * * * *
>
> There is decreased sensation to pinprick and light touch in the left upper extremity in a median nerve distribution from the mid forearm distally.
>
> * * * *
>
> There are scars over the left forearm consistent with his previous burn. This scar extends from the dorsum of the forearm around to the wrist.
>
> * * * *
>
> The [claimant] was injured with an unknown chemical burn on _____. The burn extended into the deep tissues but did resolve . . . . Electrodiagnostic testing was performed that showed multiple compressive neuropathies, some of which do correlate with his clinical symptoms.

* * * *

> It is my opinion that after review of the medical records presented, and a thorough examination, the extent of the employee's compensable injury would be a burn of the left forearm and median neuropathy. Based on his mechanism of injury he likely had some damage to the median nerve due to the extent of the burn.

(Dr. O) performed a post-designated doctor RME on January 15, 2010, and in a report of that same date stated that in his opinion CTS is not associated with the work injury at all.

In a response dated February 9, 2010, to a letter of clarification, Dr. G stated that he had reviewed Dr. O's RME report and while he was in general agreement with Dr. O's opinions and conclusions in the RME report, Dr. G did not change his opinions or conclusions contained in his April 13, 2009, report.

Dr. G's report is based on inaccurate facts that the burn extended into the deep tissues to the point that there was tendon exposure. These conditions are not documented by any medical records in evidence. Therefore, the preponderance of the other medical evidence is contrary to the designated doctor's opinion that the compensable injury extends to the left median nerve neuropathy.

Sufficiency of the Evidence

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 hearing officer's determination that the claimant's compensable injury of _____, extends to the left median nerve neuropathy is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the claimant's compensable injury of _____, extends to the left median nerve neuropathy and we render a new decision that the claimant's compensable injury of _____, does not extend to the left median nerve neuropathy.

DISABILITY

Given that we have reversed the hearing officer's determination that the compensable injury of _____, does not extend to the left median nerve neuropathy, we reverse the hearing officer's determination that the claimant had disability resulting from the compensable injury beginning May 25, 2007, through April

13, 2009, and we remand the disability issue to the hearing officer for a determination consistent with this decision.

SUMMARY

We reverse the hearing officer's decision that the claimant's compensable injury of _____, extends to the left median nerve neuropathy and we render a new decision that the claimant's compensable injury of _____, does not extend to the left median nerve neuropathy.

We reverse the hearing officer's decision that the claimant had disability resulting from the compensable injury of _____, beginning May 25, 2007, through April 13, 2009, and we remand the disability issue to the hearing officer.

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 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge