

APPEAL NO. 230606  
FILED MAY 31, 2023

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 9, 2023, with the record closing on March 29, 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 compensable injury sustained on (date of injury), extends to obstructive ventilatory defect; (2) the compensable injury of (date of injury), does not extend to pneumonia; (3) the appellant (claimant) reached maximum medical improvement (MMI) on October 5, 2021; and (4) the claimant's impairment rating (IR) is five percent. The claimant appealed, disputing the ALJ's determination of extent of injury that was not favorable to him, MMI, and IR. The respondent (carrier) responded, urging affirmance of the disputed extent-of-injury, MMI, and IR determinations. The ALJ's determination that the compensable injury extends to obstructive ventilatory defect was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, affirmed in part as reformed, and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to at least sprains of the cervical and lumbar spine and chemical exposure and that (Dr. K) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) for the issues of extent of injury, MMI, and IR. A review of the record reflects that the parties additionally stipulated that the claimant sustained a compensable injury on (date of injury), that extends to asthma and obstructive ventilatory defect. We reform Finding of Fact 1.D. to reflect all of the conditions actually stipulated to by the parties at the CCH. The claimant testified that he was injured when he was cleaning out a chemical tank.

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 pneumonia is supported by sufficient evidence and is affirmed.

## **STATUTORY MMI DATE**

Section 408.082(b) provides that:

If the [employee's] disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury. If the disability does not begin at once after the injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits accrue on the eighth day after the date on which the disability began.

The parties stipulated that the date of statutory MMI in this case is June 1, 2023. Section 401.011(30)(B) defines statutory MMI as "the expiration of 104 weeks from the date on which income benefits begin to accrue." The claimant testified that he has not worked since the date of injury. We note that based on the earliest date the claimant could have had disability, June 1, 2023, would be too early for the statutory date of MMI.

## **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 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 in pertinent part that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination, and the doctor assigning the IR shall:

- (A) identify objective clinical or laboratory findings of permanent impairment for the current compensable injury;
- (B) document specific laboratory or clinical findings of an impairment;
- (C) analyze specific clinical and laboratory findings of an impairment;
- (D) compare the results of the analysis with the impairment criteria and provide the following:
  - (i) [a] description and explanation of specific clinical findings related to each impairment, including zero percent [IRs]; and
  - (ii) [a] description of how the findings relate to and compare with the criteria described in the applicable chapter 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))]. The doctor's inability to obtain required measurements must be explained.

The ALJ found in Finding of Fact No. 5 in the decision that the preponderance of the other medical evidence is not contrary to Dr. K's certification that the claimant reached MMI on October 25, 2021, with a five percent IR. However, we note that the ALJ determined in the Decision section and at Conclusion of Law No. 5 in the decision that the claimant reached MMI on October 5, 2021. There is no certification in evidence that certified the claimant reached MMI on October 5, 2021.

Dr. K, the designated doctor, examined the claimant on November 9, 2022, for purposes of MMI and IR. Dr. K provided alternative certifications. Dr. K did provide a certification that considered and rated a cervical sprain, a lumbar sprain, chemical exposure, asthma, and obstructive ventilatory defect. In discussing the impairment assigned for chemical exposure, obstructive ventilatory defect, and asthma, Dr. K stated that he requested a pulmonary function test to help determine if the claimant qualified for a respiratory impairment. Dr. K stated his office was unable to find a facility close to the claimant to see the claimant for these conditions and therefore impairment would be based on Dr. K's examination. Using his examination findings, Dr. K assessed zero percent impairment for these conditions.

The AMA Guides provide that "[a] forced expiratory maneuver must be performed during the examination and evaluation of each patient for permanent pulmonary impairment," on 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. See Appeals Panel Decision (APD) 970774, decided June 11, 1997.

There is no indication in Dr. K's narrative report whether he was relying on previous testing performed or whether Dr. K himself performed physiologic testing of pulmonary function during his examination and utilized the methodology as provided in the AMA Guides on pages 5/159-163. The required methodology includes, in part, measurements made from at least three acceptable spirometric tracings of forced expiration: forced vital capacity (FVC), forced expiratory volume in the first second (FEV1), and the ratio of these measurements (FEV1/FVC), a predicted normal single-breath diffusing capacity of carbon monoxide (Dco) Value for an individual according to age, and utilization of Table 8, "Classes of Respiratory Impairment" (page 5/162) for estimating the extent of permanent impairment. See *a/so* APD 230102, decided March 13, 2023.

Dr. K was required under Rule 130.1(c)(3) to identify, document, analyze clinical or laboratory findings of an impairment (which included the claimant's lungs, cervical spine, and lumbar spine), and compare that analysis to the impairment criteria in the AMA Guides, which could include zero percent IR. Dr. K did not comply with Rule 130.1(c)(3) in relation to the chemical exposure, asthma, and obstructive ventilatory defect components of the injury. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on October 5, 2021, and that the claimant's IR is five percent. There is no other certification in evidence that rates the entire compensable injury. Therefore, 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 compensable injury of (date of injury), does not extend to pneumonia.

We reverse the ALJ's determination that the date of MMI is October 5, 2021. We remand the MMI issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant's IR is five percent. We remand the IR issue 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 that is accurate. 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, FEV1, and FEV1/FVC, a predicted normal single-breath Dco Value for an individual 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 sprains to the cervical and lumbar spine, chemical exposure, asthma, and obstructive ventilatory defect but does not extend to pneumonia. The ALJ is to request Dr. K explain his assessment of the claimant's IR and how it complies with the AMA Guides.

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 sprains to the cervical and lumbar spine, chemical exposure, asthma, and obstructive ventilatory defect, but does not extend to pneumonia.

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 **LIBERTY MUTUAL FIRE 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.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge