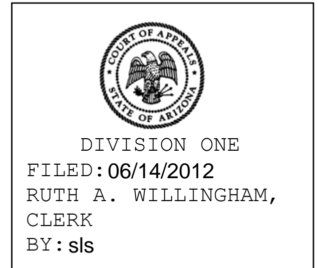
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24


DIVISION ONE
FILED: 06/14/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FREEPORT-MCMORAN MORENCI, Petitioner Employer,	1 CA-IC 11-0009
GALLAGHER BASSETT, Petitioner Carrier,	DEPARTMENT D
v.	**MEMORANDUM DECISION**
THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent,	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
LORRAINE MORRISON, Respondent Employee.	

Special Action – Industrial Commission

ICA Claim No. 20100-470185

Carrier Claim No. 48846-74730

Administrative Law Judge Gary M. Israel

AWARD AFFIRMED

Zingg Law Office, PLLC — Tucson
By Jo Fox Zingg
Attorney for Petitioners Employer and Carrier

Andrew Wade, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

Taylor & Associates, PLLC Phoenix
By Thomas C. Whitley
Attorney for Respondent Employee

T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review for a compensable claim. The petitioner employer, Freeport-McMoran Morenci (Freeport), presents two issues on appeal:

> (1) whether John B. Sullivan, Jr., M.D.'s opinion was legally sufficient to support an award of compensability; and
>
> (2) whether medical testimony regarding specific treatment the physician believes should be provided is binding on the administrative law judge (ALJ).

Because we find Dr. Sullivan's opinion legally sufficient to support the award, we affirm.

I. JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) (2003), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most

favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

II. PROCEDURAL AND FACTUAL HISTORY

¶3 At the time the respondent employee (claimant) reported an injury, she was driving a haul truck at an open pit mine for Freeport. Her work shift required her to spend twelve hours at a time in the truck cab. She was assigned to truck number 614 beginning in June 2009. In January 2010, the claimant began having physical symptoms which she believed were related to breathing truck exhaust. These included feeling tired and light-headed, tingling and burning on the skin around her eyes, nose, and lips, and burning in her nose and chest.

¶4 The claimant reported these symptoms to Freeport and a mine safety employee and a mechanic responded. The claimant was placed in a different truck while 614's cab filter was changed. But when the claimant was returned to 614, she continued to experience the same symptoms. She reported her ongoing symptoms and again was placed in a different truck. The claimant testified that the mechanic who worked on 614 told her that he repaired an exhaust pipe which had not been connected to the manifold. Despite this repair, when the claimant returned to 614, she continued to suffer from headaches, nausea, and an odd taste in her mouth. When she reported these problems, she

was encouraged to keep driving and was provided with a respirator.

¶5 The claimant testified that she could not use the respirator for her entire shift because she needed to eat, drink, and use the truck radio. Despite the respirator, the claimant thought that she could still smell truck exhaust and her skin still burned. In February 2010, Freeport sent the claimant for medical treatment, but her pulmonary function and blood oxygenation tests were normal. The claimant sought a second opinion from her primary care doctor and eventually was referred to Dr. Sullivan. She stated that she was taken off work for several months before she returned to a different job at a mine transfer station. The claimant testified that she remains sensitive to many things, her voice is raspy, and she has an irritating cough.

¶6 The claimant filed two workers' compensation claims for exposure to exhaust fumes dated February 5, 2010, and March 17, 2010. Both claims were denied for benefits, and the claimant requested ICA hearings. Four hearings were held, and the ALJ heard testimony from the claimant, four Freeport employees, Dr. Sullivan, and an independent medical examiner.

Following the hearings, the ALJ entered a consolidated award for a compensable claim.[1] His determinative finding states:

> [T]he applicant's version of these events is supported by a preponderance of credible evidence and that she sustained some exposure to fumes on the job in January and early February 2010. *Any conflict in the medical evidence of record is resolved by adopting the testimony, report and opinions of Dr. Sullivan as being most probably correct and well founded.* Even though he did not make a specific diagnosis, there were objective findings that Dr. Sullivan related to some on-the-job exposure, care was provided for the applicant's related symptoms, and there was factual support for the applicant's claims of 'smells' and exposure on or about February 5, 2010. Therefore, the applicant sustained a compensable exposure injury on February 5, 2010.

The award was summarily affirmed on administrative review, and Freeport brought this appeal.

III. DISCUSSION

¶7 Compensability requires an injury by accident arising out of and in the course of employment. *See* A.R.S. § 23-1021(A) (Supp. 2011). This involves both legal and medical causation. *DeSchaaf v. Indus. Comm'n*, 141 Ariz. 318, 320, 686 P.2d 1288, 1290 (App. 1984). Legal causation concerns whether the claimant's injury arose out of his employment. *See Peter Kiewit*

[1] The ALJ found the claimant's February 5, 2010 claim compensable, and the March 17, 2010 claim to be a continuation of that claim and not a separate claim in its own right.

Sons' Co. v. Indus. Comm'n, 88 Ariz. 164, 168, 354 P.2d 28, 30 (1960); *Scheller v. Indus. Comm'n*, 134 Ariz. 418, 420, 656 P.2d 1279, 1281 (App. 1982). Medical causation typically requires expert medical testimony to establish that the industrial accident caused the injury. *E.g., Allen v. Indus. Comm'n*, 124 Ariz. 173, 175, 602 P.2d 841, 843 (App. 1979).

¶8 Freeport first argues that Dr. Sullivan's testimony is legally insufficient to support the compensability award because it is vague and equivocal. A medical opinion must be based on findings of medical fact in order to support an award. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). These findings come from the claimant's history, medical records, diagnostic tests and examinations. *Id.; see also Spector v. Spector*, 17 Ariz. App. 221, 226, 496 P.2d 864, 869 (1972) (a physician may base his opinion entirely on a personal examination and observation of a patient or in part on the history as related to him by the patient).

¶9 Equivocal testimony is defined as being subject to two or more interpretations, and it is invoked when a doctor refuses to commit himself to one opinion. *See State Comp. Fund v. Indus. Comm'n,* 24 Ariz. App. 31, 36, 535 P.2d 623, 628 (1975). But a doctor's opinion does not have to be based in certainty to have value as evidence. *Belshe v. Indus. Comm'n,*

98 Ariz. 297, 303, 404 P.2d 91, 95-96 (1965). This court has recognized that positive knowledge of causation is not always possible but this uncertainty will not prevent a physician from stating a legally sufficient opinion. *See Harbor Ins. Co. v. Indus. Comm'n*, 25 Ariz. App. 610, 612, 545 P.2d 458, 460 (1976).

¶10 Dr. Sullivan, a medical toxicologist and clinical pharmacologist at the University of Arizona, testified that he first saw the claimant on March 23, 2010. At that time, the doctor took a history from the claimant, reviewed medical records from her primary care physician's assistant, and conducted an examination. He reported:

> Her health issues today are the following: (1) Increased nasal trigeminal nerve sensitivity likely secondary to inflammatory incitants in diesel exhaust. (2) some mid airway to lower airway irritation from diesel exhaust. (3) increased odor sensitivity. On physical examination her nasal mucosa were very inflamed. Her pulmonary function testing in the clinic was normal which does not remove the possibility of subclinic[al] upper airway inflammation.

Dr. Sullivan ordered additional diagnostic testing: "[h]igh sensitivity CRP and fibrinogen, which are markers of pulmonary inflammation from high particulate inflammatory environments."

¶11 Dr. Sullivan testified that the claimant's fibrinogen test result was borderline/close to the upper limits, and it improved when she was away from work. He stated that additional

testing still needed to be done, and at that time, he was unable to state to a reasonable medical probability the cause of the claimant's symptoms. The doctor summarized that the claimant's symptoms were related to her work environment as there was objective evidence of a problem in her airways, although the precise irritant was unknown. Further, medical care was justified and appropriate and removal from the truck cab was necessary until it could be determined that the work environment was safe.

¶12 In this case, the doctor's hearing testimony is not as clear as it could have been, because he enjoyed exploring theories and debating evidence with counsel. But as recognized by the ALJ, when that testimony is considered in combination with the doctor's written records and reports, it is legally sufficient to support a finding of compensability.

¶13 Freeport also argues that whether claimant's medical expenses should be covered by workers compensation is a legal question. It asserts that the ALJ erred in awarding medical expenses to claimant based on medical testimony concerning the propriety of such compensation. An industrially-injured claimant is entitled to receive all reasonably required medical, surgical and hospital benefits. *See* A.R.S. § 23-1062(A) (1995). The reasonable necessity of care is a medical question. *See*

generally Bergstresser v. Indus. Comm'n., 118 Ariz. 155, 157, 575 P.2d 354, 356 (App. 1978). For these reasons, we perceive no error.

¶14 For all of the foregoing reasons, we affirm the award.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

MICHAEL J. BROWN,
Acting Presiding Judge

/s/

MARGARET H. DOWNIE, Judge