

APPEAL NO. 020302
FILED MARCH 26, 2002

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 January 7, 2002. The hearing officer resolved the disputed issues before her by determining that the appellant's (claimant) compensable injury sustained on _____, extends to and includes depression but does not extend to or include a closed head/brain injury; that the respondent (carrier) did not waive the right to dispute whether the compensable injury of _____, extended to or included a closed head/brain injury or depression; that the claimant is not entitled to supplemental income benefits (SIBs) for the 16th quarter from May 15, 2001, through August 13, 2001, or the 17th quarter from August 14, 2001, through November 12, 2001; and that the carrier did not waive the right to contest the claimant's entitlement to SIBs for the 17th quarter by failing to request a benefit review conference (BRC). The claimant appealed the hearing officer's determinations that the compensable injury of _____, does not extend to or include a closed head/brain injury and that he is not entitled to SIBs for the 16th and 17th quarters. The carrier responded, urging affirmance. The hearing officer's determination that the compensable injury of _____, does extend to and include depression is unappealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

The claimant testified that on _____, he was injured when he fell down a flight of stairs, striking his head and back and that after he struck his head, the next thing he remembered was looking up and seeing people around him. The claimant testified that prior to the accident, he did experience occasional stress headaches. Since the accident, the claimant has been seen by numerous doctors and their records were submitted into evidence by the claimant. The claimant was initially taken to Harris Methodist Hospital on the day of the accident. The emergency room report indicates that the claimant thought he blacked out momentarily and he was kept overnight for observation. On March 16, 1995, the claimant was referred to Dr. A, who diagnosed a cerebral concussion with headache, irritability, and behavioral changes. The claimant has continued to treat with Dr. A. On May 18, 1995, Dr. A notes that the claimant has sustained a 20% loss of visual field secondary to a traumatic left optic nerve injury. On November 22, 1995, Dr. A added forgetfulness and memory difficulties to the claimant's assessment. On December 21, 1995, Dr. A certified that the claimant was permanently disabled due to a cerebral concussion, and that he will never be able to return to work. Dr. A continues to maintain that opinion.

On April 20, 1995, the claimant was seen by Dr. G due to vision difficulties in his left eye. Dr. G determined that the claimant's "visual fields showed a loss of temporal field, O.S. consistent with nerve damage to the left optic nerve." Dr. G further stated that, "This

could be on the basis of small damaged vessels at the time of injury, and I hope this will not progress.” Dr. G estimated that the claimant had lost 20% of his field, O.S.

On October 9, 1995, the claimant was sent to Dr. W for a designated doctor evaluation. Dr. W determined that the claimant was not at maximum medical improvement and that any anticipated impairment ratings would need to account for his loss of vision and closed head trauma.

On September 20, 1996, the claimant was sent to Dr. S by the carrier for an evaluation. Dr. S stated that generic neuropsychological testing needed to be performed. On October 18, 1996, the claimant underwent neuropsychological testing by Dr. H. Dr. H determined that there was evidence of cerebral dysfunction combined with the presence of a mood disorder and that depression is likely to be exaggerating the claimant’s clinical picture. Dr. H recommended aggressive treatment of the claimant’s mood disorder in order to determine what is attributable to the cerebral dysfunction and what is attributable to depression. Dr. H seriously questioned whether the claimant could return to a competitive work environment. Dr. H felt that the claimant should participate in an outpatient rehabilitation program for individuals suffering from brain injuries. After receiving Dr. H’s report, Dr. S issued an amended report on November 5, 1996. In his amended report, Dr. S states, “Based on the findings of the neuropsychologist, there is conclusive evidence that this [claimant] has had a brain injury, but the extent of that deficit is unknown.” Dr. S recommended that the claimant be treated by a psychiatrist for his depression and that he be enrolled in a brain injury day treatment program to address his decreased cognitive functioning.

The claimant submitted medical records from Dr. M dated January 10, 2001, through July 3, 2001. Dr. M assessed the claimant as having a closed head injury with complications, and determined that he could not return to work. The claimant was evaluated by Dr. Am on July 12, 2001. Dr. Am determined that it is unlikely that the claimant would be able to perform in a work environment. Dr. Am was unable to say whether the claimant had sustained a brain injury or not. The claimant was evaluated by Dr. Sc on September 10, 2001. Dr. Sc diagnosed a closed head injury and no ability to work.

In support of its position that the claimant did not sustain a closed head/brain injury and that the claimant had some ability to work, the carrier submitted medical records from Dr. Bk, Dr. St, and Dr. Bl. On November 18, 1998, Dr. Bk issued a peer review based upon his review of the claimant’s medical records. Dr. Bk stated that some of the claimant’s memory difficulties could be caused by his use of Xanax. Dr. Bk recommended repeat neuropsychological testing by another psychologist. He notes that the claimant had a normal MRI fairly soon after the alleged brain injury and he would think that for a brain injury to cause the symptoms that the claimant is experiencing, there would have at least been some “alteration and signal intensity.” Dr. Bk states that the claimant “does not appear to have any outstanding neurological deficits and thus on paper, it appears that he does have a possibility of returning to the work force.”

The claimant underwent a functional capacity evaluation on February 23, 2001. The examiner was unable to establish his physical limits because his efforts were so limited. The evaluation states that the claimant appears to have physiological and/or stress issues that limit his physical capabilities.

The claimant was examined by Dr. St on February 28, 2001. Dr. St determined that with respect to the spinal injury, the claimant is able to return to work in any capacity. He does not address a closed head/brain injury.

The claimant was evaluated by another designated doctor, Dr. Bl, on June 28, 2001, and July 12, 2001. Dr. Bl's August 7, 2001, report is not credible in that it is equivocal and self-contradictory regarding the claimant's ability to work given his closed head/brain injury.

The hearing officer erred in determining that the claimant's compensable injury of _____, does not extend to or include a closed head/brain injury.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer unless the determination is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find that the hearing officer's determination that the claimant's compensable injury of _____, does not extend to or include a closed head/brain injury is against the great weight and preponderance of the evidence, is not supported by sufficient evidence, and is clearly wrong and unjust.

The hearing officer erred in determining that the claimant is not entitled to SIBs for the 16th quarter because he had some ability to work and he failed to make a good faith job search.

The qualifying period for the 16th quarter was from January 30, 2001, through May 1, 2001. The hearing officer determined that the claimant had some ability to work during the qualifying period for the 16th quarter based upon Dr. Bl's August 7, 2001, report. As we have previously stated, Dr. Bl's report is not credible. The only other records that indicate that the claimant had some ability to work came from sources that did not believe, or did not consider the fact, that the claimant had a closed head/brain injury. The doctors that did consider the claimant's closed head/brain injury determined that he did not have an ability to work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110(a) (Rule 130.110(a)) provides, in part, that "The presumptive weight afforded the designated doctor's report shall begin the date the report is received by the Texas Workers' Compensation Commission (Commission)" The preamble to Rule 130.110 states: "The rule also establishes the starting date of the presumptive weight afforded the designated doctor's report, the presumptive weight will only be applicable to the qualifying period in which the report was

received by the Commission.” In the instant case, the designated doctor’s report was received by the Commission after the qualifying period for the 16th quarter had ended. It, therefore, is not entitled to presumptive weight for the 16th quarter. The great weight of the evidence presented by the doctors who considered the claimant’s closed head/brain injury in assessing the claimant’s ability to work during the qualifying period for the 16th quarter supports a determination that he had no ability to work. Therefore, the claimant is entitled to SIBs for the 16th quarter.

The hearing officer erred in determining that the claimant was not entitled to SIBs for the 17th quarter because he had some ability to work, he failed to make a good faith job search, and the carrier did not waive its right to contest entitlement.

At the hearing, there was no evidence, nor did the carrier even attempt to argue, that it requested a BRC within 10 days after receiving the claimants application for 17th quarter SIBs. The carrier conceded that it did not request a BRC within the 10-day time period. The hearing officer determined that the carrier did not pay SIBs for the 16th quarter so waiver does not apply to the 17th quarter pursuant to Rule 130.108(e).

Rule 130.108(d) requires a carrier to request a BRC within 10 days after the date it receives the application for SIBs if it had paid SIBs for the previous quarter. A carrier’s failure to do so results in the waiver of its right to contest the claimant’s entitlement to SIBs for that quarter. Rule 130.108(e) contains an exception to the waiver provision contained in subsection (d). Rule 130.108(e) provides, in relevant part, that if a carrier disputes entitlement to a subsequent quarter and did not pay SIBs during the quarter immediately preceding the disputed quarter, the carrier shall send the determination to the injured employee within 10 days of the date the form was filed with the carrier, and it becomes the injured employee’s obligation to dispute the carrier’s determination. Whether or not the carrier actually paid SIBs during the 16th quarter is irrelevant in this case. The claimant’s ultimate entitlement to SIBs for the 16th quarter had not yet been determined by the Commission on the date the claimant’s application was filed with the carrier. Additionally, an interlocutory order was issued on August 20, 2001, ordering the carrier to pay SIBs for the 16th quarter and we have determined that the claimant is entitled to SIBs for the 16th quarter. Under the facts of this case, the carrier had an obligation to request a BRC within 10 days of receiving the claimant’s application for 17th quarter SIBs. Because the carrier failed to timely request a BRC, it has waived its right to dispute the claimant’s entitlement to 17th quarter SIBs pursuant to Rule 130.108(d). Therefore, the claimant is entitled to SIBs for the 17th quarter.

The hearing officer’s decision and order are reversed and a new decision is rendered that the compensable injury sustained on _____, extends to and includes depression and a closed head/brain injury; that the claimant is entitled to SIBs for the 16th quarter from May 15, 2001, through August 13, 2001, and for the 17th quarter from August 14, 2001, through November 12, 2001; and that the carrier waived its right to contest the claimant’s entitlement to SIBs for the 17th quarter by failing to request a BRC.

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

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Terri Kay Oliver
Appeals Judge