

APPEAL NO. 100822
FILED AUGUST 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 2, 2010. The disputed issues were:

1. Did the respondent (claimant) have disability resulting from an injury sustained on _____, from March 8, 2003, through March 5, 2005?
2. Does the compensable injury of _____, extend to include a post traumatic stress disorder (PTSD), vestibular dysfunction, bilateral tinnitus, bilateral high frequency sensorineural hearing loss with moderate high frequency sensorineural hearing loss in the right and severe high frequency neurosensory hearing loss present in the left ear, depression and anxiety and an undiagnosed injury to the cervical spine and left shoulder?

The hearing officer determined that the compensable injury of _____, includes all the conditions listed in the extent-of-injury issue and that the claimant had disability from March 8, 2003, through March 5, 2005.

The appellant (carrier) appealed, contending that the disputed conditions were not related to the compensable injury and that the claimant "did not have disability for any period of time." The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that while working beneath a truck on a creeper, a pressurized valve became disconnected and "exploded" close to his face. The claimant is claiming injuries to his eyes, neck, left shoulder, hearing loss in his left ear and PTSD. The carrier accepted a left eye abrasion as the compensable injury.

EXTENT OF INJURY

PTSD and Undiagnosed Injury to the Left Shoulder

That portion of the hearing officer's determination that the compensable injury includes PTSD and an undiagnosed injury to the left shoulder¹ is supported by sufficient evidence and is affirmed.

¹ The medical evidence shows that the claimant was diagnosed with a left shoulder contusion.

Other Extent-of-Injury Conditions

The claimant was initially seen by (Dr. P) on July 11, 12, and 15, 2002, who noted injuries to the claimant's left eye, ear and left shoulder. In a Work Status Report (DWC-73) dated July 15, 2002, Dr. P released the claimant to return to work without restrictions. In a report dated August 28, 2002, Dr. P stated:

[The claimant] returned to the clinic on July 15, 2002, for a recheck. He stated that he had no further complaints about his left eye, left ear or left shoulder and examination was essentially normal. The patient did however state that he was experiencing episodes of anxiety accompanied by nausea and dizziness. There were no complaints of chest pain or shortness of breath. The patient stated that he has had similar episodes of anxiety before and felt it was because he had "lots of problems." When questioned further he stated that his problems were mostly related to his domestic situation and marital issues.

Although the claimant testified that he began to have anxiety attacks, it is undisputed that the claimant worked at his pre-injury job until March 28, 2003, when he was either terminated from his job or quit.

Regarding the conditions of depression and anxiety, the claimant was examined by (Dr. TP) a board certified psychiatrist. In a report dated September 9, 2003, Dr. TP noted the claimant's medical history and Dr. P's mental status examination. Dr. TP stated that it "is inconceivable that the claimed incident as described by [the claimant] produced a state of ongoing anxiety." (Dr. MS), a psychiatrist and carrier referral doctor, in a report dated April 27, 2010, in response to a question whether the compensable injury extended to depression and anxiety, stated:

No, there is no documentation by a board certified psychiatrist that [the claimant] suffers from depression and anxiety secondary to the incident in question. Furthermore, [the claimant] was fully capable of returning to work within four days and worked for approximately seven months after the incident without having difficulties.

Dr. MS also testified at the CCH and explained why he did not believe the claimant's hearing loss, tinnitus, vestibular dysfunction or cervical and left shoulder complaints were part of the compensable injury.

Because the claimant's claim had been denied, the claimant sought treatment with the (HC Clinic) emergency room (ER). HC Clinic records of over 25 visits between September 11, 2003, and August 17, 2007, document depression, anxiety, neck pain, left shoulder pain, tinnitus and hearing loss complaints.

(Dr. MR), an ear, nose and throat (ENT) specialist, in a report dated June 11, 2003, noted a hearing test "demonstrates a high frequency sensorineural hearing loss

bilaterally, slightly worse in the left ear than in the right" Dr. MR concluded that the testing is compatible with a central vestibular abnormality but whether "this is related to his blast is difficult to determine at this time." (Dr. S), an otolaryngologist (an ENT specialist), in a report dated September 12, 2003, confirmed that the claimant has high frequency sensorineural hearing loss, more marked in the left ear, "which may be due to the injury he sustained [in] _____. " Dr. S concluded that the injury may have contributed to the difference in the high frequency sensorineural hearing loss "but cannot be totally determined." HC Clinic records dated March 28, 2005, and a follow-up dated March 15, 2006, specifically measure and assess right mild to moderate sensorineural and left mild sensorineural hearing loss through 2000 Hz and "[m]oderately severe to severe sensorineural hearing loss" for the left ear without addressing causation.

(Dr. L) was the designated doctor appointed to determine the extent of the compensable injury. In a report dated September 9, 2003, Dr. L noted that the records she had reviewed, her mental status and physical examinations and concluded that the claimant's left sensorineural hearing loss is "a result of alcohol abuse/dependency and not a consequence of [the claimant's] claimed injury." Dr. L also opined that the claimed anxiety and panic attacks are not related to the claimant's compensable injury. In a response dated April 27, 2010, to a letter of clarification, Dr. L specifically notes that the vestibular dysfunction, bilateral tinnitus, bilateral high frequency sensorineural hearing loss with moderate high frequency sensorineural hearing loss in the right ear and severe high frequency neurosensory hearing loss present in the left ear "are not from an acute trauma." Dr. L further notes that the depression and anxiety were not caused by the accident although the claimant does suffer from anxiety and depression. Dr. L also opines that the claimant "does not have documented evidence to show a cervical spine injury or a left shoulder injury."

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where 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 Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). To be probative, expert testimony must be based on reasonable medical probability. City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App-San Antonio 2009, no pet.) citing Insurance Company of North America v. Meyers, 411 S.W.2d 710, 713 (Tex. 1966). In this case, the recitation of various conditions in HC Clinic and ER records without attendant explanation how those conditions may be related to the compensable injury does not establish those conditions are related to the compensable injury within a reasonable degree of medical probability, particularly in this case where expert medical opinion establishes causation cannot be determined or states affirmatively that there is no causation to the compensable injury.

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).

We reverse the hearing officer's determination that the compensable injury of _____, includes vestibular dysfunction, bilateral tinnitus, bilateral high frequency sensorineural hearing loss with moderate high frequency sensorineural hearing loss in the right and severe high frequency neurosensory hearing loss present in the left ear, depression and anxiety, and an undiagnosed injury to the cervical spine as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the compensable injury of _____, does not include vestibular dysfunction, bilateral tinnitus, bilateral high frequency sensorineural hearing loss with moderate high frequency sensorineural hearing loss in the right and severe high frequency neurosensory hearing loss present in the left ear, depression and anxiety, and an undiagnosed injury to the cervical spine.

DISABILITY

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. The claimant sustained his compensable injury on _____. The claimant was seen and released to return to modified duty by Dr. P on July 12, 2002, and then was released to return to work without restrictions on July 15, 2002. The claimant testified that he worked his pre-injury job until March 28, 2003. There is no evidence to the contrary.

The hearing officer determined that the claimant had disability from March 8, 2003, through March 5, 2005, yet the claimant clearly testified that he worked at his pre-injury job until March 28, 2003. Based on the claimant's testimony that he worked until March 28, 2003, we reverse that portion of the hearing officer's determination that the claimant had disability from March 8 through March 28, 2003, and we render a new decision that the claimant did not have disability from March 8 through March 28, 2003.

There is no medical evidence that takes the claimant off work after March 28, 2003, due to PTSD or the left eye abrasion; however, the claimant's testimony alone can establish disability. The claimant testified that he was unable to work after March 28, 2003, because of the effects of PTSD. In a workers' compensation case the issue of disability may be based on the sole testimony of the injured employee. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989) and APD 051383-s, decided August 9, 2005. We affirm that portion of the hearing officer's determination that the claimant had disability from March 29, 2003, through March 5, 2005.

SUMMARY

We affirm the hearing officer's determination that the compensable injury includes PTSD and an undiagnosed injury to the left shoulder (a contusion).

We affirm the hearing officer's determination that the claimant had disability from March 29, 2003, through March 5, 2005.

We reverse the hearing officer's determination that the compensable injury of _____, includes vestibular dysfunction, bilateral tinnitus, bilateral high frequency sensorineural hearing loss with moderate high frequency sensorineural hearing loss in the right and severe high frequency neurosensory hearing loss present in the left ear, depression and anxiety, and an undiagnosed injury to the cervical spine and we render a new decision that the compensable injury of _____, does not include vestibular dysfunction, bilateral tinnitus, bilateral high frequency sensorineural hearing loss with moderate high frequency sensorineural hearing loss in the right and severe high frequency neurosensory hearing loss present in the left ear, depression and anxiety, and an undiagnosed injury to the cervical spine.

We reverse the hearing officer's determination that the claimant had disability from March 8 through March 28, 2003, and we render a new decision that the claimant did not have disability from March 8 through March 28, 2003.

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.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Veronica L. Ruberto
Appeals Judge