APPEAL NO. 121672
FILED OCTOBER 29, 2012

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 July 20, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to closed head injury with cerebral concussion syndrome, C3-4 and C4-5 disc herniations, and aggravation of underlying cervical spondylosis; and (2) the respondent (claimant) had disability resulting from an injury sustained on [date of injury], from January 24, 2012, through the date of the CCH. The appellant (carrier) appeals the hearing officer's extent of injury and disability determinations. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that: (1) the carrier has accepted an [date of injury], compensable injury limited to a head contusion and cervical sprain/strain; and (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) selected [Dr. M] to serve as the designated doctor for extent of injury and disability for a specific period of time beginning January 24, 2012.

EXTENT OF INJURY

That portion of the hearing officer's extent-of-injury determination that the compensable injury of [date of injury], extends to a "closed head injury" is supported by sufficient evidence and is affirmed.

On [date of injury], the claimant, a service technician, was climbing a roof access ladder, when a gust of wind caused the locking mechanism on a metal door of the roof to break, which resulted in the metal door striking the claimant on the top of his head. The claimant testified that he continued working and finished the rest of his shift. He sought medical treatment four days later. The claimant testified that he missed some "intervening days" but worked until January 24, 2012, when he was taken off work due to a pending cervical spine surgery.

In evidence are emergency room (ER) records dated [four days after date of injury], that stated the claimant's chief complaint was an injury to his head. The records noted that the claimant complained of neck pain "(first day, resolved completely)." The

records further noted that the claimant had painless normal range of motion (ROM) in his neck and that his neck was non-tender. The records additionally noted that the claimant had severe headaches in the past but had not had one for a long while prior to the work incident. A CT of the head/brain was performed and gave as an impression: "[n]o acute intracranial process identified." A clinical impression was given of "[c]losed head injury without loss of consciousness."

The medical records in evidence show that the next complaint of the head injury was to [Dr. B] dated November 2, 2011, in which the claimant complains of shoulder pain and headaches and that "old injury one year ago, gotten worse . . . ." The same record notes that the claimant also complained of neck pain which had lasted for a few weeks. A cervical MRI without contrast was performed on November 16, 2011, and gave an impression of:

> Cord compression at C3-4 due to a large 5 mm central and right paracentral protrusion. There is also some cord edema likely compressive myelopathy. 4 mm central protrusion with canal stenosis at C4-5, but without cord edema or compression.

On January 12, 2012, the claimant was seen by [Dr. T], a neurologist, for his head injury of [date of injury]. Dr. T commented that the cervical MRI showed areas of disc herniation with pressure on the spinal cord which need to be repaired in the near future, and that the trouble with the claimant's constant headache and trouble with confusion is likely due to a post-concussion syndrome. Dr. T diagnosed the claimant with "cervical herniated disc C3-4 and C4-5 with cord compression" and "possible post-concussion syndrome."

A peer review dated January 20, 2012, and a peer review addendum dated January 23, 2012, from [Dr. O] opined that the claimant's status was post head contusion and neck strain which both had resolved. Dr. O states that he reviewed the medical history, and that the claimant had numerous other health issues which included anxiety, depression, shoulder pain, and abdominal pain. Dr. O reviewed the MRIs of the cervical spine findings and opined that the impressions given are a disease of life, and the MRI of the brain findings are pre-existing without evidence of acute injury. Dr. O opined that the claimant could not have significant stenosis and myelopathy and go from [date of injury], until November 2, 2011, and not have any complaints of significant problems in this area. Dr. O notes that there is no documentation in the records to support that the finding on the cervical MRI is secondary to the work injury. An operative report dated February 2, 2012, shows that the claimant underwent an anterior cervical discectomy and fusion C3-4 and C4-5 performed by [Dr. W].

Section 408.0041(a)(3) provides 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 the extent of the employee's compensable injury. Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary.

The designated doctor, Dr. M, was appointed to give an opinion of the extent of the claimant's compensable injury and whether the claimant's disability is a direct result of the work-related injury. Dr. M examined the claimant on March 7, 2012. Dr. M states in his narrative report that the claimant sustained a head injury on [date of injury], and was treated at an ER where he was told he had a concussion. However, the ER records indicate that the claimant was diagnosed with a closed head injury without loss of consciousness. The claimant was not diagnosed with a "possible post-concussion syndrome" until January 12, 2012. Dr. M noted that the claimant went to the ER on the day of the incident, however, the records indicate that the claimant did not go to the ER until four days following the incident. Dr. M noted that the claimant had never had any previous history of headache or neck injury. However, the ER records noted that the claimant had severe headaches in the past but had not had one for a long while prior to the work incident. Dr. M noted that after having cervical spine surgery, the claimant's headaches have gone away.

Dr. M diagnosed the claimant with "[c]ervical spine injury with either causation of a herniated disc at [C3-4] and [C4-5] with axial loading and flexion forces being applied versus just aggravation of an underlying pre-existing condition." Dr. M opined that upon reviewing the records and evaluation of the claimant, the extent of the compensable injury extends to a closed head injury with cerebral concussion syndrome, as well as a cervical spine injury with C3-4 and C4-5 disc herniation and aggravation of underlying cervical spondylosis. Further, Dr. M explained that the mechanism of injury caused a cerebral concussion and disc herniations, and that it is impossible to determine were any of these pre-existing problems or whether he sustained a single level herniation at C3-4 on the right side with cord compression and cord edema. Dr. M does not address the lapse in time between the mechanism of injury, lack of complaints to medical providers, and the diagnoses of the extent-of-injury conditions in dispute.

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).

When an injury is asserted to have occurred by way of an aggravation of a pre-existing condition, there must be evidence that there was a pre-existing condition and there was some enhancement, acceleration, or worsening of the underlying condition. The burden of proving that there is a compensable injury or aggravation of a pre-existing condition is on the claimant. APD 001825, decided September 12, 2000.

The ER records indicate that four days after the compensable injury, his neck pain had resolved. Dr. M believed that the claimant went immediately to the ER for treatment and noted that the claimant did not have a history of headaches. A review of the record indicates that the claimant did not go to the ER immediately and had a history of headaches prior to the work-related incident. Dr. M noted that the headaches have gone away after the cervical spine surgery. *See* Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995), stating that expert evidence based upon inaccurate underlying facts cannot support a determination. Dr. M did not comment on the fact that the claimant had a non-tender neck with normal ROM upon presentation to the ER. The ER noted that the neck pain the claimant had for one day resolved. Dr. M did not explain how given those circumstances the C3-4 and C4-5 disc herniations and aggravation of underlying cervical spondylosis which were not diagnosed until a year after the compensable injury could be related to the mechanism of injury. Similarly, the claimant was not diagnosed with a "possible post-concussion syndrome" until over a year after the injury and there was no discussion of whether a cerebral concussion syndrome and post-concussion syndrome were the same conditions.

That portion of the hearing officer's findings that the claimant's cerebral concussion syndrome, C3-4 and C4-5 disc herniations and aggravation of underlying cervical spondylosis arose out of or naturally resulted from the [date of injury], compensable injury is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse that portion of the hearing officer's decision that the compensable injury of [date of injury], extends to cerebral concussion syndrome, C3-4 and C4-5 disc herniations and aggravation of underlying cervical spondylosis. We render a new decision that the compensable injury of [date of injury], does not extend to cerebral concussion syndrome, C3-4 and C4-5 disc herniations and aggravation of underlying cervical spondylosis.

DISABILITY

Given that we have reversed the hearing officer's determination regarding the extent of the compensable injury, we reverse the hearing officer's determination that

the claimant had disability from January 24, 2012, through the CCH and remand the disability issue to the hearing officer to decide the disability issue considering the compensable injury which does not extend to cerebral concussion syndrome, C3-4 and C4-5 disc herniations, and aggravation of underlying cervical spondylosis.

SUMMARY

We affirm that portion of the hearing officer's extent-of-injury determination that the compensable injury of [date of injury], extends to a closed head injury.

We reverse that portion of the hearing officer's decision that the compensable injury of [date of injury], extends to cerebral concussion syndrome, C3-4 and C4-5 disc herniations and aggravation of underlying cervical spondylosis. We render a new decision that the compensable injury of [date of injury], does not extend to cerebral concussion syndrome, C3-4 and C4-5 disc herniations and aggravation of underlying cervical spondylosis.

We reverse the hearing officer's determination that the claimant had disability from January 24, 2012, through the CCH and remand for further action 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 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, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERISURE MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CINDY GHALIBAF
5221 NORTH O'CONNOR BOULEVARD, SUITE 400
IRVING, TEXAS 75039-3711.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the well written decision of my colleagues.

The carrier's case is premised on the fact that the claimant did not mention, and did not seek treatment for the compensable injury for about 15 months, with no explanation. The designated doctor does not reference that time gap.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). All of the evidence recited in the majority opinion was before the hearing officer at the CCH. In addition, the hearing officer had the opportunity to observe and judge the credibility of the claimant when he testified. Any inconsistencies in the evidence are facts which are within the province of the hearing officer to resolve. It appears to me that the majority is substituting its own opinion for that of the trier of fact, something which we have repeatedly said we would not do. APD 000211-s, decided March 16, 2000, citing National Union Fire Insurance Company of Pittsburgh,

Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Although there is conflicting evidence which might support a different result I believe the hearing officer was acting within her province as the trier of fact in determining the extent-of-injury issue.

I would affirm the hearing officer's decision.

Thomas A. Knapp
Appeals Judge