APPEAL NO. 961340

On May 14, 1996, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the CCH was: "Is the claimant entitled to lifetime income benefits [LIBS] based on an injury to the skull that resulted in incurable imbecility." Although the issue as framed appears to assume that the claimant had a skull injury and that the skull injury resulted in incurable imbecility, the actual issues litigated by the parties were whether the appellant (claimant) had a skull injury and whether it resulted in incurable imbecility. Neither party appealed the hearing officer's finding that on (date of injury), the claimant sustained an injury to his skull while in the course and scope of his employment when he fell off a truck. The hearing officer further found that the claimant failed to prove that his skull injury of (date of injury), resulted in either incurable insanity or incurable imbecility. Unfortunately, the hearing officer phrased his conclusion of law in the same terms as the issue was framed and thus the conclusion states "[t]he claimant is not entitled to [LIBS] based on an injury to the skull that resulted in incurable imbecility." The claimant appeals that conclusion. Read literally, the conclusion of law concludes that the skull injury resulted in incurable imbecility, which is contrary to the hearing officer's finding of fact. Since the hearing officer decided that the respondent (carrier) is not liable for LIBS it is apparent that the hearing officer was not, in fact, concluding that the skull injury resulted in incurable imbecility, but that the claimant was not entitled to LIBS because he had not proved that his skull injury resulted in incurable imbecility, as was stated in the finding of fact. The carrier requests affirmance.

DECISION

Affirmed as reformed herein.

Section 408.161(a) provides that LIBS are paid until the death of the employee for, among other things, "an injury to the skull resulting in incurable insanity or imbecility." On (date of injury), while working for the employer, the claimant fell off the back of a trailer when he tried to close the trailer door. The parties stipulated that the claimant sustained a compensable injury on (date of injury), and it is undisputed on appeal that the claimant sustained an injury to his skull when he fell on (date of injury). The claimant has been treated for injuries to various parts of his body since his accident of (date of injury). On November 19, 1992, the claimant was given various tests, including a Wechsler Adult Intelligence Scale-Revised Test (WAI test) by Dr. W, Ph.d, a psychologist, who concluded that the claimant had a low-average intellectual functioning with full-scale intelligence quotient (I.Q.) measured at 90 and that the claimant's depression, anxiety, and chronic pain resulted in significant difficulty with attention, concentration, verbal memory, and low

frustration tolerance. The claimant began treatment with Dr. P, a psychiatrist and neurologist, in 1992. Dr. P diagnosed organic affective syndrome and partial epilepsy, which he stated resulted from the injuries of (date of injury). Dr. P wrote that the claimant is completely disabled and incapable of gainful employment.

The claimant was found to have a subdural hematoma in the left side of his head and on March 6, 1993, he underwent a left frontal craniotomy and excision of an extremely large chronic subdural hydroma associated with the hematoma and calcified membrane. The claimant's wife testified that the claimant had a stroke on the operating table; however, the operative report does not reflect the occurrence of a stroke at the time of the operation. It may be that the claimant had a stroke not long after his operation because other medical reports mention a stroke. Following surgery, a speech pathologist provided communication-skills therapy to the claimant. The speech pathologist initially noted that the claimant had profound impairment regarding expression and comprehension, but later wrote that the claimant had improved. Dr. P wrote that the claimant's brain surgery in March 1993 resulted from the head injury of (date of injury) and that the claimant is aphasic, which he stated, was the outcome of a stroke during or immediately after the surgery. According to DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 105 (28th ed. 1994), aphasia is a defect or loss of the power of expression by speech, writing, or signs, or of comprehending spoken or written language, due to injury or disease of the brain.

The parties entered into a benefit review conference (BRC) agreement (the agreement) on June 23, 1993 (the claimant's attorney, a carrier representative, and the benefit review officer (BRO) signed the agreement). The BRC agreement reflects that the disputed issues at that time were the claimant's impairment rating (IR) and whether the claimant is entitled to LIBS. According to the agreement, the parties agreed that the Texas Workers' Compensation Commission (Commission) would appoint a designated doctor who would be a neurosurgeon and that that designated doctor would refer the claimant to Dr. H, an orthopedic specialist, for a "medical assessment" and that the designated doctor would determine the necessity for a referral to a psychiatrist "for assessment of the [IR], if deemed necessary and permitted by the AMA guidelines [Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association]." The agreement further provided that the designated doctor "should use the reports from the orthopedic specialist and psychiatrist (if deemed necessary and permitted by the AMA guidelines) to determine the total body [IR]." The agreement also provided that "the designated doctor shall determine whether the claimant's skull injury has resulted in `incurable insanity or

imbecility' to determine whether [LIBS] are due." On June 24, 1993, the Commission appointed Dr. PAC, a neurosurgeon, as the designated doctor.

On October 19, 1994, Dr. P, the psychiatrist and neurologist the claimant had been seeing, wrote that the claimant is able to take care of his daily living activities with assistance and supervision, that he is unable to handle his own money, that he is completely disabled and incapable of substantial or gainful employment, and that his "Psychiatric disability, Organic Affective Disorder" caused by "the work related head injury, is 100 percent." Dr. P wrote that the claimant has a blank, confused look, that he had no evidence of illusions, delusions, or hallucinations, that he is not oriented to time or place, that his motor skills are grossly impaired, that his social skills are moderately impaired, that his intelligence is below average, and that his "insight and judgment are nil." Dr. P further noted that the claimant suffered a cerebral vascular accident (stroke) during the surgery.

The IR report of Dr. PAC, the designated doctor, was not in evidence. In a letter to the Commission dated November 27, 1995, Dr. PAC referred to a neurological evaluation he did on July 7, 1993, and stated that the claimant suffers from post-traumatic seizure disorder and expressive dysphasia which resulted from his skull and brain injury and that the injury required surgery. He then stated that:

> I did not find the patient with mental insanity or imbecility. He had a depression that was treated by psychiatrist, [Dr. P] and neither him [sic] found or described this condition, otherwise, he would have had a higher percentage. The psychiatrist did not consider any disability impairment for medical conditions of insanity or imbecility.
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> If there is any doubt in this regard, then [Dr. P], as a psychiatrist, can address the questions of insanity or imbecility. As a neurosurgeon, I address objective neurological brain dysfunctions.

In March 1994 Dr. K wrote that the claimant suffers from generalized motor seizures and psychomotor seizures, that his condition was deteriorating, that he was exhibiting more signs of organic brain disorder, that he suffers from marked frontal lobe syndrome, and that he is "100% disabled, and he needs constant care from his wife." Dr. P referred the claimant to Dr. M, Ph.d, a psychologist, for an assessment of the claimant's intellectual functioning and she evaluated the claimant on May 9, 1996. She administered the WAI test to the claimant and noted that the claimant was unable to respond to the verbal items on the test and that he was unable to perform the tasks on

the performance portion of the test. She noted that the claimant's "full scale I.Q is in the Imbecile range (below 25)." Dr. M stated that "[t]est results suggest that this patient's head injury has left him with intellectual functioning in the imbecile range. This makes it impossible for the patient to be employed again." Dr. M diagnosed organic affective disorder, dementia due to head injury, and partial complex seizure disorder. DORLAND'S, *supra*, at 439, defines "dementia" in part as an organic mental syndrome characterized by a general loss of intellectual abilities involving impairment of memory, judgment, and abstract thinking as well as changes in personality. There was no medical opinion provided as to how the term "dementia" might compare to the term "imbecility."

In a letter to Dr. PAC dated May 10, 1996, Dr. P gave the same diagnoses as had Dr. M and noted that the claimant repeats himself, that he is forgetful, that he cannot take medications without assistance, that he has face and hand pain, that he carries his hands over his stomach, that his orientation to person and place are okay, that there was no evidence of illusions, delusions, or hallucinations, that his speech evidences severe aphasia, that his intelligence is below average--referencing "report from [Dr. M]," that his insight and judgment are poor, that he was stable but that no improvement is expected, and that he is completely disabled for any kind of substantial or gainful employment.

The claimant's wife testified that she has been married to the claimant for 18 years and that prior to the injury of (date of injury), the claimant was a "full-functioning adult" who drove, worked, and took care of himself. She said that now the claimant does not sleep well, that he is very confused, that he is forgetful, and that he has seizures. She further testified that she has to constantly take care of the claimant because he cannot take care of himself. She said that the claimant cannot work or drive. She also said that the claimant "looks" at the newspaper but does not read it. She said that they watch television together but that they do not discuss what's on television because "we cannot communicate." She also said that the claimant is unable to write and that, although he dresses himself, she has to tell him what to wear. She indicated that the claimant can feed himself. She said that the claimant can bathe himself "with supervision." She said that the claimant's condition has gotten significantly worse since he had the stroke on the operating table in March 1993.

The claimant appeared at the CCH but did not testify. The carrier introduced into evidence an oral deposition of the claimant which was taken on January 25, 1996. The deposition was taken in connection with a lawsuit brought by the claimant's wife, individually, and as the guardian of the estate of the claimant, who is identified in the style of the case as an "incapacitated person," against Dr. C, who is a doctor that treated the claimant following the accident of (date of injury). In the oral deposition the claimant

answered questions posed by the attorney for Dr. C. There was no assertion that the claimant was incompetent to give testimony in the oral deposition. The claimant's answers demonstrated that he could recall and discuss past events, such as a head injury he suffered in 1955 for which he had surgery, the length of time he was in the national guard, a head injury in 1985 or 1986 for which he was hospitalized for a short period of time, his educational background--high school and one year of college, his performance in college, the length of time he worked for the company that was taken over by the employer, his injury of (date of injury), his report of that injury to his employer, the surgery of March 1993, and the names of some, but not all, of the doctors who have treated him for various medical conditions. He testified that he is able to take care of himself, to bathe himself, and to dress himself. He also said he takes walks, picks up the paper, and gets the mail. He said he can write and use the telephone but that he cannot drive. He further said that in the morning "I see the newspaper" and that in the afternoon he watches television. He indicated that he is forgetful and that that is why his wife is his guardian. Evidence was not presented as to when and how the claimant's wife became the claimant's guardian.

The issue at the CCH was: "Is the claimant entitled to [LIBS] based on an injury to the skull that resulted in incurable imbecility?" Although the issue as framed appears to assume that the claimant had a skull injury and that it resulted in incurable imbecility, that is not the way in which the parties interpreted the issue. For example, in his opening statement, the claimant's attorney said that the issue was whether the claimant's skull injury resulted in incurable imbecility and in closing argument the carrier's attorney argued that there was a lack of evidence of a skull injury, a lack of evidence that a skull injury resulted in imbecility, and a lack of evidence that, if there was imbecility, it was incurable. The hearing officer's finding that the claimant sustained a skull injury on (date of injury), is not contested on appeal. On appeal, the claimant asserts that the hearing officer erred in concluding that "[t]he claimant is not entitled to [LIBS] based on an injury to the skull that resulted in incurable imbecility." As previously noted, that conclusion appears to conclude that the claimant's skull injury did result in incurable imbecility; however, that is not what the hearing officer found in his finding of fact. The hearing officer found that "[t]he claimant failed to prove, by a preponderance of the evidence that his skull injury of (date of injury), resulted in either incurable insanity or incurable imbecility." We view the hearing officer's decision that the claimant is not entitled to LIBS to be based on his finding that the claimant failed to prove that his skull injury resulted in incurable insanity or imbecility. We view the complained of conclusion to be based on the wording of the issue from the BRC of August 21, 1995, which, unfortunately, was not worded in such a manner so as to reflect that the existence of a skull injury and the existence of incurable imbecility were the disputed issues. Thus, in order to harmonize the hearing officer's

conclusion of law with his finding of fact that the claimant didn't prove that his skull injury resulted in incurable insanity or imbecility and his decision that the carrier is not liable for LIBS, we take his conclusion to mean that he concluded that the claimant isn't entitled to LIBS because he didn't prove that the skull injury resulted in incurable imbecility and we thus reform the conclusion of law to simply state that the claimant is not entitled to LIBS.

On appeal, neither party directs us to any court case or Appeals Panel decision under the 1989 Act which defines the term "imbecility" as used in Section 408.161(a) nor do they direct us to any court case in which that term was defined under the prior statute, TEX. REV. CIV. STAT. ANN. Art. 8306 § 11a, and we have not located any Texas workers' compensation case or Appeals Panel decision which defines that term. We note that BLACK'S LAW DICTIONARY 749 (6th ed. 1990) refers the reader to the definition of insanity for a definition of imbecility; that DORLAND'S, *supra*, at 820, defines imbecility as the condition of being an imbecile; moderate or severe mental retardation; and that WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1991) defines imbecility as the quality or state of being imbecile or an imbecile, and that it defines imbecile as a mentally deficient person, especially a feebleminded person having a mental age of three to seven years and requiring supervision in the performance of routine daily tasks or caring for himself. The claimant's attorney contends that the claimant proved that his skull injury resulted in incurable imbecility and that the hearing officer's decision is against the great weight and preponderance of the evidence and in support thereof points to the testimony of the claimant's wife, Dr. P's letter of May 10, 1996, Dr. M's finding that the claimant's I.Q. is in the imbecile range, Dr. K's report, and to what he calls confusing and unintelligent answers given by the claimant in his January 1996 deposition. The claimant's attorney does not contend that the BRC agreement wherein the parties agreed that the designated doctor would determine whether the claimant's skull injury resulted in incurable insanity or imbecility was invalid for any reason or that it should be set aside; rather, he contends that Dr. PAC, the designated doctor, stated that he only addressed objective neurological brain dysfunction and that Dr. PAC also stated that "[Dr. P] as a psychiatrist can address the questions of insanity or imbecility." The claimant's attorney further notes that Dr. P stated that the claimant's I.Q. was below average and referred to Dr. M's report.

Section 410.030(b) provides that a BRC agreement is binding on a claimant, if represented by an attorney, to the same extent as on the insurance carrier, and Subsection (a) of that section provides that a BRC agreement is binding on the carrier through the conclusion of all matters relating to the claim, unless the Commission or a court, on a finding of fraud, newly discovered evidence, or other good and sufficient cause, relieves the carrier of the effect of the agreement. Basically, the parties agreed

that the Commission would appoint a neurosurgeon as the designated doctor to determine whether the claimant's skull injury resulted in incurable insanity or imbecility. In accordance with that agreement, the Commission appointed Dr. PAC, a neurosurgeon, as the designated doctor and he reported that he did not find that the claimant had "mental insanity or imbecility." Although Dr. PAC noted that "if there was any doubt in this regard," then Dr. P, a psychiatrist, could address the questions of insanity or imbecility and that he, as a neurosurgeon, addressed objective neurological brain dysfunctions, such comments did not do away with his finding that the claimant did not have insanity or imbecility. We also note that nowhere did Dr. P directly state that the claimant had incurable insanity or imbecility as a result of his skull injury.

The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence, including the medical evidence, and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. Here, some of the testimony of the claimant's wife was contradicted by some of the answers the claimant gave in his oral deposition. The parties' agreement was in evidence and Dr. PAC did not find that the claimant was insane or was an imbecile. Neither Dr. P or Dr. K directly state that the claimant is insane or is an imbecile or that incurable insanity or imbecility resulted from his skull injury, although Drs. P and M do diagnose dementia due to the head trauma. While we do not view it as necessary that a doctor use particular words to describe the claimant's condition, Dr. P's report of May 10, 1996, that the claimant has below average intelligence and that he has poor insight and judgment would not necessarily compel a determination that the claimant's skull injury resulted in incurable insanity or imbecility, especially in view of Dr. PAC's finding to the contrary. Dr. M's finding in May 1996 that the claimant was unable to respond to verbal items on the WAI test is at least somewhat contradicted by the demonstrated ability of the claimant to give verbal answers to various questions posed at his oral deposition in January 1996. We conclude that the hearing officer's finding that the claimant failed to prove that his skull injury of (date of injury), resulted in incurable insanity or imbecility is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). That finding supports his decision and order that the carrier is not liable for LIBS.

As reformed, the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge