

APPEAL NO. 050314
FILED APRIL 7, 2005

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 January 11, 2005, with the record closing on January 18, 2005. The issue at the CCH was whether the appellant/cross-respondent (claimant) is entitled to lifetime income benefits (LIBs) as a result of the compensable injury of _____. The claimant appeals the hearing officer's determination that he is not entitled to LIBs as a result of the compensable injury of _____, contending that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust and requests reversal of the decision or remand of the case to the hearing officer. The respondent/cross-appellant (carrier) appeals the hearing officer's overruling of the carrier's oral motion at the CCH to exclude testimony and evidence regarding the portions of the claimant's hands that suffered third degree burns, asserting that the claimant provided an incomplete answer to an interrogatory that asked about the burns to his hands. Each party filed a response.

DECISION

Reversed and rendered.

CARRIER'S CROSS-APPEAL

The carrier did not object at the CCH to the introduction into evidence of the claimant's exhibits. The carrier did make an oral motion to exclude testimony and evidence regarding the portions of the claimant's hands that suffered third degree burns and objected to the claimant's testimony regarding third degree burns and skin grafting that was done because the carrier contended that the claimant had provided an incomplete answer to an interrogatory regarding the specific portions of the hands that suffered third degree burns. The carrier directed the hearing officer's attention to the interrogatory answer complained of, which was in evidence. The hearing officer overruled the carrier's motion and objections. We have reviewed the interrogatory and answer complained of and conclude that the hearing officer did not abuse her discretion in overruling the carrier's motion and objections. See Texas Workers' Compensation Commission Appeal No. 001801, decided September 22, 2000.

ASSERTION OF NEWLY DISCOVERED EVIDENCE

The claimant attaches to his appeal a letter from his surgeon, (Dr. W) dated February 8, 2005, regarding a reexamination of the claimant done on February 8, 2005, and photographs of the claimant's hands. The claimant contends that the attachments constitute newly discovered evidence and requests that we remand the case to the hearing officer to consider these documents. In Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983), the Texas Supreme Court stated that it is incumbent upon a party who

seeks a new trial on the ground of newly discovered evidence to satisfy the court that the evidence has come to his knowledge since the trial; that it is not owing to the want of due diligence that it did not come sooner; that it is not cumulative; and that it is so material that it would probably produce a different result if a new trial were granted. The Appeals Panel has applied the test set forth in the Jackson case to assertions of newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 93280, decided May 26, 1993. We conclude that the claimant has not shown that the letter and photographs attached to his appeal constitute newly discovered evidence, because the claimant has not shown why, with the exercise of due diligence, he could not have been reexamined prior to the CCH or why he could not have provided photographs at the CCH. In addition, Dr. W's letter is cumulative of the opinion he gave in a letter that is in evidence. We will not consider on appeal the attachments to the claimant's appeal nor will we remand the case to the hearing officer to consider those attachments.

LIBs ISSUE

It is undisputed that the claimant sustained a compensable injury on _____, that resulted in burns to various parts of his body, including his hands. The issue at the CCH was whether the claimant is entitled to LIBs as a result of his compensable injury of _____. We note that the hearing officer made a typographical error in stating the issue in her decision by noting the year of the injury as 2005, and we hereby reform the decision to state the year of injury to be 2003. The claimant contends that as a result of his compensable injury, he has third degree burns covering the majority of both hands and is entitled to LIBs under Section 408.161(a)(7), which provides, for a claim for workers' compensation benefits based on a compensable injury that occurs on or after June 17, 2001, that LIBs are paid until the death of the employee for:

- (7) third degree burns that cover at least 40 percent of the body and require grafting, or third degree burns covering the majority of either both hands or one hand and the face.

On March 11, 2003, Dr. W, a plastic surgeon, performed surgery on the claimant consisting of burn excision with split-thickness skin grafting to the bilateral hands and left elbow. In a letter dated March 31, 2004, Dr. W wrote:

The following is a report on [claimant] to indicate the nature of his burn injuries and subsequent medical problems. This gentleman was injured on _____. He sustained a 35% electrical flash burn in a work related accident. His burn involved his face, upper chest, both upper extremities including the majority of hands and portions of the abdomen and both thighs. The burns of both of his hands (1,000 sq. cm), both thighs (2,500 sq. cm) and abdomen were 3rd degree in depth and required skin grafting. The skin grafting of the hands represent more than 50% of each hand.

The claimant testified that the majority of both of his hands required grafting.

Dr. W's oral deposition was taken on September 2, 2004. Dr. W agreed that his answers would be based on reasonable medical probability. Dr. W described the difference between a second degree burn and a third degree burn and noted that the main way to determine the level of the burn is by visual inspection and evaluation of the wound. With regard to the type of surgery he performed on the claimant on March 11, 2003, Dr. W said:

He – as previously mentioned, he had third-degree burns of his hands, and as I indicated previously, a third-degree burn means that the skin is completely damaged and will not heal on its own, where a second-degree burn will. Therefore, we excised or cut away the dead tissue on his hands and placed skin grafts on those areas.

Dr. W also responded as follows to these questions:

Q: Okay. Go back to the burns. I just want to make it clear. In a statement dated March 31st, 2004 you stated that the skin grafting of his hands, that he had injured -- third-degree burns more on – on more than 50 percent of each hand. Is that your opinion?

A: Yes.

Q: And your opinion is based on your estimation of the observation of his hands; is that correct?

A: Based on the areas that required grafting.

Q: The areas that required grafting. So, the dorsum of the hand and parts of the fingers?

A: Most of the fingers, as I recall.

Q: Most of the fingers as you recall. And that was both on the left and the right hand?

A: Correct.

* * * *

Q: So, I guess my first question is, Doctor, do you have an opinion whether [claimant] sustained third-degree burns to a majority of each hand?

A: You don't really need me for this. Why don't you take [claimant's] hands and measure them? That's going to be the most exact thing. Anything that I – you know, I think that he's about 50 percent. I could be wrong. I could be correct.

And you know, the simple thing here is, why don't you measure him, rather than sit here with me and ask me a bunch of questions? I mean, that's the most objective analysis. Measure the grafted area, measure his hands, and be done with it.

Q: Is there someone, Doctor, that you're aware of, either yourself or somebody that you could refer us to take those measurements?

A: Not offhand.

* * * *

Q: Did you graft any part of [claimant's] hands that were only second-degree burns?

A: No.

* * * *

Q: So Doctor, based upon reasonable medical probability is your opinions today still consistent with your report of March 31st, 2004?

A: Yes. As what I can recollect.

* * * *

Q: Okay. So, as it stands, then, based upon your recollection and your treatment and your initial assessments of [claimant], as it stands today your opinions regarding whether he sustained third-degree burns to the majority of each hand is the same as that which is contained in Exhibit Number 2? [Exhibit 2 to the deposition is identified as Dr. W's letter of March 31, 2004].

[Carrier attorney]: Objection, leading.

A: Yes.

On April 15, 2004, (Dr. S) examined the claimant at the request of the carrier. Dr. S's report reflects that he evaluated the claimant's hands. With regard to the right hand, Dr. S wrote: "There is evidence of a skin grafting to the entire dorsum of the hand and to approximately 20% of the radial aspect of the thumb and to the thenar area."

With regard to the left hand, Dr. S wrote: "There is evidence of a skin grafting to the entire dorsum of the hand with a mild dorsal syndactyly to the third web space and also skin grafting to the radial one-third of the thenar area." Dr. S concluded his report by stating "As stated, the entire dorsum of both hands and some of the palmar aspects of both hands, i.e. the majority of both hands, have been burned and may require lifelong treatment."

(Dr. T), a plastic surgeon, reviewed the claimant's medical records at the request of the carrier and testified telephonically at the CCH. Dr. T did not examine the claimant. Dr. T stated in his report that:

It is impossible for me to determine exactly the percentage of each hand that had a third-degree burn and required skin grafting. Based on the information that I have at this time, it does not appear that over 50 percent of each hand sustained a third-degree burn.

In his telephonic testimony, Dr. T agreed that normally a third-degree burn requires skin grafting. He stated that "from these records it appears that he didn't have grafting to the majority of the hands." When Dr. T was asked whether the claimant suffered burns to a majority of both of his hands, he said that it was impossible to determine but that with the records he had, he did not think in reasonable medical probability that the claimant sustained over 50% burns, but added that he could not be a 100% certain "that he did not have it done."

Dr. T was also asked the following questions, to which he responded as indicated:

Q: Doctor, and finally, isn't it true that you stated in direct examination that you really can't say that he did not sustain third degree burns to a majority of each hand?

A: That's correct.

* * * *

Q: Just for clarification, [Dr. T], based on your review of the medical records what is your opinion with regards to whether the Claimant suffered third degree burns to a majority of both of his hands?

A: Based on all of the information that I have it doesn't appear that he did.

The claimant appeals the following finding of fact and conclusion of law, contending that they are against the great weight and preponderance of the evidence:

FINDINGS OF FACT

2. Claimant failed to prove by a preponderance of credible evidence that he suffered third degree burns over the majority of both hands.

CONCLUSIONS OF LAW

3. Claimant is not entitled to [LIBs] as a result of the compensable injury of _____.

The claimant had the burden to prove by a preponderance of the evidence that he is entitled to LIBs. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Dr. W's opinion supports the claimant's contention that he sustained third degree burns covering the majority of both hands. While Dr. W did indicate in his deposition that he could be wrong, it nevertheless remained his opinion at the end of the deposition that the claimant sustained third degree burns to the majority of each hand. Dr. W's opinion was based on the amount of skin grafting he had done on the claimant's hands and the fact that the skin grafting he did was only done for third degree burns. As the surgeon who performed the skin grafting on the claimant's hands for third degree burns, Dr. W would be in the best position to opine on whether the claimant had third degree burns covering the majority of both hands.

Dr. S's opinion provides support for the claimant's contention, especially in light of Dr. W's testimony that the third degree burns of the hands required skin grafting and Dr. S's evaluation of the skin grafting to the hands. While Dr. S did not directly state that the claimant had third degree burns covering a majority of both hands, his opinion that the majority of both hands had been burned and may require lifelong treatment must be read in conjunction with the fact that the only burns to the hands that Dr. S described in the examination portion of his report were burns that required skin grafting. As noted, Dr. W said that skin grafting was done for third degree burns of the hands. It can thus reasonably be concluded that Dr. S was referring to a majority of both hands that required skin grafting, which would be for third degree burns.

Considering that Dr. T did not examine the claimant's hands and that he stated that it was impossible for him to determine from the records that were provided to him the percentage of each hand that had third degree burns, we do not think that his opinion that it did not appear that over 50% of each hand sustained a third degree burn is evidence that can reasonably be said to have weighed against the opinions of Drs. W and S, who actually saw the claimant's hands and were able to render opinions. Dr. T said it was impossible for him to make a determination based on the records provided to him.

Having considered the evidence, we conclude that the hearing officer's finding of fact that the claimant failed to prove by a preponderance of the credible evidence that he suffered third degree burns over the majority of both hands is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. We

reverse the hearing officer's decision that the claimant is not entitled to LIBs and we render a decision that the claimant is entitled to LIBs.

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

**JOSEPH KELLEY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78755.**

Robert W. Potts
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge