APPEAL NO. 101604
FILED DECEMBER 14, 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 September 27, 2010. With regard to the one issue before him the hearing officer determined that the compensable injury of _____, does not include the low back or left knee but does include a bipolar disorder.

The appellant (carrier) appealed the hearing officer's determination that the compensable injury includes a bipolar disorder essentially on a sufficiency of the evidence basis. The respondent (claimant) responded, urging affirmance and submitting additional medical reports. The hearing officer's determination that the compensable injury does not include the low back or left knee has not been appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and a new decision rendered.

EVIDENCE NOT OFFERED AT THE CCH

The claimant attached to his response to the carrier's appeal, medical reports dated May 29, 2008; December 23, 2009; January 19, 2010; and January 5, 2010, which had not been offered or admitted into evidence at the CCH. Documents submitted for the first time on appeal (or in this case in a response) are generally not considered unless they constitute newly discovered evidence. *See generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.—Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* APD 051405, decided August 9, 2005. In this case the documents were all dated well before the CCH and there was no indication that they were not available at the time of the CCH. Upon review we cannot agree that these documents meet the requirements of newly discovered evidence and they were not considered.

BIPOLAR DISORDER

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified, and the medical records support, that the claimant was a driver, moving vehicles around on a parking lot and in a parking garage,

and that he was involved in a motor vehicle accident on _____, when another vehicle hit the vehicle that the claimant was driving on the driver side door.

Initial medical records are not in evidence. The claimant reported injuries to his neck, head and right knee in his Employee's Notice of Injury or Occupational Disease and Claim for Compensation (DWC-41) dated November 17, 2004, and written statement dated _____. The earliest medical records in evidence begin in June 2005 when the claimant began treating with (Bx Clinic). The Bx Clinic report dated June 28, 2005, diagnosed various sprains/strains, a post-concussion syndrome, depression and anxiety disorders. In addition, the claimant submitted to a pain health evaluation on that same date. No bipolar disorder was discussed in that report.

The claimant was seen by a carrier required medical examination (RME) doctor in September 2005 and by a designated doctor in November 2005. No bipolar disorder was mentioned or rated by either doctor. The claimant was seen by a second designated doctor in April 2007, and no bipolar disorder was noted in that report. Neither the first nor second designated doctor was appointed on extent of injury.

Other medical records admitted in evidence include mental health mental retardation (MHMR) records which show that the claimant was diagnosed with a bipolar disorder as far back as 1989. The claimant proceeds on a theory of aggravation of the bipolar disorder. A referral doctor from the treating doctor, in a report dated July 22, 2009, considered mental and behavioral disorders and noted that the claimant "has not been diagnosed . . . as having a disorder by a qualified professional . . . ." The doctor recommended further evaluation to see if he qualified for a chronic pain management program.

The claimant was subsequently seen by (Dr. TM) a third designated doctor appointed to determine extent of injury. In a letter dated January 6, 2010, Dr. TM was specifically asked to address a disputed "'aggravation' of bipolar disorder." In a discussion of medical information, Dr. TM noted a letter from (Dr. M), a treating doctor and stated:

> [Dr. M] gives his opinion that [the claimant's] bipolar disorder "has been aggravated." Neither [Dr. M] nor anyone else has provided information on a CCH regarding a head injury. However, an MHMR psychiatrist [(Dr. R)] provided a note in 1/06 stating that the patient has been diagnosed with "bipolar disorder I, mixed severe with psychotic features." She further states that the head injury has "affected [claimant] by increasing his symptoms of anger and mood swings." She does not make a comment on "aggravation" as understood under the [workers' compensation] system.

Dr. TM concluded his report with the following assessment:

> Bipolar Disorder: I see limited evidence for the diagnosis of bipolar disorder, with a question raised about the adequacy of treatment under

> MHMR. The very limited information from the MHMR psychiatrist in 1/06 fails to present a case for "aggravation" of bipolar disorder under the compensability concepts of the Texas Workers' Compensation Act. Therefore, no "aggravation" has been documented by the documentation provided up to this point. However, I believe that it is reasonable for the patient to be provided a *psychiatric consultation under the Texas [workers' compensation] system (not MHMR) by a psychiatrist capable of making such a diagnosis and determining aggravation*. I will not become involved in this evaluation, but will be happy to go over the results of the evaluation to finalize my determination on "aggravation of bipolar disorder" when it has been completed. [Emphasis in original.]

Dr. TM referred the claimant to (Dr. C), a psychiatrist, who examined the claimant. In a report dated April 14, 2010, Dr. C noted that "[r]ecords are currently not available, but as far as I am aware, a diagnosis of bipolar disorder was not entertained at that point in time [in 1995]." Dr. C had an impression of "[h]istory of bipolar disorder with probable postconcussional symptoms." Dr. C, in his discussion, incorrectly commented that the claimant "was never treated for major psychiatric issues prior to his head injury." Dr. C commented that he does not have "neuropsychological testing at this point" and further stated that "I can infer bipolar disorder, although I have not observed this myself or really have adequate records to determine this other than relying on his responsive treatment through MHMR and [the claimant's] own reports." Dr. C concluded that "[t]here is certainly [a] reasonable expectation that his accident was the cause of his neurobehavioral change or exacerbated a latent tendency." Dr. C's report was sent to Dr. TM, who in a report dated May 5, 2010, commented that he concurred "with the compensability of the bipolar disorder as an *aggravation* in line with the opinion stated by [Dr. C]." [Emphasis in the original.]

(Dr. B) performed an RME on behalf of the carrier. In a comprehensive report dated June 11, 2010, Dr. B is asked whether the compensable injury includes aggravation of bipolar disorder. Dr. B responded that "[i]n reasonable medical probability, any mood symptoms are due to untreated and undiagnosed disease of chemical dependency." Dr. B explained:

> The [claimant] reports that he smokes marijuana instead of taking his Depakote. Depakote is a definitive treatment for bipolar disorder. Marijuana is not. Therefore, and reasonable medical probability, there is no bipolar disorder or bipolar disorder aggravation.
>
> On the other hand, the disease of chemical dependency frequently does occur in the diagnosis of bipolar disorder, but the mechanism of injury described, current behavior, and results of current objective neuropsychiatric measures including urine drug screen (qualitative and quantitative) would not be consistent with any aggravation of his alleged bipolar disorder. Benzodiazepines abuse and marijuana abuse (or dependence) and not taking bipolar disorder medication as prescribed

would be far more likely to aggravate a bipolar disorder than the mechanism of injury described.

In Guevara v. Ferrer, 247 S.W.3d 662, 665 (Tex. 2007), the Texas Supreme Court reiterated the longstanding general rule that "expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors." Guevara went on further to state that "[c]ompetent proof of the relationship between the event sued upon and the injuries or conditions complained of has always been required." In this case we hold that aggravation of a bipolar disorder is outside the common knowledge and experience of the fact finder and requires expert evidence of causation.

Dr. C, in his report acknowledged that he did not have all the relevant records of the claimant's past medical history available. The history that Dr. C did have was inaccurate in that Dr. C commented that the claimant had never been treated for major psychiatric issues prior to his compensable injury. Further, Dr. C "infers" a bipolar disorder although he has not observed this himself or have adequate records to support this diagnosis. No aggravation has been documented in the medical records. Dr. TM simply concurred with Dr. C's inference of "bipolar disorder as an aggravation." Neither doctor explained how the claimant's alleged head injury would or could cause an aggravation of his bipolar disorder.

We have 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. APD 022301, decided October 23, 2002. *See also* Guevara, *supra* and City of Laredo v. Garza, 293 S.W.3d 625 (Tex. App.—San Antonio 2009, no pet.) 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 hold that neither Dr. TM or Dr. C's opinion constitutes expert medical evidence within reasonable medical probability sufficient to establish aggravation of a bipolar disorder condition. Accordingly, we reverse the hearing officer's determination that the claimant's compensable injury of _____, includes bipolar disorder and we render a new decision that the claimant's compensable injury of _____, does not include bipolar disorder.

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

_____
Margaret L. Turner
Appeals Judge