APPEAL NO. 131006
FILED JUNE 6, 2013

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 February 28, 2013, with the record closing on March 20, 2013, 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: (a) status post closed head injury with subarachnoid hemorrhage and possible diffuse axonal shearing injury; (b) post-traumatic head injury with depression; (c) post-traumatic headache; (d) post-traumatic anosmia (loss of smell); (e) brain concussion; (f) pain disorder associated with psychological factors and a general medical condition; (g) mood disorder; and (h) cognitive disorder; (2) the respondent (claimant) reached maximum medical improvement (MMI) on May 31, 2012; (3) the claimant's impairment rating (IR) is 25%; (4) the claimant had disability from September 30, 2010, to May 31, 2012; and (5) the claimant's average weekly wage (AWW) is $162.51.

The appellant (carrier) appealed the hearing officer's extent of injury, MMI, IR and disability determinations. Further, the carrier contends that the hearing officer erred as a matter of law: by not notifying the carrier that the hearing officer was sending a letter of clarification (LOC) to the designated doctor; by not sending a copy of the LOC to the carrier's attorney; by not sending a copy of the designated doctor's response to the carrier's attorney; and by not giving the carrier's attorney an opportunity to present additional evidence and argument concerning the new evidence offered into evidence as identified in the hearing officer's decision and order as Hearing Officer's Exhibit No. 4.

That portion of the hearing officer's determination that the compensable injury does extend to status post closed head injury with subarachnoid hemorrhage, and the hearing officer's determination that the claimant's AWW is $162.51 have not been appealed and have become final pursuant to Section 410.169.

DECISION

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

The claimant testified that he sustained an injury when he fell off a moving golf cart and hit his head and neck on cement on [date of injury]. It is undisputed that the claimant was hospitalized for 8 days due to his head and neck injuries. The parties stipulated that: on [date of injury], the claimant sustained a compensable injury that at least included a skull fracture, cervical fracture, and a concussion; Dr. F] was appointed

as the designated doctor by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI and IR; and the AWW is $162.51.

EXENT OF INJURY

In evidence is a letter of causation dated October 1, 2012, in which [Dr. B] opined that the claimant's work injury of falling off a golf cart onto the cement at work on [date of injury], caused a direct impact to the claimant's status post closed head injury with subarachnoid hemorrhage and possible diffuse axonal shearing injury; post-traumatic head injury with depression; post-traumatic headache; post-traumatic anosmia (loss of smell); and brain concussion. Furthermore, Dr. B opined that the work injury of [date of injury], "caused [the claimant] to experience pain and physical limitations which produced the pain disorder associated with psychological factors and a general medical condition, mood disorder, and cognitive disorder." Under the facts of this case, Dr. B's letter of causation is sufficient expert medical evidence to establish causation for the extent of injury conditions of: post-traumatic head injury with depression; post-traumatic headache; post-traumatic anosmia (loss of smell); brain concussion; pain disorder associated with psychological factors; mood disorder; and cognitive disorder. *See* Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007). However, there is insufficient expert medical evidence linking a "possible diffuse axonal shearing injury" and "general medical condition" to the compensable injury. Under the facts of this case, the inference and mere recitation of a "possible" injury and "general medical condition" does not establish by expert evidence that these conditions are related to the compensable injury within a reasonable degree of medical probability.

As previously mentioned, that portion of the hearing officer's determination that the compensable injury does extend to status post closed head injury with subarachnoid hemorrhage has not been appealed and has become final pursuant to Section 410.169.

That portion of the hearing officer's extent-of-injury determination that the compensable injury of [date of injury], extends to: post-traumatic head injury with depression; post-traumatic headache; post-traumatic anosmia (loss of smell); brain concussion; pain disorder associated with psychological factors; mood disorder; and cognitive disorder is supported by sufficient medical evidence and is affirmed.

That portion of the hearing officer's extent-of-injury determination that the compensable injury of [date of injury], extends to possible diffuse axonal shearing injury, and a general medical condition is reversed and a new decision rendered that the compensable injury of [date of injury], does not extend to a possible diffuse axonal shearing injury and a general medical condition.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that he had disability as defined by Section 401.011(16). Disability is a question of fact to be determined by the hearing officer. *See* Appeals Panel Decision (APD) 042097, decided October 18, 2004. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. APD 041116, decided July 2, 2004. The claimant need not prove that the compensable injury was the sole cause of his disability only that it was a producing cause. APD 042097, *supra*.

In this case, the disability period in dispute is from September 30, 2010, through May 31, 2012. The carrier contends that the claimant does not have disability for the period in dispute based on: the functional capacity evaluation dated September 22, 2010, which shows the claimant tested at a very heavy physical demand level; the Work Status Report (DWC-73) dated September 28, 2010, which states the claimant can return to work without restrictions as of September 29, 2010; and the claimant's testimony that he actually returned to work full duty. At the CCH, the claimant testified that he returned to work for about one month and stopped working in "November" when he passed out at work and had not returned to work since that incident. In evidence is Dr. F's narrative report dated July 31, 2012, in which Dr. F states in the sub-section entitled "Return to Work" that the claimant "did return to work full duty without restrictions and worked for a couple of months until the dizzy episode while working an [sic] football game approximately November 2010 and has never returned to work since." The evidence is conflicting as to what date the claimant returned to work, and what date he stopped working.

Although the hearing officer may believe the claimant's testimony alone, even though contradicted by medical reports to establish disability, the hearing officer's disability determination is not supported by the evidence. The medical evidence and the claimant's testimony that he returned to work during the disability period in dispute do not support the hearing officer's determination that the claimant had disability for the entire period in dispute. We note that the hearing officer made a conclusion of law and decision regarding disability, but he did not make a finding of fact on disability. Because the evidence does not support the hearing officer's disability determination, and there is conflicting evidence as to what dates the claimant returned to work and stopped working, we reverse the hearing officer's disability determination and we remand the disability issue to the hearing officer to make a finding of fact, conclusion of law and decision consistent with this decision.

MMI AND IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

After the CCH the hearing officer sent a LOC dated March 15, 2013, to the designated doctor stating that:

> It has been determined administratively that the compensable injury extends to and includes status post closed head injury with subarachnoid hemorrhage and possible diffuse axonal shearing injury, post-traumatic head injury with depression, post-traumatic headache, post-traumatic anosmia (loss of smell), and cognitive disorder. [[1]]
>
> ****
>
> Statutory MMI can be no later than June 4, 2012.

A copy of the LOC was sent to the claimant, claimant's attorney, carrier, and treating doctor. In that letter, the hearing officer informed the designated doctor that his written response must be faxed to the Division with copies mailed to the carrier, claimant, claimant's representative, and treating doctor. There is no evidence that a copy of the designated doctor's response was sent to the carrier's representative. The designated doctor's response dated March 19, 2013, states that based on the accepted "closed head injury with subarachnoid hemorrhage and possible diffuse axonal shearing injury,

[1] We note that the hearing officer did not include in his LOC the extent-of-injury conditions of "brain concussion, pain disorder associated with psychological factors and a general medical condition, and mood disorder" that he found to be part of the compensable injury.

post-traumatic head injury with depression, post-traumatic headache, post-traumatic anosmia (loss of smell), and cognitive disorder" the claimant is assigned a 25% IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) based on mental and behavioral disorders on page 14/301. The response indicates that copies were mailed to the carrier, claimant, claimant's representative, and treating doctor. As previously noted there was no evidence that a copy of the designated doctor's response was sent to the carrier's representative.

Rule 127.20 provides in part that:

(c) The Division, at its discretion, may also request clarification from the designated doctor on issues the Division deems appropriate.

(d) To respond to the request for clarification, the designated doctor must be on the Division's designated doctor list at the time the request is received by the Division. The designated doctor shall respond, in writing, to the request for clarification within five working days of receipt and send copies of the response to the parties listed in Rule 127.10(f).

Rule 127.10(f) provides, in part, that the designated doctor shall provide the designated doctor reports to the injured employee and the injured employee's representative (if any) by facsimile or by electronic transmission if the designated doctor has been provided with a facsimile number or email address for the recipient, otherwise, the designated doctor shall send the reports by other verifiable means.

In this case, the hearing officer requested a LOC from the designated doctor regarding MMI and IR, pursuant to Rule 127.20(c). The designated doctor sent copies of his response dated March 19, 2013, to the parties, pursuant to Rules 127.20(d) and 127.10(f). *See also* Rule 140.1 which defines party to a proceeding. As previously mentioned, the hearing officer did not send a copy of the LOC to the carrier's representative and the designated doctor did not send a copy of his response to the carrier's representative. After the hearing officer received the designated doctor's response dated March 19, 2013, the hearing officer closed the record on March 20, 2013, and issued a decision on March 22, 2013. However, there is no evidence that the hearing officer gave the parties the opportunity to respond to the designated doctor's response prior to closing the record and issuing a decision. In APD 060047, decided March 16, 2006, review of the record indicated there was no evidence that the parties received a copy of the designated doctor's report by mail so they could respond by the date set forth by the hearing officer. In that case, the Appeals Panel reversed the hearing officer's determination that the IR is 34% and remanded the case back to the

hearing officer to allow the parties an opportunity to respond to the designated doctor's report, including the presentation of additional evidence.

As previously mentioned, the hearing officer closed the record on March 20, 2013, and there is no evidence the hearing officer gave the parties the opportunity to respond to the designated doctor's response. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on May 31, 2012, with 25% IR, and we remand the MMI and IR issues to the hearing officer to make a finding of fact, conclusion of law, and decision and order consistent with this decision.

SECTION 410.203(c)

Pursuant to Section 410.203(c), the Appeals Panel may not remand a case more than once. Given that we are remanding this case for MMI and IR and disability, we note that there are deficiencies in the hearing officer's LOC, the designated doctor's amended certification of MMI and IR, and other certifications of MMI and IR that are in evidence.

First, the hearing officer's LOC dated March 15, 2013, states that the statutory date of MMI is June 4, 2012. However, in the background information of his decision the hearing officer states that the "MMI date certified by the [designated doctor] is not supported by a preponderance of the evidence; the correct statutory MMI date, based on the evidence, is May 31, 2012." The carrier states in its appeal that the correct statutory date of MMI is June 1, 2012, not May 31, 2012. Section 401.011(30)(B) defines statutory MMI as "the expiration of 104 weeks from the date on which income benefits begin to accrue." Section 408.082(b) provides that:

> If the disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury. If the disability does not begin at once after the injury occurs or within [8] days of the occurrence but does result subsequently, weekly income benefits accrue on the eighth day after the date on which the disability began.

The carrier contends that benefits accrue or began to accrue on the eighth day of disability which is June 4, 2010, therefore the statutory date of MMI is June 1, 2012. The parties did not stipulate or actually litigate the date of statutory MMI. The evidence does not support the hearing officer's determination that the claimant's statutory date of MMI is May 31, 2012.

Second, as previously mentioned the hearing officer's LOC dated March 15, 2013, did not include all the extent of injuries conditions that he determined to be

part of the compensable injury. Specifically, the hearing officer's LOC omitted the conditions of: "brain concussion and pain disorder associated with psychological factors and a general medical condition, and mood disorder." Also, the hearing officer did not inform the designated doctor that the carrier has accepted as compensable injuries: a skull fracture, a cervical fracture, and a concussion, and that these conditions, in addition to the extent-of-injury conditions he determined to be part of the compensable injury, be considered and rated in certifying the claimant's MMI and IR.

Furthermore, based on the hearing officer's LOC, Dr. F amended his certification of MMI and IR. However, Dr. F's amended certification that the claimant reached MMI on June 4, 2012, with a 25% IR, cannot be adopted because he does not consider and rate the entire compensable injury. Dr. F only rated the mental and behavior injuries listed in the LOC by the hearing officer. Dr. F did not take into consideration or rate the accepted compensable injuries of a skull fracture, cervical fracture, and concussion and the other compensable injuries that the hearing officer did not include in his LOC which were pain disorder associated with psychological factors and mood disorder. See APD 122580, decided February 22, 2013; and APD 110267, decided April 19, 2011.

Also, we note that the designated doctor, without re-examining the claimant, amended his certification of MMI and IR based on additional conditions listed in the hearing officer's LOC. In APD 130187, decided March 18, 2013, the designated doctor in a response to a LOC amended his certification of MMI and IR based on medical records not previously available to him. The designated doctor, without physically re-examining the claimant, changed the MMI date to a later date based on records not previously available to him. The hearing officer adopted the amended certification of MMI and IR and the Appeals Panel reversed the hearing officer's determination because the designated doctor did not re-examine the claimant prior to his amended certification of MMI and IR and did not have the additional medical records prior to the date of his examination. Rule 130.1(b)(4)(A and B) provides that to certify MMI the certifying doctor shall review medical records and perform a complete medical examination of the injured employee for the explicit purpose of determining MMI. See APD 100152, decided April 8, 2010; See also APD 010297-s, decided March 29, 2001.

Finally, there were other certifications of MMI and IR in evidence. See Section 408.125(c). Dr. F initially examined the claimant on July 31, 2012, and he certified that the claimant reached MMI on September 29, 2010, with a 0% IR. Dr. F's certification cannot be adopted because he did not consider or rate the entire compensable injury. Dr. F did not consider or rate the extent of injury conditions that the hearing officer has determined to be compensable and the Appeals Panel has affirmed, which include: post-traumatic head injury with depression; post-traumatic headache; pain disorder associated with psychological factors; mood disorder; and cognitive disorder.

[Dr. BA], the doctor selected by the treating doctor acting in place of the treating doctor, examined the claimant on November 1, 2012, and he certified that the claimant reached MMI on May 31, 2012, with a 24% IR. Dr. BA diagnosed a skull fracture, cervical spine fracture and "status post closed head injury with loss of consciousness, depression, and short term memory loss" and assessed a 15% whole person IR based on a psychological evaluation and a 10% whole person IR for "memory loss and other issues." Dr. BA's certification cannot be adopted because he did not rate or consider the entire compensable injury as administratively determined and he did not document clinical findings to support his IR. We note there are two other certifications of MMI and IR from Dr. BA which one certification states he examined the claimant on November 1, 2012, and he certified that the claimant reached MMI on October 2, 2012, with a 0% IR, the other certification states he examined the claimant on November 1, 2012, and he certified that the claimant reached MMI on May 31, 2012, with a 0% IR. However, neither certification has a narrative report attached to explain whether Dr. BA considered and rated the entire compensable injury.

SUMMARY

We affirm that portion of the hearing officer's extent of injury determination that the compensable injury of [date of injury], extends to: post-traumatic head injury with depression; post-traumatic headache; post-traumatic anosmia (loss of smell); brain concussion; pain disorder associated with psychological factors; mood disorder; and cognitive disorder.

We reverse the hearing officer determination that the compensable injury of [date of injury], extends to a possible diffuse axonal shearing injury and a general medical condition, and we render a new decision that the compensable injury of [date of injury], does not extend to a possible diffuse axonal shearing injury and a general medical condition.

We reverse the hearing officer determination that the claimant had disability beginning September 30, 2010, and continuing through May 31, 2012, and we remand the disability issue to the hearing officer to make a finding of fact, conclusion of law and decision and order consistent with the evidence in this case.

We reverse the hearing officer's determination that the claimant reached MMI on May 31, 2012, with 25% IR, and we remand the MMI and IR issues to the hearing officer to make a finding of fact, conclusion of law, and decision and order consistent with this decision.

REMAND INSTRUCTIONS

The hearing officer is to determine whether Dr. F is still qualified and available to be the designated doctor. If Dr. F is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed pursuant to Rule 127.5(c) to determine MMI, which cannot be later than the statutory date of MMI (*See* Section 401.011(30)) and the IR.

The hearing officer is to give the parties the opportunity to stipulate as to the statutory date of MMI. If the parties cannot agree as to the date of statutory MMI, the hearing officer is to determine the date of statutory MMI based on the evidence in the case. The hearing officer is to request that the designated doctor re-examine the claimant and to give a certification of MMI and IR for the claimant's compensable injury of [date of injury], based on the claimant's condition as of the MMI date, which can be no later than date of statutory MMI considering the claimant's medical record and the certifying examination.

The hearing officer is to request from the designated doctor a certification of MMI and IR on the entire compensable injury. The hearing officer is to inform the designated doctor that the compensable injury of [date of injury], includes: (1) a skull fracture; (2) a cervical fracture; (3) a concussion; (4) status post closed head injury with subarachnoid hemorrhage; (5) post-traumatic head injury with depression; (6) post-traumatic headache; (7) post-traumatic anosmia (loss of smell); (8) brain concussion; (9) pain disorder associated with psychological factors; (10) mood disorder; and (11) cognitive disorder. The hearing officer is to inform the designated doctor that the compensable injury of [date of injury], does not include a possible diffuse axonal shearing injury and a general medical condition.

The hearing officer is to ensure that the designated doctor has all the pertinent medical records. The parties (claimant, claimant's attorney, carrier, carrier's representative, and treating doctor) are: to be provided with the hearing officer's letter to the designated doctor, to be provided the designated doctor's response, to be allowed an opportunity to respond to the designated doctor's response; and to be allowed to present additional evidence. The hearing officer is to make determinations on the issues of disability, MMI, and IR which are supported by the evidence and 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 which was amended

June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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

RICHARD J. GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge