APPEAL NO. 152492
FILED FEBRUARY 22, 2016

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 November 5, 2015, in El Paso, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that appellant (claimant) is not entitled to lifetime income benefits (LIBs) from (date of injury), through the date of the CCH based on a physically traumatic injury to the brain resulting in incurable insanity or imbecility.

The claimant appealed the hearing officer's determination urging that the hearing officer applied an incorrect standard in defining imbecility.

The respondent (self-insured) responded, urging affirmance of the hearing officer's determinations.

DECISION

Reversed and remanded.

The claimant was injured on (date of injury), when he fell from a ladder and struck the ground sustaining, among other conditions, a closed head injury and concussion. Following a course of treatment, the claimant was examined on June 4, 2014, by (Dr. C), appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine maximum medical improvement (MMI) and impairment rating (IR). Dr. C certified that the claimant reached MMI on April 11, 2014, and assigned an IR of 14% pursuant to Table 2 on page 142 of 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) which indicates that mental impairment exists but that the ability remains to perform satisfactorily most activities of daily living.

The claimant argues that he is entitled to LIBs due to his traumatic brain injury which has resulted in severe cognitive dysfunction which affects his personal, non-vocational life and has rendered him permanently unemployable.

Section 408.161(a)(6) provides that LIBs are paid until the death of the employee for a physically traumatic injury to the brain resulting in incurable insanity or imbecility. We have addressed this section of the 1989 Act in Appeals Panel Decision (APD) 121131-s, decided on August 27, 2012. In that case we affirmed a hearing officer's

decision finding entitlement to LIBs under Section 408.161(a)(6) as supported by sufficient evidence. We noted in that decision, the hearing officer considered the evidence in light of several factors including the definitions of imbecility contained in BLACK'S LAW DICTIONARY 749 (6th ed. 1990), DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 105 (28th ed. 1994), and WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1991). We further noted that the hearing officer cited *National Union Fire Insurance Company v. Burnett*, 968 S.W.2d 950 (Tex. App-Texarkana 1998 no pet.) and *Modreski v. General Motors Corporation*, 326 N.W.2d 386 (1981). In the *Burnett* case the appellate court cited a Virginia case, *Barnett v. D. L. Bromwell, Inc.*, 6 Va. App. 30, 366 S.E.2d 271 (1988) which "applied a nontechnical meaning of the term 'imbecility'" and determined that it means:

> [A]n irreversible brain injury which renders the employee permanently unemployable and so affects the non-vocational quality of his life by eliminating his ability to engage in a range of cognitive processes. [Citation omitted.]

In *Modreski, supra,* the Michigan Supreme Court cited the decision of the appellate board stating:

> We conclude that a worker's mental illness is "insanity" if he suffers severe social dysfunction and that a worker's intellectual impairment is "imbecility" if he suffers severe cognitive dysfunction. Social or cognitive dysfunction is "severe" if it affects the quality of the worker's personal, non-vocational life in significant activity comparably to the loss of two members or sight of both eyes, and is incurable if it is unlikely that normal functioning can be restored.

In the case on appeal, the hearing officer determined that the claimant's injury resulted in neither incurable insanity nor imbecility. In the Discussion section of her decision the hearing officer stated:

> As for the issue of whether or not [the] [c]laimant is entitled to LIBs because of "imbecility," the standard that will be used in our case is that of 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 hearing officer did not discuss any factors in reaching her decision regarding entitlement to LIBs for incurable imbecility other than the definition of imbecility contained in WEBSTER'S, *supra*, as mentioned above.

We note that in a recent case, the court of appeals, first district, citing *Lumbermen's Reciprocal Ass'n v. Gilmore,* 258 S.W. 268, 269 (Tex. Civ. App.–Texarkana 1924), stated the term "imbecility" has been in use in the Labor Code for almost a century, always without an assigned definition. The court went on to state that dictionary entries published closer in time to the enactment of the legislation would be more instructive. The court specifically referenced the following definition of imbecility from the 1910 edition of BLACK'S LAW DICTIONARY:

> A more or less advanced decay and feebleness of the intellectual faculties; that weakness of mind which, without depriving the person entirely of the use of his reason, leaves only the faculty of conceiving the most common and ordinary ideas and such as relate almost always to the physical wants and habits . . . the test of legal capacity in this condition, is the stage to which the weakness of mind has advanced, as measured by the degree of reason, judgment, and memory remaining.

See Chamul v. Amerisure Mutual Ins. Co., 2016 Tex. App. LEXIS 1263 (Tex. Civ. App.–Houston [1st Dist.] 2016 no writ history).

The court further noted that attaching a narrow definition to limit a benefit without statutory text to support that interpretation violates the rule of liberal construction and would result in the exclusion of claimants having a mental age of less than three years from receiving LIBs. *See Barchus v. State Farm Fire & Cas. Co*., 167 S.W.3d 575 (Tex. App.–Houston [14th Dist.] 2005, pet. denied).

We hold that the hearing officer erred in linking her analysis of the claimant's entitlement to LIBs for a physically traumatic injury to the brain resulting in incurable imbecility solely to a single factor rather than considering additional factors such as those discussed in APD 121131-s, *supra,* and *Chamul*, *supra*. Accordingly, we reverse the hearing officer's determination that the claimant is not entitled to LIBs from (date of injury), through the date of the CCH based on a physically traumatic injury to the brain resulting in incurable insanity or imbecility and remand the issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to weigh the evidence and apply the correct legal standard by considering additional factors such as those discussed in APD 121131-s, *supra*, and *Chamul*, *supra,* to determine whether or not the claimant is entitled to LIBs from (date of injury), through the date of the CCH based on a physically traumatic injury to the brain resulting in incurable insanity or imbecility. The hearing officer is to make findings of fact, conclusions of law, and a decision regarding the issue

that are consistent with this decision. The hearing officer is not to consider additional evidence on remand.

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 **El PASO INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

JUAN CABRERA, SUPERINTENDENT
6531 BOEING DRIVE
EL PASO, TEXAS 79925.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge