APPEAL NO. 160618

FILED JUNE 09, 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 February 1, 2016, reopened on February 16, 2016, and held open until February 29, 2016, in Tyler, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter; and (2) the compensable injury of (date of injury), extends to post-traumatic stress disorder (PTSD).

The appellant (carrier) appealed the hearing officer's determinations. The carrier contends that the hearing officer erred in reopening the record to obtain and admit evidence that was neither exchanged nor offered by either party. The carrier also contends that the evidence does not support the hearing officer's extent of injury and SIBs determinations. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Reversed and rendered.

The parties stipulated in part that the claimant sustained compensable injuries on (date of injury), of a head contusion, post-concussion syndrome, neck sprain/strain, left shoulder sprain/strain, and left knee sprain/strain, with an impairment rating of 15% or greater, and that the claimant's qualifying period for the fourth quarter was from March 14 through June 19, 2015. The claimant testified he was injured in a motor vehicle accident. We note that the decision states that Hearing Officer's Exhibits HO-1 and HO-2 were admitted; however, the hearing officer also admitted HO-3 after the February 1, 2016, CCH.

EVIDENCE ADMITTED

The carrier contends that the hearing officer improperly reopened the record to admit evidence after the CCH that was never exchanged with the carrier. To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex.1986).

> A letter in the hearing file from the hearing officer dated February 16, 2016, to the carrier's adjuster states in part the following:
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> As a [h]earing [o]fficer, I have the responsibility and duty to fully develop the record in each case that comes before me. I have, therefore, reopened the record in [the case on appeal], and directed the ombudsman for [the claimant] to provide me with the examination reports from (Dr. M).

Another letter in the hearing file from the hearing officer dated February 18, 2016, to the carrier's adjuster stated that all of the reports from Dr. M obtained from the ombudsman were included and admitted as Hearing Officer Exhibit 3. We note that included with these records is a letter from Dr. M dated January 26, 2016, that was previously exchanged and admitted without objection from the carrier as Claimant's Exhibit 12 page 18.

Section 410.163(b) provides that a hearing officer "shall ensure the preservation of the rights of the parties and the full development of facts required for the determination to be made." In APD 992056, decided November 1, 1999, an extent of injury case, the Appeals Panel noted that Section 410.163(b) does not grant the hearing officer the right to become a "surrogate party at the CCH," and that a hearing officer is not to become an advocate for either party. The Appeals Panel further stated that "it is the parties themselves who are primarily responsible for presenting their case and protecting their own interests," and held that it was "improper for the hearing officer to shore up the claimant's case under the guise of ensuring a full development of the record." In APD 92272, decided August 6, 1992, which is a case involving the issue of compensability, the Appeals Panel noted that the hearing officer acts as an impartial judge of the facts and is not an advocate for any party. This may appear to be a fine line at times, but it is one that must be observed to have a dispute resolution system that is, and appears to be, absolutely fair, impartial, and just.

The records from Dr. M admitted by the hearing officer after the CCH consist of Dr. M's diagnosis of PTSD and a discussion of psychological testing administered to the claimant dated April 29, 2014, and progress notes dating from May 2014 through May 2015. A review of the record reveals that neither party sought the admittance of Dr. M's records dated April 29, 2014, through May 2015, that the hearing officer admitted into evidence after the CCH; instead, the hearing officer unilaterally reopened the record to

direct the ombudsman to provide him with medical records from Dr. M, and upon receipt of those documents admitted them into evidence. The hearing officer in this case exceeded the authority to fully develop the facts under Section 410.163(b) and abused his discretion when he reopened the record to request and obtain from the ombudsman medical records that neither party sought to admit into the record and were not exchanged with or disclosed to the carrier prior to the hearing officer's admittance of those records after the CCH. Accordingly, we will not consider any of the records from Dr. M dated April 29, 2014, through May 2015 that were erroneously admitted by the hearing officer after the CCH.

EXTENT OF INJURY

The hearing officer determined that the compensable injury of (date of injury), extends to PTSD.

The Texas courts have long established the general rule that "expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience" of the fact finder. *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007). The Appeals Panel has 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 City of Laredo v. Garza*, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing *Guevara*.

The Texas Department of Insurance, Division of Workers' Compensation appointed (Dr. L) to determine the extent of the claimant's compensable injury. Dr. L examined the claimant on November 23, 2015, and opined that PTSD is part of the compensable injury. Dr. L explained that PTSD, in his medical opinion and in all medical probability and based on his review of the available medical records, the claimant's medical history, and Dr. L's analysis of the mechanism of injury and examination, was well-established in the medical records. Dr. L stated that "[b]ut for the occurrence of the sentinel compensable event, [the claimant] would not have developed PTSD; therefore, in all reasonable medical probability, this is part of the compensable injury." Dr. L does not provide an explanation of how the mechanism of injury caused PTSD. There are no other records in evidence that explain how the mechanism of injury caused PTSD.

As there are no records in evidence, [1] including Dr. L's extent-of-injury opinion, that explain how the mechanism of injury caused PTSD, we reverse the hearing officer's

[1] We note that none of the records from Dr. M that were erroneously admitted by the hearing officer after the February 1, 2016, CCH provide an explanation of how the mechanism of injury caused PTSD.

determination that the compensable injury of (date of injury), extends to PTSD, and we render a new decision that the compensable injury of (date of injury), does not extend to PTSD, without consideration of the exhibits the hearing officer erroneously admitted after the CCH.

SIBs

The claimant's theory of entitlement to SIBs for the fourth quarter is based on a total inability to work. The hearing officer found that during the qualifying period for the fourth quarter the claimant had no ability to work, and noted in his Discussion that Dr. M stated in a letter dated January 26, 2016,[2] that the "claimant was unable to work during the qualifying period for the fourth quarter due to the 'severity of his PTSD and associated emotional reactivity and mood instability.'" The hearing officer also noted that a November 2014 functional capacity evaluation (FCE) determined that the claimant demonstrated a "less than sedentary" physical demand level, and that "[t]here are sufficient narratives supporting the claimant's complete inability to work at this time. . . ."

28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

> (E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

In APD 012286, decided November 14, 2001, the Appeals Panel "held that the narrative report from the doctor must specifically explain how the compensable injury causes a total inability to work." *See also* APD 032173, decided October 9, 2003, and APD 111188, decided October 10, 2011.

In evidence is the January 26, 2016, letter from Dr. M discussed by the hearing officer in his Discussion regarding the claimant's ability to work. As noted above Dr. M's January 26, 2016, letter was previously exchanged and admitted at the CCH without objection from the carrier as Claimant's Exhibit 12 page 18. In that letter Dr. M states that:

[2] We note that the hearing officer mistakenly states Dr. M's letter is dated January 16, 2016.

> After review of my therapy notes during the timeframe in question ([March 14 through June 12, 2015]), it is my opinion that [the claimant] was unable to maintain competitive employment during this timeframe. As a neuropsychologist, I am unable to formally address physical limitations as it pertains to return to work. My primary concern with [the claimant] returning to work during this timeframe was related to the severity of his PTSD and associated emotional reactivity and mood instability.

Dr. M's letter does not state that the claimant has a total inability to work. None of the medical reports in evidence,[3] including the November 2014, FCE, constitute a narrative report from a doctor which specifically explains how the compensable injury caused a total inability to work in any capacity. Additionally, we have rendered a new decision that the (date of injury), compensable injury does not extend to PTSD. Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter, and we render a new decision that the claimant is not entitled to SIBs for the fourth quarter, without consideration of the exhibits the hearing officer erroneously admitted after the CCH.

SUMMARY

We reverse the hearing officer's determination that the compensable injury of (date of injury), extends to PTSD, and we render a new decision that the compensable injury of (date of injury), does not extend to PTSD.

We reverse the hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter, and we render a new decision that the claimant is not entitled to SIBs for the fourth quarter.

[3] We note that none of the records from Dr. M that were erroneously admitted by the hearing officer after the February 1, 2016, CCH provide a narrative report from Dr. M that specifically explains how the compensable injury causes a total inability to work.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge