APPEAL NO. 121131-s
FILED AUGUST 27, 2012

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 May 4, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer determined that the respondent (claimant) is entitled to lifetime income benefits (LIBs) from [a day after date of injury], through the present based on a physically traumatic injury to the brain resulting in incurable insanity or imbecility.

The appellant (self-insured) appeals, contending that the medical evidence was insufficient to meet the standard of incurable insanity or imbecility and that there is no evidence that the claimant has been incurably insane (or suffered from imbecility) since May of 2004. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The background facts are largely undisputed. The claimant was a cadet in the [Academy]. The claimant testified that while participating in boxing drills in April and [month and year of injury], he was knocked unconscious, and on the latter occasion, on [date of injury], he was hospitalized. Medical records in evidence indicate the claimant had "suffered a traumatic brain injury with hemorrhage" and that the claimant was hospitalized for 2-1/2 weeks. The self-insured accepted "a compensable head/brain injury." The claimant was eventually certified as having reached maximum medical improvement on March 17, 2006, with a 20% impairment rating based on tables related to mental status impairment in Chapter 4 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).

ENTITLEMENT TO LIBS

This is a case of first impression in defining incurable insanity or imbecility. Prior to September 1, 1997, Section 408.161(a)(6) provided that LIBs are payable for "an injury to the skull resulting in incurable insanity or imbecility." The legislature changed the law for compensable injuries occurring on or after September 1, 1997, to provide for LIBs in the case of "a physically traumatic injury to the brain resulting in incurable insanity or imbecility." Most of the Appeals Panel decisions in the past discussing terms of "incurable insanity or imbecility" focused on whether an injury to the skull occurred or whether such an injury caused the claimant's mental deficits based on the language of the 1989 Act prior to September 1, 1997.

The claimant testified that he attempted to return to various jobs but was unable to do so because of seizures, and stress leading to violent outbursts. The hearing officer, in his Background Information, recites that the claimant was referred to [Dr. H], a psychologist, in November 2005. Dr. H believed the claimant had cognitive deficits and had sustained a traumatic brain injury. Dr. H concluded because of "this pattern of test performance one should be very concerned with the [claimant's] ability to function adequately in situations that are volatile, unclear, or require problem solving."

The hearing officer, in the Background Information, recites other treatment the claimant received from a psychiatrist. The claimant testified that although he had been advised not to drive he did so in order to look for and maintain employment. The claimant had two motor vehicle accidents due to seizures and then had a third accident due to seizures while driving in May 2011. The claimant's drivers license was eventually either revoked or surrendered. [Dr. A], the claimant's treating doctor, in a report dated June 2, 2005, noted that the claimant "seemed to deteriorate" since his initial injury on [date of injury]. In a report dated April 11, 2011, Dr. A noted that the claimant was not qualified to drive because of his brain injury. Dr. A in a report dated May 5, 2011, noted that the claimant "has developed schizophrenia, hallucinations, seizure disorder and bipolar disorder." In a report dated May 13, 2011, Dr. A noted the Section 408.161(a)(6) provision of a physical traumatic injury to the brain resulting in incurable insanity or imbecility and stated that the claimant's "actions over the past 6-12 months would seem to qualify [the claimant] under this." [Dr. PL], a self-insured required medical examination psychiatrist, in a report dated May 26, 2011, diagnosed a traumatic brain injury and related seizures and chronic headaches which according to [Dr. L], a psychiatrist, also resulted in a significant personality change and two psychiatric syndromes. Dr. PL stated that the psychiatric syndromes "[i]ncluded 293.83 Mood Disorder (Depressed Features) due to a General Medical Condition (Traumatic Brain Injury), and 293.82 Psychosis (auditory hallucinations and paranoid features) due to a General Medical Condition (Traumatic Brain Injury)." Dr. PL concluded that in her opinion "the traumatic brain injury is the precipitating factor which led to seizures, chronic headaches, and subsequently to the cognitive deterioration, personality and mood disturbances, impulsive aggression and perceptual distortions which warrant the diagnoses mentioned above."

Dr. L, the treating psychiatrist, in a report dated May 26, 2011, noted that the claimant "has not maintained sustained improvement or remission despite over six years of treatment by multiple specialists." Dr. L concluded that the claimant "is currently suffering from mania, episodic hallucinations, and is unable to drive because of recurrent seizures." Based on the evidence, the hearing officer found that the brain injury is irreversible and rendered the claimant "permanently unemployable and

significantly affects the non-vocational quality of his life by eliminating his ability to engage in a range of usual cognitive processes."

The hearing officer in his Background Information cited Section 408.161(a)(6) and noted that the same language of "incurable insanity or imbecility" occurs in the workers' compensation acts of other states. The hearing officer further noted that the Appeals Panel in several cases has used a definition of "incurable insanity or imbecility" using Black's Law Dictionary and Dorland's Illustrated Medical Dictionary 105 (28th ed. 1994). Appeals Panel Decision (APD) 961340 decided August 21, 1996, noted:

> BLACK'S LAW DICTIONARY 749 (6th ed. 1990) refers the reader to the definition of insanity for a definition of imbecility; that DORLAND'S, *supra*, at 820, defines imbecility as the condition of being an imbecile; moderate or severe mental retardation; and that WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1991) defines imbecility as the quality or state of being imbecile or an imbecile, and that it defines imbecile as 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, in the Background Information, goes on to comment:

> Those definitions imply more of a congenital and generic condition and not one caused by an industrial accident. The Appeals Panel decisions have not discussed the terms "incurable insanity or imbecility" beyond the above definitions, and have not discussed them in any recent decisions. The majority of the decisions focus on whether an injury to the skull occurred, or whether such an injury caused the claimant's deficits, based on the language of the [1989] Act prior to September 1, 1997.

The hearing officer, in this case, cites National Union Fire Insurance Company v. Burnett, 968 S.W.2d 950 (Tex. App.-Texarkana 1998 no pet.), a case where the appellate court held that severe depression without evidence of psychosis (*id* at 956) does not fall within the definition of "incurable insanity." Nonetheless, the Burnett case has some instructive language on the definition of incurable insanity or imbecility. The Burnett court cited a Virginia court (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 usual cognitive processes. [Citation omitted.]

The hearing officer also cited Modreski v. General Motors Corporation, 326 N.W.2d 386 (1981), a Michigan Supreme Court case regarding a definition of the terms “insanity” and “imbecility.” That 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.

The hearing officer concluded, based on the evidence and related legal arguments that the claimant is entitled to LIBs based on a physically traumatic injury to the brain resulting in incurable insanity or imbecility. We hold that the hearing officer did not err in determining that the claimant is entitled to LIBs based on a physically traumatic injury to the brain resulting in incurable insanity or imbecility. The hearing officer’s determination that the claimant is entitled to LIBs based on a physically traumatic injury to the brain resulting in incurable insanity or imbecility is supported by sufficient evidence and is affirmed.

DATE OF ELIGIBILITY TO LIBS

The hearing officer’s determination of entitlement to LIBs states that the claimant is entitled to LIBs from [a day after date of injury], through the present (May 4, 2012, was the date of the CCH). The hearing officer does not discuss why he chose [a day after date of injury], as the beginning eligibility date for LIBs. We note that [a day after date of injury], is the day after the stipulated date of injury. Former 28 TEX. ADMIN. CODE § 131.1(b) (Rule 131.1(b)) provided that LIBs begin to accrue as provided by Section 408.082 and are payable retroactively from the date of disability. The Texas Department of Insurance, Division of Workers’ Compensation (Division) adopted the repeal of Rule 131.1 effective January 9, 2008, concerning the initiation of LIBs based on the Texas Court of Appeals’ ruling in Mid-Century Insurance Company v. Texas Workers’ Compensation Commission, 187 S.W.3d 754 (Tex. App.-Austin 2006, no pet.). In Mid-Century, the court held that the legislature specifically reserved LIBs for seven enumerated categories of injurious conditions that include both immediately qualifying injuries and those evolving or deteriorating over time. The court noted that the legislature further provided that LIBs are payable “for” those conditions. The court specifically held:

> An employee is eligible to receive LIBs on the date that the employee suffers from one of the conditions specified in Section 408.161. Section 408.161 does not permit payment of LIBs prior to that date. Once an employee is adjudicated eligible to receive LIBs, however, LIBs should be paid retroactively to the date the employee first became eligible.

The hearing officer determined (and we affirmed) that the claimant is entitled to receive LIBs in this case. Therefore, LIBs should be paid retroactively to the date the claimant first became eligible. In this particular case, clearly the records the hearing officer relies on were generated much later than [a day after date of injury]. In fact, the claimant testified that he worked, or attempted to work, and go to college sometime in the years between 2006 and 2011. The claimant is only entitled to LIBs from the date that he became "incurably insane" or an "imbecile." Most of the doctors that commented on the claimant's condition do not attempt to address a specific date that the claimant achieved this condition. Dr. A, in his report dated May 13, 2011, stated that the claimant's actions over the past 6-12 months would seem to qualify the claimant under Section 408.161(a)(6).

We reverse that portion of the hearing officer's determination that finds the claimant entitled to LIBs from [a day after date of injury], through the present and remand the case for further consideration consistent with this decision. There are a number of potential dates that the hearing officer could consider that the claimant became eligible for LIBs; however, the date of [a day after date of injury] (the date after the compensable injury) is not supported by any of the medical evidence or doctors' assessments.

REMAND INSTRUCTIONS

On remand, the hearing officer is to determine a date that the claimant became eligible for LIBs that is supported by the evidence. No new evidence is required, however, the parties are to be allowed to comment on the evidence in the record.

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, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Cynthia A. Brown
Appeals Judge

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Margaret L. Turner
Appeals Judge