

APPEAL NO. 991430

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 June 18, 1999. The issues at the CCH were whether the respondent/cross-appellant's (claimant) request for spinal surgery should be approved, whether the claimant sustained a compensable injury on _____, and whether the appellant/cross-respondent (self-insured) waived the right to contest the compensability of the claimed back injury by not contesting compensability within 60 days of being notified of the injury. The hearing officer determined that the claimant's request for spinal surgery is approved and the self-insured is liable for the costs of surgery; that the claimant sustained a compensable injury on _____, as a matter of law; and that self-insured employer waived its right to contest the compensability of the claimed back injury by not contesting compensability within 60 days of being notified of the injury. The self-insured appeals, urging that the hearing officer abused her discretion by refusing to grant a joint motion for continuance so the parties could properly litigate the two newly added issues; that the self-insured did dispute the compensability of the injury within 60 days of receiving newly-discovered evidence; that the claimant could not suffer a compensable injury as a matter of law; and that the self-insured should not be liable for the costs of spinal surgery. The claimant filed a response stating that he agrees with the hearing officer's decision on all issues except the compensability issue, which should be reversed.

DECISION

Reversed and remanded.

The claimant filed a "Claimant's Response to Carrier's Request for Review" (Response) in which he requests that the hearing officer's decision on the issue of compensability be reversed. In his Response, the claimant does not state the date he received the decision. However, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) provides that the Texas Workers' Compensation Commission (Commission) shall deem the received date of its notices and written communications to be five days after the date mailed. The Commission records reflect that the decision of the hearing officer was distributed to the parties on June 25, 1999, under cover letter dated June 25, 1999. Accordingly, the claimant is deemed to have received the decision on June 30, 1999, and his request for review was required to be filed not later than 15 days thereafter. Section 410.202(a). Since the claimant's Response was mailed on July 13, 1999, was received by the Commission on July 15, 1999, it was timely as an appeal. Rule 143.4(c).

The CCH was scheduled to determine the sole issue of whether the claimant's request for spinal surgery should be approved. Prior to going on the record, the parties discussed and agreed that two other issues should be added, whether the claimant sustained a compensable injury on _____, and whether the self-insured waived the right to contest the compensability of the claimed back injury by not contesting

compensability within 60 days of being notified of the injury. The hearing officer stated that she would be going forward on all issues that day, but would allow the parties an opportunity to preserve their argument as to whether the CCH should be continued. The claimant argued that he was not prepared to go forward on the issue of compensability, because he did not have any medical records from his treating doctor. The self-insured asserted a formal motion for continuance, stating that it only had documents pertaining to spinal surgery, and wanted an opportunity to subpoena medical records. The hearing officer denied the motion for continuance, stating that she could see no reason to forestall the decision on spinal surgery, and that, because the self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) the day of the CCH, it should be ready to proceed on the issue. The hearing officer allowed the parties access to the claim file to obtain documents to use in the presentation of their cases.

The 1989 Act provides that a CCH is limited to the disputed issues from the benefit review conference (BRC), unless additional issues are added by agreement of the parties or upon a finding of good cause by the hearing officer. Section 410.151(b). The CCH was set only on the issue of spinal surgery, an issue which does not proceed through a BRC, but is appealed directly to a CCH. In this case, neither party brought forward an issue of compensability or waiver through the dispute resolution process prior to the spinal surgery CCH. If the hearing officer were to proceed only on the spinal surgery issue and determine the self-insured liable, it would have little effect beyond an advisory opinion because a carrier is liable for medical benefits, including spinal surgery, only for reasonable and necessary treatment of a "compensable injury." Section 408.021. The underlying issue of compensability must be resolved before it can be determined if the self-insured is liable for spinal surgery.

Section 410.155 provides that a written request by a party for a continuance of a CCH to another date must be directed to the Commission and that the Commission may grant a continuance only if it determines there is good cause for the continuance. Rule 142.10(c)(3) provides that a party may orally request a continuance during a hearing and that, in addition to showing good cause, must show that a continuance will not prejudice the rights of the other party. We review a ruling on a request for a continuance under an abuse of discretion standard, that is, whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951252, decided September 13, 1995. The guiding principle or test for the existence of good cause to grant a continuance is that of ordinary prudence, that is, whether the movant exercised the degree of diligence in prosecuting the case as an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 970135, decided March 12, 1997.

In this case, two essential issues were added at the CCH pursuant to the agreement of the parties. There is no indication in the record that a written request was made prior to the CCH for additional issues to be added, or an order issued by the hearing officer adding such issues. While we are concerned with what appears to be a last minute effort by the self-insured to contest compensability, both parties consented to the issues being added and were unprepared to proceed at that time. To force the parties to litigate issues of

which they were not put on notice constituted a denial of due process and prejudiced the rights of both parties. We conclude that it was an abuse of discretion for the hearing officer to not grant both parties' request for a continuance in order to prepare to litigate the two added issues. Therefore, we reverse the hearing officer's decision and order and remand the case. On remand the parties should be given the opportunity at a CCH on remand to further develop the evidence and present argument concerning whether the claimant sustained a compensable injury on _____, and whether the self-insured waived the right to contest the compensability of the claimed back injury by not contesting compensability within 60 days of being notified of the injury. Since the issue of compensability has not been resolved, we must reverse and remand the issue of self-insured's liability for spinal surgery for the appropriate conclusion of law, based upon whether the hearing officer determines that the claimant sustained a compensable injury on _____.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge