

APPEAL NO. 081791
FILED FEBRUARY 12, 2009

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 concluded on October 14, 2008. The hearing officer determined that the appellant (carrier) waived the right to contest compensability of a closed head injury and a cognitive disorder by not contesting compensability pursuant to Section 409.021; that the carrier did not waive the right to contest compensability of a speech disorder by not contesting compensability pursuant to Section 409.021; and that the _____, compensable injury includes a closed head injury and cognitive disorder, but does not include a speech disorder. The hearing officer's determinations that the carrier did not waive the right to contest compensability of the speech disorder and that the compensable injury does not include a speech disorder have not been appealed and have become final pursuant to Section 410.169.

The carrier appeals the hearing officer's carrier waiver determination of the closed head injury and cognitive disorder, contending that the carrier waiver issue had improperly been added and that the carrier had not waived those conditions. The carrier also appeals the extent-of-injury determination regarding the closed head injury and cognitive disorder on a sufficiency of the evidence basis. The respondent (claimant) responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant was a milk truck driver and on _____, sustained an injury when she fell from her truck. The parties stipulated that the claimant sustained a compensable injury on _____. Whether the claimant lost consciousness due to the fall is in dispute.

EXTENT OF INJURY

The hearing officer's determination that the _____, compensable injury includes a closed head injury and cognitive disorder is supported by the evidence, and is affirmed.

ADDING THE CARRIER WAIVER ISSUE

Texas Department of Insurance, Division of Workers' Compensation (Division) records indicate a CCH was held on February 27, 2008, and a motion for continuance was granted. However, we note that a record of that proceeding was not included in the appeal file. The carrier contends that another hearing officer, at the February 27, 2008, setting of this case, added the issue of carrier waiver at the claimant's request. After

two additional continuances, the case was heard on October 14, 2008, resulting in the decision and order in this appeal.

At the October 14, 2008, setting of this case, the hearing officer allowed the parties an opportunity to argue their positions on adding the carrier waiver issue. The carrier contends that “moments before entering the hearing room” prior to the February 27, 2008, setting, the claimant, then being assisted by an ombudsman, requested to add the issue of carrier waiver. The only issue reported out of the benefit review conference (BRC) was “[d]oes the _____ compensable injury extend to and include a closed head injury, cognitive disorder and speech disorder?” In evidence are the claimant’s answers to interrogatories which in part state:

- X 2. If a [BRC] has been held, does the Benefit Review Officer’s report accurately list all issues you are presently disputing? If not, please list those issues you are presently disputing that differ from those listed in the Benefit Review Officer’s report.

ANSWER: Yes

- X 3. If a [BRC] has been held, does the Benefit Review Officer’s report accurately describe your position on the disputed issues listed? If not, please explain how your position differs from that described in the Benefit Review Officer’s report.

ANSWER: Yes

The carrier contends it came to the February 27, 2008, CCH with the understanding that there was only the extent-of-injury issue to be litigated and there was no good cause for adding the carrier waiver issue. The carrier further contends that Section 410.151 and 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) were not followed in adding the issue and the claimant did not avail himself of the opportunity to add the issue prior to the February 27, 2008, setting. The claimant, represented by an attorney at the October 14, 2008, setting contends that any argument the carrier may have had was remedied by the fact the CCH had been continued for eight months and the carrier had ample time to prepare. The claimant also contends that the issues of extent of injury and waiver “are so integrally entwined that they must be tried simultaneously” and that the carrier waiver issue was crucial to the case. The hearing officer ruled that the order adding the issue (of carrier waiver) stands and noted: “At the request of Claimant and for good cause” the issue of carrier waiver was added. (We note that there was no prior written order in evidence). The hearing officer did not specify what evidence showed good cause.

Section 410.151 pertains to the scope of a CCH and subsection (b) provides that an issue that was not raised at a BRC may not be considered unless the parties consent or the Division determines that good cause existed for not raising the issue at the BRC. Rule 142.7(a) provides in part that a dispute not expressly included in the

statement of disputes will not be considered by the hearing officer. Rule 142.7(c) provides in part that a party may submit a response to the disputes identified as unresolved in the BRC report in writing no later than 20 days after receiving the BRC report. Rule 142.7(d) provides in part that the parties may, by unanimous consent, submit for inclusion in the statement of disputes one or more disputes not identified as unresolved in the BRC report. Rule 142.7(e) provides:

Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. The hearing officer will allow such amendment only on a determination of good cause.

* * * *

- (2) An unrepresented claimant may request additional disputes to be included in the statement of disputes by contacting the [Division] in any manner no later than 15 days before the hearing.

It is undisputed that there was no response to the BRC report and that the carrier did not consent to the addition of the carrier waiver issue. There is no evidence that the claimant requested an additional dispute be included in the statement of disputes prior to the beginning of the February 27, 2008, setting of the CCH.

We review the hearing officer's ruling to add an issue on an abuse-of-discretion standard, that is, whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 031719, decided August 11, 2003, Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Ignorance of the law does not excuse the failure to raise an issue at the BRC. APD 94253, decided April 18, 1994. The Appeals Panel has strictly applied Rule 142.7 unless there is a knowing waiver of its provisions by both parties. APD 93593, decided August 31, 1993.

In this case, the parties stated their respective positions and the hearing officer added the issue of carrier waiver stating there was good cause but she did not specify what evidence showed good cause. Nowhere does the claimant assert that carrier waiver was discussed at the BRC and there was no written response to the benefit review officer's report in evidence. Additionally, there was not unanimous consent to add the issue. In APD 001987, decided October 4, 2000, the hearing officer added an issue not discussed at the BRC over the objection of the carrier. In that case, a response to the BRC report had been filed (unlike the present case) but the requested issue had been omitted. The Appeals Panel, after reviewing the record concluded: "that no good cause was shown to add the issue. A claimant's ignorance of the law and the late-perceived 'need' to add an issue does not constitute good cause for adding an issue." The hearing officer's decision, in this case, finding unspecified good cause for

adding the carrier waiver issue is against the great weight and preponderance of the evidence and without reference to any guiding rules or principles.

We reverse the hearing officer's ruling that there was good cause for adding the issue of carrier waiver and render a new decision that there was no good cause for adding the issue of carrier waiver. Because the carrier waiver issue should not have been added, we also reverse the hearing officer's determination on the added issue and render a new decision by striking the hearing officer's determination that the carrier waived the right to contest compensability of the closed head injury and cognitive disorder. Our reversal of that determination does not affect the hearing officer's determination that the _____, compensable injury includes a closed head injury and cognitive disorder which was determined independently of carrier waiver.

SUMMARY

We affirm the hearing officer's determination that the _____, compensable injury includes a closed head injury and cognitive disorder. We reverse the hearing officer's determination that the carrier waived the right to contest compensability of a closed head injury and cognitive disorder because that issue should not have been added. We render a new decision by striking the hearing officer's determination that the carrier waived the right to dispute compensability of the closed head injury and cognitive disorder.

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

**RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge