

APPEAL NO. 091328
FILED OCTOBER 30, 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 held on May 11, June 23, and August 5, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of _____, includes disc disruption and an annular tear at L4-5; (2) the compensable injury of _____, does not include disc disruption and an annular tear at L5-S1; (3) the respondent/cross-appellant (claimant) sustained disability from January 12, 2009, through the date of the CCH (August 5, 2009); (4) the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. D) on May 13, 2008, did not become final under Section 408.123; (5) the claimant has not reached MMI for the compensable injury of _____; (6) because the claimant has not reached MMI, no IR can be assigned for the compensable injury of _____; and (7) the appellant/cross-respondent (carrier) waived the right to contest compensability of disc disruption and an annular tear at L4-5 by not timely contesting the diagnosis in accordance with Section 409.021 but did not waive the right to contest compensability of disc disruption and an annular tear at L5-S1 by not timely contesting the diagnosis in accordance with Section 409.021.

The carrier appealed, arguing that the hearing officer granted a motion for continuance on March 10, 2009, based on a request for examination by the designated doctor. The carrier also appealed the hearing officer's determination to admit into evidence the designated doctor's report of June 10, 2009, as well as the designated doctor's report of February 25, 2009. The carrier disputes the hearing officer's determinations that the first certification of MMI and assigned IR did not become final under Section 408.123; that the claimant has not reached MMI and therefore cannot be assigned an IR; that the compensable injury extends to disc disruption and an annular tear at L4-5; that the carrier did waive its right to contest compensability of disc disruption and an annular tear at L4-5; and that the claimant had disability from January 12 through August 5, 2009. The claimant responded, urging affirmance of the determinations appealed by the carrier. The claimant also cross-appealed, disputing that portion of the extent-of-injury determination that the compensable injury does not include disc disruption and an annular tear at L5-S1 and the determination that the carrier did not waive its right to contest compensability of disc disruption and an annular tear at L5-S1 by not timely contesting the diagnosis in accordance with Section 409.021. The carrier responded, urging affirmance of the determinations cross-appealed by the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

MOTION FOR CONTINUANCE

Section 410.155(b) and 28 TEX. ADMIN. CODE § 142.10(b)(2) (Rule 142.10(b)(2)) provide that the [Texas Department of Insurance, Division of Workers' Compensation (Division)] may grant a continuance if the hearing officer determines that good cause exists for the continuance. We review good cause determinations under an abuse-of-discretion standard. Appeals Panel Decision (APD) 002251, decided November 8, 2000. The hearing officer's determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for the existence of good cause is that of ordinary prudence; that is, the degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. APD 022821, decided December 23, 2002. Under the circumstances of this case, we cannot conclude that the hearing officer abused his discretion in determining that good cause did exist to grant the claimant a continuance.

ADMISSION OF EXHIBITS

We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that 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. APD 061788, decided November 27, 2006; see also Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We find no abuse of discretion in the hearing officer's admission of the documents in question over the carrier's objections. The carrier has failed to offer sufficient proof that the admission of the documents amounted to reversible error. Further, the hearing officer has a duty to fully develop the record. Section 410.163.

BACKGROUND INFORMATION

The parties stipulated that the claimant sustained a compensable low back sprain injury on _____. The parties additionally stipulated that Dr. D was appointed as designated doctor by the Division to evaluate the claimant for the compensable injury of _____, and to determine the date of MMI, IR, and the extent of the claimant's compensable injury.

EXTENT OF INJURY

The hearing officer's findings that the claimant has not been diagnosed with disc disruption and annular tear at L5-S1 and that Dr. D's determination that the claimant's compensable injury of _____, includes disc disruption and an annular tear at L4-5 are supported by a preponderance of the evidence. The hearing officer's determinations that the compensable injury includes disc disruption and an annular tear at L4-5 but does not include disc disruption and an annular tear at L5-S1 are supported by sufficient evidence and are affirmed.

CARRIER WAIVER

Disc disruption and an annular tear at L5-S1

That portion of the hearing officer's waiver determination that the carrier did not waive the right to contest compensability of disc disruption and an annular tear at L5-S1 by not timely contesting the diagnosis in accordance with Section 409.021 is supported by sufficient evidence and is affirmed.

Disc disruption and an annular tear at L4-5

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that not later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Division and the employee in writing of its refusal to pay. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. In APD 041738-s, decided September 8, 2004, the Appeals Panel established that when a carrier does not timely dispute the compensability of an injury, the compensable injury is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period.

In State Office of Risk Mgmt. v. Lawton,¹ 2009 Tex. LEXIS 629 (Tex. August 28, 2009), the Texas Supreme Court held that the interpretation given in APD 041738-s, *supra*, would eliminate the distinction between compensability and extent of injury. In Lawton, the carrier agreed that the claimant had a compensable injury. Similarly, in the instant case, the carrier agreed that the claimant had a compensable injury but later disputed the extent of that injury. We find the reasoning set forth in the Lawton decision applicable to the facts in the case at issue.

Accordingly, we reverse the hearing officer's decision that the carrier waived the right to contest compensability of disc disruption and an annular tear at L4-5 by not timely contesting the diagnosis in accordance with Section 409.021 and render a new decision that the carrier did not waive its right to contest compensability of disc disruption and an annular tear at L4-5 by not timely contesting the diagnosis in accordance with Section 409.021.

FINALITY OF THE FIRST CERTIFICATION

The hearing officer's determination that the first certification of MMI and assigned IR from Dr. D on May 13, 2008, did not become final under Section 408.123 is supported by sufficient evidence and is affirmed.

¹ We note that the decision in Lawton, *supra*, is not yet final until opportunities for rehearing have been exhausted.

MMI/IR

The hearing officer's determination that the claimant has not reached MMI for the compensable injury of _____, is supported by sufficient evidence and is affirmed. The hearing officer's determination that because the claimant has not reached MMI, no IR can be assigned for the compensable injury of _____, is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant sustained disability from January 12 through August 5, 2009, as a result of the compensable injury of _____, is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of _____, includes disc disruption and an annular tear at L4-5. We affirm the hearing officer's determination that the claimant sustained disability from January 12 through August 5, 2009. We affirm the hearing officer's determination that the first certification of MMI and assigned IR from Dr. D on May 13, 2008, did not become final under Section 408.123. We affirm the hearing officer's determination that the claimant has not reached MMI for the compensable injury of _____. We affirm the hearing officer's determination that because the claimant has not reached MMI, no IR can be assigned for the compensable injury of _____. We affirm the hearing officer's determination that the carrier did not waive the right to contest compensability of disc disruption and an annular tear at L5-S1 by not timely contesting the diagnosis in accordance with Section 409.021.

We reverse the hearing officer's determination that the carrier waived the right to contest compensability of disc disruption and an annular tear at L4-5 by not timely contesting the diagnosis in accordance with Section 409.021 and render a new decision that the carrier did not waive the right to contest compensability of disc disruption and an annular tear at L4-5.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge