

APPEAL NO. 100457
FILED JUNE 25, 2010

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 March 1, 2010. The sole disputed issue before the hearing officer was:

Does the appellant's (claimant) compensable injury of _____, extend to and include a cervical disc protrusion and radiculopathy at the C2-3 spinal level, and stenosis at the C5-6 spinal level?

The hearing officer determined that the claimant's compensable injury of _____, does not extend to include a cervical disc protrusion or radiculopathy at the C2-3 spinal level or stenosis at the C5-6 spinal level. The claimant did not attend the CCH on March 1, 2010, nor did he respond to a 10-day letter dated that same date and mailed to the claimant's last known address. On appeal, (Ms. R), as guardian of the claimant, filed an appeal, contending that the claimant had good cause for neither attending the CCH on March 1, 2010, nor responding to the 10-day letter, and requests that the case be remanded to the hearing officer to allow the claimant an opportunity to present evidence in the disputed issue. Further, Ms. R attached to the appeal a Letter of Guardianship dated April 8, 2010, appointing Ms. R, the claimant's sister, as guardian for the claimant, an incapacitated person.

Respondent 1 (carrier) responded, urging affirmance. Respondent 2 (subclaimant) did not respond to the claimant's appeal.

DECISION

Reversed and remanded.

A CCH was held on March 1, 2010, to decide the disputed extent-of-injury issue. The claimant did not appear at the CCH and a 10-day letter dated March 1, 2010, was sent to the claimant at his last known address. The claimant failed to respond to the 10-day letter and the hearing officer closed the record on March 11, 2010. The hearing officer issued a decision on March 15, 2010, that was unfavorable to the claimant.

On appeal, Ms. R states that the claimant was in a motorcycle accident on January 25, 2010, and that the claimant has undergone two brain surgeries. Essentially, Ms. R contends that the claimant was unable to attend the CCH on March 1, 2010, and unable to respond to the 10-day letter due to the claimant's accident, and that she initiated guardianship proceedings as a result of the claimant's condition. Ms. R attached a Letter of Guardianship, from (City), Texas, dated April 8, 2010, that shows that Ms. R was appointed guardian of the claimant, an incapacitated person.

In Appeals Panel Decision (APD) 042634, decided November 29, 2004, the Appeals Panel noted that the purpose of the 10-day letter process is to give the nonappearing party the opportunity to meaningfully participate in the dispute resolution process. In APD 020273, decided March 29, 2002, the claimant made a number of factual allegations in her appeal regarding good cause for failing to attend the CCH and her attempts to respond to the 10-day letter, and the Appeals Panel stated that it was not in a position to evaluate the credibility of the claimant in regard to those matters and thus, remanded the case to the hearing officer to take evidence concerning the claimant's allegations and to permit the claimant to present evidence on the merits of her claim at the CCH on remand.

In the instant case, Ms. R makes factual allegations that, if true, could constitute a basis for good cause for the claimant's failure to attend the CCH on March 1, 2010, or respond to the 10-day letter dated March 1, 2010. The attached Letter of Guardianship shows that Ms. R was appointed guardian of the claimant, an incapacitated person, after the date of the CCH but before the date to timely appeal the hearing officer's decision. We believe that the Letter of Guardianship attached to the claimant's appeal constitutes newly discovered evidence pertaining to why the claimant did not attend the CCH on March 1, 2010, or respond to the 10-day letter dated March 1, 2010. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

In this case, the Letter of Guardianship was not available at the time of the CCH on March 1, 2010; it is not cumulative of other evidence of record, it is not due to lack of diligence that it was not offered at the CCH, and it is so material that it would probably result in a different decision. Ms. R has provided newly discovered evidence on appeal where a remand is warranted based on that evidence. Additionally, Ms. R has made factual allegations regarding good cause for the claimant failing to attend the CCH and respond to the 10-day letter. Ms. R requests that the case be remanded to the hearing officer to allow the claimant to meaningfully participate in the dispute resolution process. As in APD 020273, *supra*, the case is remanded to the hearing officer to take evidence concerning Ms. R's allegations and to permit the parties to present evidence on the merits of the claim at the CCH on remand.

Accordingly, we reverse the hearing officer's determination that the claimant's compensable injury of _____, does not extend to include a cervical disc protrusion or radiculopathy at the C2-3 spinal level or stenosis at the C5-6 spinal level and we remand this case back to the hearing officer to allow Ms. R, as the claimant's guardian, an opportunity to participate in the dispute resolution process, and present evidence if she wishes to do so. As a separate issue, if Ms. R, as the claimant's guardian, does not appear at the CCH on remand (after notice of the CCH on remand is sent to Ms. R's address of record), the hearing officer shall send a 10-day letter to Ms. R's address of record and determine whether the claimant had good cause for not attending the CCH on remand.

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 Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

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

**EDWARD J. HENNESSY
2900 WESLAYAN, SUITE 550
HOUSTON, TEXAS 77027.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge