APPEAL NO. 152304
FILED JANUARY 21, 2016

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 October 28, 2015, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter, June 27 through September 25, 2015.

The appellant (carrier) appealed the hearing officer's determination of entitlement to the first quarter of SIBs based on sufficiency of the evidence and also urged that the hearing officer abused her discretion in admitting certain evidence over the carrier's objection. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on (date of injury), which resulted in an impairment rating of 15% or greater; (2) the claimant has not commuted any portion of his impairment income benefits; (3) the qualifying period for the first quarter of SIBs was from March 15 through June 13, 2015; (4) during the qualifying period for the first quarter of SIBs, the claimant was unemployed; and (5) during the qualifying period for the first quarter of SIBs, the minimum number of job applications or work search contacts required for Bandera County was five contacts per week.

The claimant testified that he was injured while in the course and scope of his employment on (date of injury), when he fell from a boom lift, sustaining injuries to his head, elbows, feet, and low back. He has undergone three surgical procedures to his left foot as well as a two level lumbar spinal surgery. The claimant filed a "supplemental" Application for [SIBs] (DWC-52) on June 24, 2015, reflecting that he made three job search contacts during each week of the qualifying period. As previously mentioned, the parties stipulated that the minimum number of job search contacts required for the claimant's county of residence during the qualifying period was five. At the CCH the claimant's theory of entitlement to SIBs was inability to work in any capacity during each week of the qualifying period.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards.

Section 408.1415(a) states that the Texas Department of Insurance, Division of Workers' Compensation commissioner by rule shall adopt compliance standards that require each SIBs recipient to demonstrate an active effort to obtain employment. 28 TEX. ADMIN. CODE §§ 130.100-130.109 (Rules 130.100-130.109), effective July 1, 2009, govern the eligibility of SIBs.

Rule 130.102(d)(1) provides in pertinent part that an injured employee demonstrates an active effort to obtain employment by meeting the following work search requirement each week during the entire qualifying period:

> (E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The claimant relies upon the medical report of his treating doctor, (Dr. Z), dated October 21, 2015, to establish his inability to work during the qualifying period in accordance with Rule 130.102(d)(1)(E) above. Although she made no findings of fact concerning the sufficiency of Dr. Z's narrative, the hearing officer explained in the Discussion section of her decision and order that Dr. Z's narrative specifically explains how the injury caused a total inability to work during the qualifying period and that no other record showed that the claimant was able to return to work. The hearing officer therefore determined that the claimant is entitled to SIBs for the first quarter due to a total inability to work.

EVIDENTIARY RULING

At the CCH the carrier objected to the admission of the October 21, 2015, medical report from Dr. Z on the grounds that the report had not been timely exchanged. To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show 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. *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex.1986).

Rule 142.13(c)(1) provides that the parties exchange documentary evidence "no later than 15 days after the benefit review conference [BRC]." Rule 142.13(c)(2) further provides that "[t]hereafter, parties shall exchange additional documentary evidence as it becomes available." Rule 142.13(c)(3) provides that the hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. A party who belatedly investigates the facts and then does not disclose known information in order to make further investigation and development runs the risk of having evidence excluded for failure of exchange. *See* APD 991744, decided October 1, 1999.

In this case, the BRC was held on September 2, 2015. The claimant's position at the BRC was that "the claimant was unable to return to work in any capacity as determined by [Dr. Z]. The claimant provided an active job search as required." We note that the claimant did not argue entitlement based upon work searches at the CCH. The exchange deadline pursuant to Rule 142.13(c)(1) was September 17, 2015. Dr. Z's report is dated October 21, 2015. After the carrier objected to the report, the hearing officer asked the claimant's counsel for a response. Counsel replied that the narrative report from Dr. Z had been requested on September 24, 2015, and was received and exchanged on October 21, 2015. The carrier does not dispute that the exchange of this report took place on October 21, 2015. The hearing officer then stated "[s]ince the claimant has the burden of proving entitlement to SIBs and it was exchanged as soon as they received it, I will agree that it probably should have been done long before it actually was, but I will overrule the carrier's objection. . . . "

As noted previously, to be reversible, it must be shown that an error in the admission or exclusion of evidence was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. In this case the claimant had the burden of proof to demonstrate that, during the qualifying period for the first quarter of SIBs, he was unable to perform any type of work in any capacity and, further, he was required to provide a narrative report from a doctor which specifically explains how the injury caused a total inability to work. The October 21, 2015, report from Dr. Z is the only narrative report in evidence which specifically explains how the injury caused a total inability to work during the qualifying period for the first quarter of SIBs. The claimant offered no explanation for his failure to request Dr. Z's report until September 24, 2015, a date more than three months following expiration of the qualifying period and one week subsequent to the exchange of documentary evidence deadline prescribed by Rule 142.13(c)(1).

We review a hearing officer's ruling on the admission or exclusion of evidence on an abuse-of-discretion standard and in determining whether there has been an abuse of discretion we look to see whether the hearing officer acted without reference to any guiding rules or principles. We hold that the hearing officer abused her discretion in admitting the medical report of Dr. Z and that abuse of discretion caused the rendition of an improper judgment.

As previously discussed, Dr. Z's October 21, 2015, narrative report is the only narrative report in evidence discussing a total inability to work. Because we hold that the hearing officer erred in admitting Dr. Z's narrative report into evidence, we reverse the hearing officer's decision that the claimant is entitled to SIBs for the first quarter and render a new decision that the claimant is not entitled to SIBs for the first quarter, June 27 through September 25, 2015.

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

RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge