APPEAL NO. 160074
FILED MARCH 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 December 1, 2015, in El Paso, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury sustained on (date of injury), does not extend to an injury to the right hand, left carpal tunnel syndrome, left cubital tunnel syndrome, and a subcortical edema at the base of the second and third metacarpal and in the trapezoid and capitate without evidence of fracture to the left hand; (2) the appellant (claimant) did not have disability from December 1, 2014, and continuing through the date of the CCH; and (3) the claimant reached maximum medical improvement (MMI) on December 1, 2014, with an impairment rating (IR) of zero percent.

The claimant appealed the hearing officer's determinations based on sufficiency of the evidence grounds and argued that the hearing officer erred in allowing the testimony of (Dr. H), the respondent's (carrier) peer review doctor, over the claimant's objection. The carrier responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), in the form of at least a left hand contusion and laceration.

The claimant testified that he sustained injury to his hands when coworkers with whom he was carrying heavy pipes dropped their sections causing the claimant's hands to become crushed between the pipes. The claimant sustained a laceration to the top of his left hand and received sutures. The sutures were removed on December 1, 2014, and the claimant was released to return to work full duty. In February 2015, the claimant sought treatment with (Dr. S) and was diagnosed with the disputed conditions.

The claimant asserts that the hearing officer erred in allowing Dr. H to testify at the CCH because the identity of that witness was not exchanged by the carrier as required by 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)). Rule 142.13(c)(1)(D) requires, in part, that no later than 15 days after the benefit review conference (BRC), parties shall exchange the identity and location of any witness known to have knowledge of the relevant facts. The claimant asserted that the carrier exchanged Dr. H's identity, along with the identities of 43 other potential witnesses, via

facsimile transmission at 10:00 p.m. on October 20, 2015, the 15th day following the date of the BRC on October 5, 2015.

We note that Rule 102.3(d) provides that "[a]ny written or telephonic communications received other than during normal business hours on working days are considered received at the beginning of normal business hours on the next working day." Further, Rule 102.3(c) establishes that "[n]ormal business hours in the Texas workers' compensation system are 8:00 a.m. to 5:00 p.m. Central Standard Time with the exception of the [Texas Department of Insurance, Division of Workers' Compensation's (Division)] El Paso field office whose normal business hours are 8:00 a.m. to 5:00 p.m. Mountain Standard Time." The preamble to Rule 102.3 comments that subsection (d) establishes the date communications are deemed received outside of normal business hours on working days. The preamble goes on to state "[t]his subsection applies to communications received by **any participant** in the Texas workers' compensation system. [Emphasis added.] Because the carrier's exchange of information was received by the claimant after normal business hours on October 20, 2015, the claimant did not receive the exchange until October 21, 2015, a date more than 15 days after the BRC.

The claimant objected to the testimony of Dr. H and argued that the carrier had not exchanged the identity of the witness within 15 days after the BRC. The hearing officer did not discuss the reasons for the late exchange nor did she make any determination of good cause, but summarily overruled the claimant's objection and allowed Dr. H to testify at the CCH concerning extent of the compensable injury. The hearing officer additionally denied the claimant's request that the CCH record be held open so that the treating doctor could respond to Dr. H's testimony.

To obtain reversal of a decision based upon error in the admission or exclusion of evidence, an appellant must show that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause, the rendition of an improper decision. Appeals Panel Decision (APD) 051705, decided September 1, 2005. Because the identity of the carrier's witness was not timely exchanged, and the hearing officer overruled the claimant's objection and allowed the testimony of Dr. H without a finding of good cause for the carrier's untimely exchange of information, we find the hearing officer's evidentiary ruling was, in fact, error. We further note that the hearing officer stated in her decision that:

> The testimony provided by the peer reviewer was persuasive and thorough. Therefore, the [c]laimant failed to establish that the remaining diagnoses were also caused, accelerated, worsened or enhanced as a result of the compensable injury.

Accordingly, the hearing officer based her decision regarding extent of the compensable injury on the testimony of Dr. H which was reasonably calculated to cause, and probably did cause, the rendition of an improper decision.

We hold that the hearing officer erred in admitting the testimony of Dr. H, a witness whose identity was not timely exchanged pursuant to Rule 142.13(c)(1)(D). We reverse the hearing officer's decision and remand the extent of injury, disability, MMI and IR issues to the hearing officer to make findings of fact, conclusions of law, and enter a decision which are supported by the evidence. The hearing officer is to consider neither the testimony of Dr. H nor any additional evidence 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 Division, 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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge