

APPEAL NO. 160363
FILED APRIL 28, 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 January 14, 2016, with the record closing on January 25, 2016, in Austin, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the respondent (claimant beneficiary) is a proper legal beneficiary of (decendent), entitling her to death benefits.

The appellant (carrier) appealed the hearing officer's determination based on sufficiency of the evidence grounds and argued that the hearing officer erred in admitting the deposition of (CN) into evidence over the carrier's objection. The claimant beneficiary responded, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the decedent sustained a compensable injury on (date of injury), which resulted in his death.

The claimant beneficiary testified that, on February 14, 2012, she and the decedent agreed to be married and thereafter, until the decedent's death, lived together as husband and wife and represented to others that they were married. In support of her position, the claimant beneficiary offered excerpts from the deposition of CN which was taken on October 2, 2014, in the probate matter of the estate of the decedent. The carrier objected to the admission of the deposition excerpts into evidence on the grounds that such testimony had not been timely exchanged and was provided to the carrier on January 6, 2015, only 8 days prior to the CCH, in response to its request for production.

28 TEX. ADMIN. CODE § 142.13(c)(1) (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 Appeals Panel Decision (APD) 991744, decided October 1, 1999.

In this case, the BRC was held on November 5, 2015. The exchange deadline pursuant to Rule 142.13(c)(1) was November 25, 2015. As noted above, the deposition of CN was taken on October 2, 2014. After the carrier objected to the offer, the hearing officer asked if the claimant beneficiary had an explanation for the late exchange. Counsel for the claimant beneficiary replied that the deposition had been in the possession of the claimant beneficiary's

probate attorney, “an attorney that’s not a party to the [w]orkers’ [c]ompensation claim” and that it was provided to counsel for the carrier as soon as it was made available to the attorney representing the claimant beneficiary before the Texas Department of Insurance, Division of Workers’ Compensation (Division). The hearing officer then stated:

“[T]wo things makes (sic) me think there’s good cause. One is the nature of this dispute of death benefits my threshold by allowing late exchange would be lowered because of the nature of the dispute. Secondly, this is a response in a request for discovery that was signed and they received this information. I think this was exchanged as soon as they got it. The rules provide additional information could be exchanged upon receipt. So in this situation, I understand the objection, but it is overruled.”

The hearing officer is incorrect in his determination that the threshold for establishing good cause for the late exchange of documentary evidence pursuant to Rule 142.13(c)(1) is lowered in disputes concerning death benefits. We further disagree with his ruling that good cause for the late exchange of relevant documentary evidence exists where such evidence is obtained by the opposing party through additional discovery processes as authorized by Rule 142.13(f).

To obtain a reversal of a decision 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 error, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. *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. APD 051705, decided September 1, 2005; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex.1986). Because excerpts from the deposition of CN were not timely exchanged, and the hearing officer overruled the carrier’s objection and admitted the deposition excerpts without a showing of good cause for the claimant beneficiary’s untimely exchange, we find the hearing officer’s evidentiary ruling was in fact error. We further note that the hearing officer relied on the deposition excerpts in rendering his decision, stating in his decision that CN and the decedent were “great” friends, best friends and business partners. The admission of CN’s deposition testimony was reasonably calculated to cause, and probably did cause, the rendition of an improper decision. Accordingly, we hold that the hearing officer abused his discretion in admitting excerpts from the deposition of CN due to the claimant beneficiary’s failure to timely exchange such evidence.

We reverse the hearing officer’s decision and remand the issue of whether the claimant beneficiary is a proper legal beneficiary of the decedent, 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 deposition testimony of CN 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 **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge