APPEAL NO. 051172-s
FILED JULY 7, 2005

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 April 29, 2005. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the 8th, 9th, 10th, and 11th quarters.

The claimant appealed, contending that the hearing officer had abused her discretion by improperly excluding several of the claimant's exhibits and that the hearing officer had erred "as a matter of law" in finding the claimant was not entitled to SIBs for the quarters at issue. The respondent (carrier) responded that the hearing officer had not abused her discretion in excluding the medical records and even if the hearing officer erred a reversal "is not warranted because any error was not reasonably calculated to cause not did cause the rendition of an improper judgment." The carrier urges affirmance of the hearing officer's decision.

DECISION

Reversed and remanded.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Neither party appealed the hearing officer's determination that the claimant "was under employed as a direct result of the impairment from the compensable injury" thereby the claimant met the requirements of Section 408.142(a)(2) and Rule 130.102(b)(1). At issue was whether the claimant satisfied the requirement of Section 408.142(a)(4) and Rule 130.102(b)(2) that the claimant had made a good faith effort to obtain employment commensurate with the employee's ability to work. In the 8th quarter the claimant proceeded on both a theory that she had returned to work in a position relatively equal to her ability to work and a good faith effort to obtain employment pursuant to Rule 103.102(d)(5) and (e).

With regard to the return to work in a position relatively equal to the ability to work, Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. The preamble to Rule 130.102(d)(1) states, "This standard eliminates arguments regarding the rate of pay for the job because it ties the finding to whether or not the employment is appropriate considering the injured employee's ability to work. A person who has actually been successful in returning to work within his or her ability will not be required to continue additional job search efforts." The Appeals Panel has previously noted that the focus of the "relatively equal" inquiry in Rule 130.102(d)(1) is not on whether the wages are the same, but rather on whether the employment was relatively equal in terms of hours worked and whether the job is within

the claimant's restrictions. Texas Workers' Compensation Commission Appeal No. 000702, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 050667, decided May 6, 2005.

In this case the parties stipulated that the claimant earned $637.50 during the 8th quarter qualifying period ($237.50 delivering telephone books, although stipulated as being $237.50, and two payments of $200.00 each for helping her mother around the home) and $600.00 for each of the 9th, 10th, and 11th quarter qualifying periods helping her friend's parents at flea markets in various states. The claimant testified that she was offered, and accepted $50.00 a week for helping run a flea market table or stand.

At issue was what were the claimant's restrictions and more importantly whether the claimant could work full time or only part time. The hearing officer, on more than one occasion asked for evidence of whether the claimant could work full time or only part time. The carrier offered an addendum, dated December 1, 2004 (which was toward the end of the 11th quarter qualifying period), from its required medical examination (RME) doctor which stated:

> I believe the patient can perform sedentary type work only. With her chronic pain, she needs to change positions frequently. She will have difficulty using particularly her left arm for repetitive lifting, pushing, pulling or activities above shoulder height. With her low back symptoms she should avoid repetitive lifting of more than 25 pounds or lifting with bending or twisting at the waist.

The claimant offered various medical reports (to be discussed later) from two (or perhaps more) health care providers in (State). The carrier objected to the Claimant's Exhibit No. 9 (pages 2 and 3) 10 and 11 on the ground that the medical reports were from doctors not on the ADL (approved doctor list) pursuant to Rule 180.20(a)(2). The hearing officer, after some discussion, sustained the carrier's objection and excluded the records. The records were included in the file as "an offer of proof."

Rule 180.20(a)(2) provides that on or after September 1, 2003, doctor's who provide any functions in the Texas Workers' Compensation Commission (Commission) system are required to be on the ADL. Neither the rule nor Section 408.023, establishing a list for approved doctors indicate whether "functions" preclude rendering an opinion on ability to work. Section 408.023 effective June 17, 2001, requires the Commission to establish rules for doctors and other health care providers who provide health care services as treating doctors or other health care services, perform peer review, and perform utilization review. The preamble to Rule 180.20 indicates that the purpose of the rule is to comply with HB-2600 and "will apply to doctors who provide health care services as treating doctors, referral doctors, consulting doctors, [RME] doctors, peer review doctors, utilization review doctors, designated doctors, and doctors on the MQRP." The emphasis here appears to be on providing health care services regarding the treatment of an injury. On the other hand Section 410.165(b) clearly states that the hearing officer "shall accept the written reports signed by a health care

provider." (Emphasis added.) Under the carrier's theory an expert medical witness could not testify or render a medical opinion on a complex medical issue unless the medical expert was on the ADL. We do not believe that to be the case and we hold that the hearing officer erred in excluding the records insofar as they contained an opinion on the ability to work and what restrictions the claimant may have. In any event the hearing officer is still the sole judge of the weight and credibility of the evidence including the ability to work full or part time.

The carrier correctly notes that to obtain a 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. 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. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

In this case one of the key factors was whether the claimant possessed an ability to work full time (as found by the hearing officer) or only part time as contended by the claimant. The carrier's RME doctor said "sedentary type work only" but does not address full time or part time. The claimant's testimony was equivocal at best and seemed to be that she believed she could only work 15 to 20 hours a week and that her doctors told her she could only work 20 hours a week. A review of the excluded exhibits does not support the claimant's testimony. Excluded Exhibit No. 10 includes billing notes, handwritten (and very difficult to read) progress notes and a typed report dated December 15, 2004, which states that the claimant's condition "would prevent her from working." Claimant's Exhibit No. 11 contains 108 pages of assorted notes, and clinical notes with those after Bates stamped 33 pages either predated the claimant's compensable injury or dealt with matters clearly not the compensable injury. Neither of these exhibits are reasonably calculated to render a different judgment. However, pages 2 and 3 of Claimant's Exhibit No. 9 contains a report dated February 28, 2005 (after the 11th quarter qualifying period) from a doctor who treated the claimant and which comments on an examination of November 5, 2004. That report concludes:

> It was my recommendation that [Claimant] work no more than ten hours per week. Of these ten hours, specific and strict limitations must be followed. I recommended [Claimant] do no lifting, carrying, bending or twisting. Because [Claimant]'s condition is significantly aggravated by prolonged confinement to one position, I recommended that her standing/walking and sitting/driving be limited to no more than one hour daily. Repetitive hand motions must be stringently avoided. This includes grasping, pushing, pulling, forearm and wrist rotation and fine manipulation. I also suggested [Claimant] avoid overhead reaching, kneeling, climbing or squatting.

We hold that the hearing officer erred in excluding pages 2 and 3 of the Claimant's Exhibit No. 9 and that in view of the hearing officer's several inquiries of whether the claimant could work full or part time, the exclusion of the report which specifically addresses the inquiry and renders an opinion on full time versus part time work was reasonably calculated to cause an improper judgment.

We remand the case to the hearing officer for the inclusion into evidence of the Claimant's Exhibit No. 9, for the hearing officer to consider that exhibit and to render a decision on the disputed issues. The hearing officer is to make findings with regard to the good faith effort to obtain employment in the 8th quarter considering both Rule 130.102(d)(1) and Rule 130.102(d)(5) and (e). No rehearing on remand is necessary.

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 Commission's Division of Hearings, 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Colonial Casualty Insurance Company, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Margaret L. Turner
Appeals Judge

CONCURRING OPINION:

It is undisputed that the doctor, whose February 28, 2005, report was not admitted into evidence, was not on the Commission's ADL at the time the doctor examined the claimant and issued her report. In my opinion, the doctor was performing functions under the Texas Workers' Compensation Act when the doctor examined the claimant, evaluated her work ability, and issued a report describing work restrictions, all of which was performed with regard to the claimant's work-related injury, and was not done on an emergency or immediate post-injury basis. Pursuant to Section 408.023(f) and Rule 180.20(a)(2), the doctor had to be on the ADL in order to perform those functions. The question is then whether the doctor's report describing the claimant's medical condition and work status should be excluded from evidence solely on the basis that the doctor was not on the ADL.

Section 410.165(b) provides that a hearing officer shall accept all written reports signed by a health care provider. The doctor, an out-of state chiropractor, signed the report in issue. A health care provider means a health care facility or health care practitioner. Section 401.011(22). A health care practitioner includes an individual licensed to provide or render and provides or renders health care. Section 401.011(21)(A). Health care includes all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services. Section 401.011(19). Health care includes chiropractic service provided by or at the direction of a doctor. Section 401.011(19)(A). A doctor includes a doctor of chiropractic who is licensed and authorized to practice. Section 401.011(17). There is no contention that the claimant's out-of-state doctor is not authorized and licensed to practice in the state where the doctor practices and examined the claimant. The written report in issue meets the requirements for acceptance by the hearing officer under Section 410.165(a).

Section 410.165(a) does not contain a requirement that the written report signed by the health care provider must be provided by a doctor on the ADL in order to be admissible at the CCH, nor is there a Commission rule that makes admissibility of a written report signed by a health care provider dependent on whether the doctor is on the ADL. In the absence of such a statutory or rule provision, I cannot agree with the carrier's position that the doctor's report was not admissible based solely on the fact that the doctor was not on the ADL.

In arguing for reversal of the hearing officer's evidentiary ruling, the claimant's response describes an emergency and immediate post-injury care situation not relevant to the issue at hand because emergency and immediate post-injury care is an exception to the requirement to be on the ADL. Section 408.023(f). What is more compelling is a situation where a carrier denies the compensability of the injury, an injured employee cannot obtain medical care from a doctor on the ADL due to the denial, the injured employee obtains nonemergency medical care from a doctor not on the ADL through health insurance or a charity hospital, the need for medical care is ongoing, several months elapse before the compensability dispute gets to a CCH, and the only medical

records and reports the injured worker has to prove the compensability of his injury and his disability come from doctors not on the ADL, all because of the carrier's denial. While that is not the situation in the instant case, I believe that a decision in the instant case that would limit the admissibility of medical reports, other than the reports of emergency care or reports coming within another exception to the ADL, to only those reports from a doctor on the ADL, would result in fundamental unfairness to the injured worker in the situation previously described. I concur in the remand to have the hearing officer consider the doctor's report of February 28, 2005.

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Robert W. Potts
Appeals Judge