APPEAL NO. 051193
FILED JULY 13, 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 18, 2005. The hearing officer resolved the disputed issues by deciding that: (1) (Dr. C) was not properly appointed by the Texas Workers' Compensation Commission (Commission) in accordance with Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5); (2) that because Dr. B was the properly appointed designated doctor, the Commission must seek clarification from Dr. B regarding whether the inclusion of the disc protrusion at L4/5 as part of the compensable injury would change his prior certification of maximum medical improvement (MMI) and impairment rating (IR) and whether he wishes to reexamine the respondent (claimant); (3) that because clarification has not been sought from Dr. B regarding his certification, the claimant's date of MMI and IR cannot be determined; (4) that the claimant had disability from January 29, 2004, through the date of the CCH; (5) that the claimant had good cause for failing to submit to the required medical examination (RME) on March 31, 2004, and is entitled to temporary income benefits (TIBs) from March 31, 2004, through the date of the CCH; and (6) that the claimant had good cause for failing to submit to the RME on April 22, 2004, and is entitled to TIBs from April 22, 2004, to the date of the CCH.

The appellant (carrier) appealed, disputing the disability determination as well as the determination that the claimant had good cause for failing to attend the RME scheduled for April 22, 2004. The carrier also contends that the hearing officer erred in finding that the claimant is entitled to TIBs from March 31, 2004, through the date of the CCH, arguing that MMI ends a claimant's entitlement to TIBs and that to order the carrier to now pay TIBs is an express violation of the 1989 Act.

The claimant responded, urging affirmance of the disputed determinations. In her response, the claimant also states her disagreement with the hearing officer's determination that the appointment of Dr. C was not correct and argues that presumptive weight should be given to the report of Dr. C and that there should be a determination that the claimant has not yet reached MMI and thus has no IR. We note that although the claimant's response was timely as a response, it is untimely as an appeal and therefore the issues disputed by the claimant in her response cannot be considered. Since there was not a timely appeal, the determinations that Dr. C was not properly appointed as the second designated doctor and that "[b]ecause the [Commission] has not sought clarification from [Dr. B] in regard to his certification, the claimant's date of [MMI] and [IR] for the compensable lumbar sprain/strain and disc protrusion at L4/5 injury of _____, cannot be adjudicated" are final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

DISABILITY

The parties stipulated that the claimant sustained a compensable lumbar strain/sprain and a disc protrusion at L4/5 injury in the course and scope of employment with employer on _____. Disability is defined in Section 401.011(16). Whether the claimant had disability from January 29, 2004, to the date of the CCH was a fact question for the hearing officer to resolve from the conflicting evidence presented at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence on the issue of disability, we conclude that the hearing officer's determinations are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

GOOD CAUSE

Section 408.004(e) effective for RMEs scheduled to occur after January 1, 2000, provides in part that an employee is not entitled to TIBs, during and for a period in which the employee fails to submit to an examination under Subsection (a) and (b) unless the Commission determines that the employee had good cause for the failure to submit to the examination. Rule 126.5(g) provides that a carrier "shall send a copy of the request for a medical examination order required by subsection (d) of this section to the employee and the employee's representative (if any) by facsimile or electronic transmission if carrier has been provided with a facsimile number or email address for the recipient, otherwise, the carrier shall send the request by verifiable means." Rule 126.5(h) provides that a carrier "shall maintain copies of the request for a medical examination order and shall also maintain verifiable proof of successful transmission of the information." The rule goes on to instruct that "verifiable proof includes, but is not limited to, a facsimile confirmation sheet, certified mail return receipt, delivery confirmation from the postal or delivery service, or a copy of the electronic transmission."

The hearing officer found that the carrier did not prove by verifiable means that the claimant received sufficient notice, including written notice, of the requested RME scheduled for April 22, 2004. The carrier argues in its appeal that it presented evidence at the CCH that the carrier sent notice of the appointment through a private shipper on April 6, 2004; that the adjuster stated under oath in responses to interrogatories that she sent notice to both the claimant and claimant's representative on April 6, 2004; and that there was documentation from a carrier employee that the claimant called the carrier to let them know that she received the appointment notice.

The claimant testified that she did not receive notice of the appointment and denied ever receiving a delivery from the private delivery service used by the carrier. The carrier correctly points out that confirmation of delivery to the claimant's address on April 6, 2004, from the private delivery service was in evidence. The claimant testified at the CCH as to her correct address. The address listed on the confirmation of delivery from the private delivery service on April 6, 2004, was the same address the claimant acknowledged as her correct address during the CCH. As the trier of fact, the hearing officer may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer was presented with conflicting evidence regarding whether the notice was sent based on representations made by employees of the carrier and the claimant's testimony that she never received such notice. Rule 126.5(h) specifically lists the evidence of confirmation of delivery from a delivery service presented by the carrier as an example of verifiable proof. The hearing officer concluded that the carrier failed to prove by verifiable means that the claimant received written notice of the April 22, 2004, RME appointment but gave no indication as to why the confirmation of delivery to the claimant's address by a private delivery service was not credible. We note that Rule 126.5 addresses requirements for requesting RMEs rather than the actual order and notice of the appointment. Rule 126.6 does not provide a corresponding requirement of verifiable proof of successful transmission of the information regarding the actual order. A Commission order dated March 30, 2004, approving the request for an RME appointment was in evidence. Additionally, correspondence dated April 5, 2004, notifying the claimant of the Commission ordered RME appointment scheduled for Thursday, April 22, 2004, was in evidence along with confirmation of delivery to the claimant's address by a private delivery service on April 6, 2004.

Although there is compelling evidence regarding notice of the appointment, whether good cause exists for failure to attend a RME is a matter left up to the discretion of the hearing officer. That determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 010828, decided May 16, 2001. The test for good cause is that of ordinary prudence; that is, the degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994.

As noted above, there is no requirement that the carrier prove the claimant received notice of the RME appointment by verifiable means. The hearing officer applied the wrong standard to determine whether or not the claimant received notice of the RME appointment scheduled for April 22, 2004. This was legal error and an abuse of discretion. Therefore, we remand this issue of good cause back to the hearing officer to apply the correct standard in determining whether or not the claimant had good cause for failing to submit to the RME on April 22, 2004, and is entitled to TIBs from April 22, 2004, to the date of the CCH. We note that it is undisputed that the RME scheduled for March 31, 2004, was cancelled. However, to the extent that the hearing officer's

determination that the claimant is entitled to TIBs from March 31, 2004, to the date of the CCH may conflict with the determination regarding entitlement to TIBs from April 22, 2004 to the date of the CCH, we correspondingly reverse and remand that determination.

MMI AND IR

There was not a timely appeal of the determination that the claimant's date of MMI and IR cannot be adjudicated. However, we note that under the holding in Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied), an affirmance of the hearing officer's determination that MMI and IR cannot be determined pending the appointment of a designated doctor would, in essence, be a remand. The court noted in that case that the mere failure of the Appeals Panel to use the word "remand" in its opinion did not make its nonfinal decision (on MMI and IR) final for the purposes of judicial review, and was, in effect, a remand.

However, the carrier correctly notes in its appeal that Section 408.102 provides that TIBs continue only until the employee reaches MMI. Section 408.121(b) provides that the carrier shall begin to pay impairment income benefits not later than the fifth day after the date on which the carrier receives the doctor's report certifying MMI. Because the claimant's entitlement to TIBs ends upon attainment of MMI, on remand the hearing officer must also resolve the issues of MMI and IR before entitlement to TIBs can be determined.

We affirm the determination that the claimant had disability from January 29, 2004, and continuing through the date of the CCH; we reverse the determination that the claimant is entitled to TIBs from March 31, 2004, to the date of the CCH, striking that language from the decision and order; and we reverse the determination that the claimant had good cause for failing to submit to the RME on April 22, 2004, and that the claimant is entitled to TIBs from April 22, 2004, to the date of the CCH and remand back to the hearing officer for actions consistent with this decision.

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.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge