

APPEAL NO. 111432
FILED NOVEMBER 28, 2011

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 August 30, 2011. The six issues at the CCH were: (1) did the appellant (claimant) sustain a compensable injury on (date of injury); (2) is the respondent (carrier) relieved of liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001; (3) did the claimant have disability from July 30, 2009, to the present resulting from an injury sustained on (date of injury) (modified by agreement of the parties); (4) does the compensable injury of (date of injury), include chronic pain disorder, adjustment disorder with mixed anxiety/depressed mood, right rotator cuff rupture or tear, right shoulder derangement, right rotator cuff syndrome, right shoulder strain, right AC joint osteophyte, right shoulder impingement syndrome, urolithiasis with obstructive uropathy, diabetes, urinary tract infection, or lung nodule; (5) has the claimant reached maximum medical improvement (MMI) and, if so, on what date; and (6) if the claimant reached MMI, what is the impairment rating (IR)? We note that the extent of injury, the MMI, and the IR issues were not certified out of a benefit review conference (BRC) but were added at the CCH by the agreement of the parties. The BRC report, in evidence, does not contain a statement of the claimant's position at the BRC regarding the extent of the compensable injury or MMI/IR. We further note that the BRC report shows that a special accommodation request was made for a Spanish speaking interpreter.

In the Agreement section of her decision, the hearing officer states that the parties have reached an agreement and the "Agreement section includes findings of fact and the Decision section constitutes the conclusions of law." The hearing officer determined that the parties agreed on the six issues as follows:

- (1) the claimant sustained a compensable injury on (date of injury);
- (2) the claimant timely notified employer under Section 409.001 and the carrier is not relieved of liability pursuant to Section 409.002;
- (3) the claimant did not have disability resulting from the compensable injury of (date of injury), from July 30 through September 2, 2009; the claimant had disability resulting from the compensable injury of (date of injury), from September 3 through December 23, 2009; and the claimant did not have disability resulting from the compensable injury of (date of injury), from December 24, 2009, continuing through the date of the CCH;

- (4) the compensable injury of (date of injury), includes a right shoulder strain, but does not include chronic pain disorder, adjustment disorder with mixed anxiety/depressed mood, right rotator cuff rupture or tear, right shoulder derangement, right rotator cuff syndrome, right AC joint osteophyte, right shoulder impingement syndrome, urolithiasis with obstructive uropathy, diabetes, urinary tract infection, or lung nodule;
- (5) the claimant reached MMI on July 21, 2011, as certified by (Dr. M); and
- (6) the claimant's IR is nine percent, as certified by Dr. M.

The claimant appealed the hearing officer's decision, stating that she did not agree with Finding of Fact No. 9 [on the extent of the compensable injury] because "[she did] not agree with the agreement made [at the CCH] on August 30, 2011, I did not understand what my attorney . . . was agreeing my injury was limited to a sprain/strain." The claimant further argued that her attorney failed to meet with her and explain what was to be agreed upon, stating "[h]e took me out of the hearing and told me not to say anything. I do not agree my injury does not include the MRI findings . . . my injury includes the right shoulder MRI findings showing a right rotator cuff rupture or tear, right shoulder derangement, right rotator cuff syndrome, right AC joint osteophytes, right shoulder impingement syndrome. The claimant also appealed Conclusion of Law No. 6 on the extent of the compensable injury. Under other matters, the claimant further contended that she asked her attorney to submit "X-rays" as evidence and "he told me not to speak. I feel I was not given an opportunity to present my evidence." The carrier responded, urging affirmance. The carrier contends that "[t]he claimant and her attorney stipulated and agreed with the carrier regarding all issues." Furthermore, the carrier states that "the claimant's attorney spoke fluent Spanish. He addressed his client in front of the carrier. Their discussions were always in Spanish. The carrier's attorney listened to the claimant's attorney explain the terms of the stipulations and there was a certified interpreter at the [CCH] itself."

DECISION

Reversed and remanded.

28 TEX. ADMIN. CODE § 140.2(a) (Rule 140.2(a)) provides that the Texas Department of Insurance, Division of Workers' Compensation (Division) on its own motion or upon request, will provide special accommodations to an individual who intends to participate in a proceeding and who does not speak English, or who has a physical, mental, or developmental handicap.

The file indicates that the CCH was recorded on one compact disc (CD) by the hearing officer. A court reporter was present at the CCH and, upon request, a transcript of the CCH was provided to the Division by the carrier. Following the receipt of the claimant's appeal and the carrier's response, a complete translation (which included the statements of the court interpreter from English into Spanish and from Spanish into English during the CCH as recorded on the CD and provided by the written transcript) of the proceedings was provided to the Division by the Division's own translator. The CD recording, the transcript, and the Division's own translation were reviewed on appeal.

A review of the proceedings reflects that the claimant, claimant's attorney, carrier's attorney, employer's representative, a court reporter and a court interpreter were present before the hearing officer at the CCH. The court interpreter was sworn by the hearing officer to translate the hearing from English to Spanish and Spanish to English to the best of her ability. No exhibits were offered into evidence by the claimant or the carrier at the CCH, but the hearing officer admitted into evidence three hearing officer's exhibits: (1) the BRC report previously mentioned above; (2) a carrier information sheet; and (3) a Benefit Dispute Agreement (DWC-24) written entirely in English with no attached translation into Spanish. The DWC-24 in evidence was signed only by the carrier's representative and does not contain a signature by the claimant or the claimant's attorney. At the CCH, the hearing officer stated that it was her understanding that the parties had reached an agreement as to the six issues before her at the CCH. The claimant's attorney and the carrier's attorney stated to the hearing officer on the record that an agreement was reached on the disputed issues.

In her appeal, the claimant argues that her (date of injury), compensable injury is not limited to a right shoulder strain/sprain but also includes the conditions or findings revealed in her right shoulder MRI. The claimant further contends that she did not understand nor did her attorney explain to her what the proposed agreement was. The claimant also contends that her attorney would not let her speak at the CCH or to present evidence to the hearing officer.

Section 401.011(3) provides that an "Agreement" means the resolution by the parties to a dispute under this subtitle of one or more issues regarding an injury, death, coverage, compensability, or compensation. The term does not include a settlement.

Rule 147.4 in pertinent part provides:

- (c) An oral agreement reached during a benefit [CCH] and preserved in the record is effective and binding on the date made.
- (d) A signed written agreement, or one made orally, as provided by subsection (c) of this section, is binding on:

- (1) a carrier and a claimant represented by an attorney through the final conclusion of all matters relating to the claim, whether before the [Division] or in court, unless set aside by the [Division] or court on a finding of fraud, newly discovered evidence, or other good and sufficient cause.

A review of the CCH proceedings reflects when the hearing officer began stating her understanding of the parties' agreement as to the compensability issue, the claimant, through the court interpreter, interrupted the hearing officer. The court interpreter then stated that the claimant is "making hand gestures at me and she was saying that she really doesn't understand. I might have to—how should I say—interpret in a different way. I think the legal terms or the proper language is the one that she's having a little bit of problems with."¹ Also, the court interpreter tells the hearing officer that she "might have to go down a little bit on the level . . . so that she's a little bit understanding me."² The court interpreter stated that "I think it's just the procedure that she's a little bit apprehensive about."³ The court interpreter began talking to the claimant on her own, not translating the actual proceedings. The hearing officer asked for an explanation for the record as to what the court interpreter was saying. The court interpreter stated that the claimant is "not quite in tune with the proper procedure or core procedure and I asked her if she was a little bit apprehensive about it and that I would lower my level a little bit and try to explain to her more so she'll be more at ease and she said that that is good."⁴ The hearing officer then asked if "we" needed a recess. The court interpreter stated that "I think it's just the procedure that she's a little bit apprehensive about." The claimant's attorney responded "I think so too. Maybe just go ahead and if she hears the agreement, it might—it'll make sense to her."⁵ The hearing officer responded "[a]ll right. Okay."

The hearing officer then inquired about the agreement as to compensability, timely notice, and disability periods and received the attorneys' affirmation as to the agreement. A review of the proceedings reflects that during the CCH, the claimant's attorney talked in Spanish to the claimant, and at one point, told the hearing officer that "[t]he reason we're doing it this way, Your Honor, is she understands the end of the agreement, what it means to her in dollars, but we hadn't really gone through which weeks. This is just more a procedural aspect that wasn't fully explained to her."⁶ The hearing officer responded "[o]kay" and continued to get an oral agreement on the record

¹ See transcript page 7-8.

² See transcript page 8.

³ See transcript page 9.

⁴ See transcript page 9.

⁵ See transcript page 9.

⁶ See transcript page 12.

as to of the issues of compensability and timely reporting.⁷ The hearing officer stated her understanding of the agreement on the issues of MMI and IR and received each of the attorneys' agreement on the record.

A review of the proceedings reflects that when the hearing officer began to recite the claimed extent-of-injury conditions in the disputed issue, the claimant interrupted and her attorney talked to her (inaudible on the recording) and the recitation was resumed by the hearing officer as to the proposed agreement. The claimant again interrupted the proceedings. The court interpreter stated to the hearing officer that the claimant "wanted to show you x-rays,"⁸ that "the pain is from her shoulder to her elbow,"⁹ and that "she did not have chronic pain at the time of the injury."¹⁰ At that point, the claimant's attorney stated "I probably need to talk to her about this."¹¹

After a short recess, the CCH reconvened and the hearing officer stated that it was her understanding that the parties had come to an agreement on the extent of injury and the MMI/IR issues.

The hearing officer stated that "[i]t is my understanding the parties have reached the following agreement with regard to extent. Okay. It's my understanding that the parties agree that the (date of injury), compensable injury includes a right shoulder strain, but it does not include chronic pain disorder, adjustment disorder with mixed anxiety/depressed mood, right rotator cuff rupture or tear, right shoulder derangement, right rotator cuff syndrome, right AC joint osteophyte, right shoulder impingement syndrome, urolithiasis with obstructure uropathy, diabetes, urinary tract infection, or lung nodule." We note that although the claimant was represented by an attorney, the hearing officer did not ask the claimant or request a response as to whether she was in agreement with the resolution of the disputed issues as stated.

A review of the record (including the CD recording, the transcript, and the Division's own translation) reflects the court interpreter incorrectly translated from English into Spanish for the claimant medical terms with regard to the extent-of-injury condition(s). Instead of interpreting that it was the hearing officer's understanding that the (date of injury), compensable injury includes "a right shoulder strain," the court interpreter incorrectly translated that to the injury of [(date of injury)] includes "your right shoulder." The court interpreter also translated "right rotator cuff rupture or tear" as right side where it ruptured; "right rotator cuff syndrome" as right side of the shoulder

⁷ See transcript page 12.

⁸ See transcript page 14.

⁹ See transcript page 15.

¹⁰ See transcript page 16.

¹¹ See transcript page 16.

where she had a syndrome; and “right shoulder impingement syndrome” as right shoulder syndrome impairment.

We also note upon review that there are several other instances in which the court interpreter failed to accurately translate from English to Spanish specific sections of the Act, the ending date of disability, and other terminology at the CCH.

Throughout the hearing the claimant repeatedly interrupted with questions regarding the issues in dispute and the claimant’s attorney stated that the “procedural aspect” was not fully explained to her. While matter of procedure in a hearing generally may be waived, Hipp v. Donald, 220 S.W.2d 268 (Tex. Civ. App.-Fort Worth 1949, writ ref. n.r.e.), for a waiver to be effective there must be an actual or constructive knowledge of the right or privilege involved, along with an intention to relinquish such right. Braugh v. Phillips, 557 S.W.2d 155 (Tex. Civ. App.-Corpus Christi 1977, writ ref. n.r.e.). See also Appeals Panel Decision (APD) 92195, decided July 1, 1992.

An agreement may be set aside on a showing of failure to understand the extent of the agreement, mutual mistake of fact, misrepresentation, or for other good cause show. See APD 081484, decided November 19, 2008. We reverse and remand the hearing officer’s decision for a determination of whether good cause exists to set aside the parties’ agreement. If good cause is found to exist, the hearing officer should take evidence and issue a decision on the merits of the disputed issues. The hearing officer is to provide special accommodations to the claimant pursuant to Rule 140.2. The hearing officer is to provide the parties with a copy of the Division’s own translation that was part of the review on appeal.

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 **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge