APPEAL NO. 132241
FILED NOVEMBER 21, 2013

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 1, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on February 19, 2013, and that the claimant's impairment rating (IR) is 18%.

The appellant (carrier) appealed the hearing officer's MMI and IR determinations, arguing that the hearing officer committed reversible error in admitting the MMI/IR certification of [Dr. S], the doctor selected by the treating doctor to act in his place, and that the hearing officer committed reversible error in denying its motion for continuance made at the CCH. The carrier also argues that the MMI/IR certification adopted by the hearing officer fails to explain the MMI dates and rates noncompensable conditions. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

A Benefit Review Conference (BRC) was held in this case on March 25, 2013. Records of the Texas Department of Insurance, Division of Workers' Compensation (Division) reflect that a CCH was previously scheduled in this case to occur on May 24, 2013, which was continued at the claimant's request.

At the CCH held on August 1, 2013, the claimant sought to admit as an exhibit an amended MMI/IR certification by Dr. S, the doctor selected by the treating doctor to act in his place. The carrier objected, arguing that Dr. S's amended certification is dated July 8, 2013, the carrier received it on July 15 or 16, 2013, and therefore the certification was not timely exchanged in accordance with 28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 143.13(c)(1)). That rule provides that the parties exchange documentary evidence "no later than 15 days after the [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. The claimant contended that he made reasonable attempts to obtain the amended certification, and that immediately upon receiving the certification he faxed it to the carrier. The hearing officer determined at the CCH that the claimant had good cause for not previously exchanging Dr. S's certification and admitted it as an exhibit.

To obtain a reversal of a judgment 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 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. Appeals Panel Decision (APD) 043000, decided January 12, 2005; APD 121647, decided October 24, 2012; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We hold that under the circumstances of this case the hearing officer did not abuse his discretion in admitting Dr. S's amended certification.

Upon the admission of Dr. S's amended certification into evidence, the carrier requested a continuance to obtain evidence to contradict Dr. S's amended certification. The carrier contended that Dr. S's previous MMI/IR certification was invalid as a matter of law, which was the case the carrier was prepared to argue, and that the amended certification admitted at the August 1, 2013, CCH changed the issues to be argued and as such the carrier was not prepared to go forward. Although the hearing officer admitted Dr. S's amended certification that was not timely exchanged, the hearing officer denied the carrier's request for continuance.

Section 410.155(b) and Rule 142.10(b)(2) provide that the Division may grant a continuance if the hearing officer determines that good cause exists for the continuance. As discussed above, we review good cause determinations under an abuse-of-discretion standard, and the hearing officer's determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles.

We hold that the hearing officer in this case abused his discretion in denying the carrier's request for continuance. The carrier prepared its case on the basis of Dr. S's previous MMI/IR certification, which it contends was invalid as a matter of law. The carrier was unaware until shortly before the August 1, 2013, CCH that the claimant was seeking to admit an amended MMI/IR certification that would change the manner in which the carrier would try the case, and that said certification would be admitted at the CCH. Under the facts of this case the carrier was prevented from adequately investigating this case and its lack of information was not due to a lack of diligence on the carrier's part. Because we have determined that the hearing officer abused his discretion in denying the carrier's request for continuance, we must also reverse the hearing officer's determinations regarding MMI and IR and remand those issues for reconsideration.

The claimant testified at the CCH that he was injured on [date of injury], when he slipped on a wet rung of the ladder he was climbing and fell to the ground. Medical records in evidence indicate the claimant fell approximately 15 feet. It is undisputed by the parties that the claimant has sustained an injury to his lungs as a result of the compensable injury.

We note that there are MMI/IR certifications in evidence from Dr. S, [Dr. K], the designated doctor appointed by the Division to determine in part MMI, IR, and extent of injury, as well as [Dr. T], a doctor selected by the treating doctor to act in his place.

We note that Dr. S's amended certification certifying that the claimant reached MMI on February 19, 2013, the date of examination, with an 18% IR, does not contain a complete narrative report and does not include clinical findings. However, there is another narrative report in evidence based on an examination date of February 19, 2013, from Dr. S with a date of MMI of April 5, 2013, and 18% IR containing clinical findings. We note that Dr. S's 18% IR does not consider or rate an injury to the claimant's lungs, a condition which, as mentioned above, is undisputed by the parties.

Dr. K certified on February 21, 2012, that the claimant reached MMI on February 21, 2012, with a 9% IR, based on a partial distal clavicle resection for the claimant's left shoulder, range of motion measurements of the claimant's left wrist, and the claimant's lungs.

Dr. T certified on November 1, 2011, that the claimant reached MMI on November 1, 2011, with a 7% IR. We note that Dr. T does not consider or rate an injury to the claimant's lungs, a condition which, as mention above, is undisputed by the parties.

REMAND INSTRUCTIONS

We remand the case back to the hearing officer for further proceedings. On remand the hearing officer is to request the parties to stipulate to the date of statutory MMI. If the parties are unable to stipulate, the hearing officer should take additional evidence to determine the date of statutory MMI. The hearing officer is also to request the parties to stipulate to the conditions that comprise the compensable injury of [date of injury]. The parties shall be allowed the opportunity to fully develop their case and present evidence at the new hearing. The hearing officer is then to make determinations that are supported by the evidence on the claimant's MMI and IR 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 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RICHARD J. GERGASKO, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge