APPEAL NO. 150452
FILED APRIL 14, 2015

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) on remand was held on January 28, 2015, in San Antonio, Texas, with [hearing officer] presiding as hearing officer. In Appeals Panel Decision (APD) 142338, decided December 17, 2014, we remanded the case for the hearing officer to: (1) either take a stipulation from the parties or make a finding of fact regarding which certification is the first valid certification in this case and whether the first valid certification was finally modified, overturned, or withdrawn by agreement of the parties; (2) decide whether the certification became final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12); (3) correct the date of (Dr. B) certification in the decision; (4) make a determination on finality, maximum medical improvement (MMI), and impairment rating (IR); and (5) consider the evidence regarding the appellant's (claimant) disability during the period of December 3, 2012, through May 16, 2013, including the correct dates of the claimant's right shoulder and lumbar spinal surgeries, and make a determination on disability for the period of December 3, 2012, through May 16, 2013, which is consistent and is supported by the evidence.

At the January 28, 2015, CCH the claimant was not present, the claimant's attorney was present, and the respondent's (self-insured) attorney appeared by telephone. The claimant's attorney and the self-insured's attorney represented to the hearing officer that they had come to an agreement on the disputed issues on remand.

On remand, the hearing officer determined, consistent with the oral agreement recited during the January 28, 2015, CCH, that: (1) the February 12, 2012, MMI certification and 12% IR assessed by Dr. B on April 11, 2012, was the first valid certification in this case and was not modified, overturned or withdrawn by agreement of the parties;[1] (2) the February 12, 2012, MMI certification and 12% IR assessed by Dr. B on April 11, 2012, became final under Section 408.123 and Rule 130.12; (3) the claimant reached MMI on February 12, 2012, with a 12% IR;[2] (4) on November 29, 2012, the claimant had surgery on his right shoulder, and on April 8, 2014, the claimant

[1] Review of the record shows that the parties read into the record that the February 12, 2012, MMI certification and 12% IR assessed by Dr. B on April 11, 2012, was the first valid certification, but did not read into the record that portion stating "in this case and was not modified, overturned or withdrawn by agreement of the parties."

[2] The hearing officer's decision states that the claimant reached MMI on February 12, 2012, with a 12% IR; however, review of the record shows that the parties did not read into the record the resolution of the MMI and IR disputed issues.

had lumbar spinal surgery; and (5) the claimant did not have disability from December 3, 2012, through May 16, 2013.

On appeal the claimant is not represented by an attorney and has filed a pro se appeal requesting review of the hearing officer's finality, MMI, IR and disability determinations arguing that he disagrees with the hearing officer's decision because he was not present at the January 28, 2015, CCH, when the oral agreement was read into the record. The claimant specifically argues that the adoption of Dr. B's certification of MMI and IR "was done without the [c]laimant being present at the remand [CCH] on January 28, 2015. As the [c]laimant was not present to voice his disagreement with [Dr. B's] certification, it should not have been agreed to by the parties." The claimant requests that the designated doctor's certification of MMI and IR be adopted.

The self-insured responded, urging affirmance because an oral agreement reached during a CCH, which is preserved on the record, is effective and binding on the parties pursuant to Rule 147.4(c).

DECISION

Reversed and rendered to set aside the hearing officer's decision and order.

ORAL AGREEMENT

Section 410.166 provides, in part, that an oral agreement of the parties that is preserved in the record is final and binding. Rule 147.4(c) provides that an oral agreement reached during a benefit CCH and preserved in the record is effective and binding on the date made. Rule 147.4(d) provides, in part, that a signed written agreement, or one made orally is binding on: (1) the carrier and a claimant represented by an attorney through the final conclusion of all matters relating to the claim, whether before the Texas Department of Insurance, Division of Workers' Compensation (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; and (2) a claimant not represented by an attorney through the final conclusion of all matters relating to the claim while the claim is pending before the Division, unless set aside by the Division for good cause.

Review of the record supports the claimant's contention that he was not present at the January 28, 2015, CCH. As previously mentioned, the claimant's attorney was present and the self-insured's attorney appeared by telephone. At the CCH, there was no explanation requested by the hearing officer or provided by the claimant's attorney why the claimant was not present at the CCH. At the January 28, 2015, CCH, the claimant's attorney recites into the record an oral agreement reached by the parties on

the disputed issues. The hearing officer's decision and order, which reflects the agreement that was read into the record, was signed and issued on January 28, 2015, and the decision was mailed to the claimant and the claimant's attorney on February 5, 2015. Division records show that the claimant's attorney filed a Notification of Withdrawal with the Division on February 10, 2015.

On appeal the claimant is essentially requesting that he be relived of the effects of the oral agreement made by his attorney and the self-insured's attorney on January 28, 2015, because he was not present at the January 28, 2015, CCH, and had he been present at the CCH he would not have agreed to the resolution of the disputed issues that were read into the record.

The Appeals Panel has held that an oral agreement reached during a CCH, which is preserved on the record, is effective and binding on the parties on the date made in the same manner as a signed written agreement, subject to the provisions of Section 147.4(c). *See* APD 050265, decided March 25, 2005, where the carrier contended on appeal that the parties stipulated at the CCH to an incorrect date of MMI by mistake.

However, the Appeals Panel has also held that even where the parties make an agreement on the record at a CCH, a hearing officer may not permit an agreement to be made that is contrary to the 1989 Act and the rules. *See* Rule 147.9, Requirements for Agreements and Settlements. *See also* APD 020394, decided April 10, 2002, where an oral agreement was reached prior to the CCH by the parties on the issue of disability; however, the hearing officer made a disability determination inconsistent with the agreement of the parties. In that case the Appeals Panel reversed and rendered a new decision that was in accordance with the agreement of the parties on the issue of disability.

In this case, the claimant was not present at the January 28, 2015, CCH, there is no explanation requested by the hearing officer or provided by the claimant's attorney at the January 28, 2015, CCH why the claimant was not present at the proceeding. The claimant asserts that he was not in agreement with the resolution of the disputed issues at the CCH on January 28, 2015, and that the agreement was made without his presence or consent.

Furthermore, review of the record indicates that the hearing officer erred by including the language "in this case and was not modified, overturned or withdrawn by agreement of the parties" because the parties did not read into the record that portion as being part of the agreement at the January 28, 2015, CCH. *See* Rule 130.12. The parties did not completely resolve by agreement that portion of the disputed issue that the first valid certification was not modified, overturned or withdrawn by agreement of

the parties. Therefore, the hearing officer's first valid certification determination is not supported by the parties' agreement at the January 28, 2015, CCH.

Also, review of the record indicates that the parties did not resolve the disputed issues of MMI and IR by agreement at the January 28, 2015. Although the parties read into the record that the February 12, 2012, MMI certification and 12% IR assessed by Dr. B on April 11, 2012, became final under Section 408.123 and Rule 130.12, the parties did not resolve the disputes issues of MMI and IR by agreement on January 28, 2015, CCH. Therefore, the hearing officer's MMI and IR determinations are not supported by the parties' agreement at the January 28, 2015, CCH.

We agree with the claimant's assertion that there is good and sufficient cause to set aside the oral agreement made at the January 28, 2015, CCH, given that the claimant was not present at the CCH and no explanation of the claimant's absence at the CCH was requested by the hearing officer or provided by the claimant's attorney on the record. Division records show that the claimant's attorney withdrew from representing the claimant on February 10, 2015, five days after the hearing officer's decision was signed and issued, on February 5, 2015. On appeal, the claimant is without representation and has filed a pro se appeal asserting his disagreement of the oral agreement made at the January 28, 2015, CCH, by the claimant's attorney and self-insured's attorney without his presence or consent. Furthermore, the hearing officer's first valid certification, MMI and IR determinations are not supported by the parties' agreement, because the parties did not resolve those disputed issues by agreement at the January 28, 2015, CCH.

Accordingly, we reverse the hearing officer's decision that: (1) the February 12, 2012, MMI certification and 12% IR assessed by Dr. B on April 11, 2012, was the first valid certification and was not modified, overturned or withdrawn by agreement of the parties; (2) the February 12, 2012, MMI certification and 12% IR assessed by Dr. B on April 11, 2012, became final under Section 408.123 and Rule 130.12; (3) the claimant reached MMI on February 12, 2012, with a 12% IR; and (4) the claimant did not have disability from December 3, 2012, through May 16, 2013, and we render a new decision setting aside the hearing officer's decision and order.

The true corporate name of the insurance carrier is **SAN ANTONIO HOUSING AUTHORITY (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

HENRY ALVAREZ
818 SOUTH FLORES
SAN ANTONIO, TEXAS 78204.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge