APPEAL NO. 160787

FILED JULY 6, 2016

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 February 29, 2016, reopened and held open until April 1, 2016, in Tyler, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the claimed injury did not occur while respondent 1 (claimant) was in a state of intoxication, as defined in Section 401.013, from the introduction of a controlled substance, so that the appellant (carrier) is not relieved of liability for compensation; and (2) the claimant had disability beginning on November 11, 2014, and continuing through the date of the CCH.

The carrier appealed both of the hearing officer's determinations, contending that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The carrier also contends that the hearing officer abused his discretion when he unilaterally reopened the record after the CCH to obtain and admit evidence regarding disability that was neither exchanged nor offered by either party. The claimant responded, urging affirmance of the hearing officer's determinations. The appeal file does not contain a response from respondent 2 (subclaimant).

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated in part that on (date of injury), the claimant sustained an injury of a right hand laceration. The claimant testified his right hand was caught under the rotor on a conveyor belt he was cleaning.

COMPENSABLE INJURY

The hearing officer's determination that the claimed injury did not occur while the claimant was in a state of intoxication, as defined in Section 401.013, from the introduction of a controlled substance, so that the carrier is not relieved of liability for compensation, is supported by sufficient evidence and is affirmed.

EVIDENCE ADMITTED

The carrier contends that the hearing officer improperly and unilaterally reopened the record to obtain and admit evidence regarding disability that had not been exchanged with the carrier.

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; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986).

In evidence is Hearing Officer's Exhibit 9, which is a letter dated March 16, 2016, from the hearing officer to the claimant, the claimant's ombudsman, and the carrier's attorney. The letter states the following:

> As the [h]earing [o]fficer, it is my obligation and duty to fully develop the record. After reviewing the exhibits in this case, it was clear that I had no evidence on which to base a determination of disability. Based on the testimony, the claimant continued to treat with [Dr. W] until July, 2016,[1] but there was no information on what the claimant's work status was from [Dr. W] or why the appointments with [Dr. W] ended in July, 2016.
>
> Consequently, I asked the ombudsman assisting the claimant to obtain whatever records of [Dr. W's] she was able to get. I have re-opened the record, and those records, which are attached, will be admitted as Hearing Officer Exhibits 3-6.
>
> I will accept written responses and comments in regard to the attached documents through 5:00 pm on Friday, April 1, 2016. I will close the record at that time and prepare my written decision.

The records received and admitted by the hearing officer as Hearing Officer Exhibits 5 and 6 after the CCH consist of office notes and Work Status Reports (DWC-73) from Dr. W dated November 18, 2014, and January 13, 2015, which state the claimant cannot return to work from November 18, 2014, through March 1, 2015. Although not listed as hearing officer exhibits in his March 16, 2016, letter, the hearing officer's exhibits also contain Hearing Officer Exhibits 7 and 8, which are office notes

[1] We note that the hearing officer's reference to July 2016 contains a typographical error.

from Dr. W dated May 22, 2015, and July 27, 2015. A review of the record reveals that neither party sought the admittance of these records; instead, the hearing officer unilaterally reopened the record to direct the ombudsman to provide him with medical records from Dr. W, and upon his receipt of those documents admitted them into evidence.

The hearing officer has a statutory responsibility to "ensure the preservation of the rights of the parties and the full development of facts required for the determination to be made." Section 410.163(b). Hearing officers are also specifically authorized to "request additional evidence" from the parties pursuant to 28 TEX. ADMIN. CODE § 142.2(10) (Rule 142.2(10)). These important responsibilities must be exercised in light of and balanced with the fundamental requirement that both sides receive a fair and objective hearing. The hearing officer is the neutral fact finder and, as such, cannot serve or appear to serve as an advocate. While the hearing officer has a responsibility to develop facts necessary for an informed decision, this must be done in a manner and procedure that is outcome neutral and protects the procedural and substantive rights of the parties. *See* APD 992056, decided November 1, 1999, and APD 92272, decided August 6, 1992, for further explanation.

In applying these considerations to the present case, we note that the hearing officer made two separate requests for additional information relating to the claimant's status, and that the second request occurred 16 days after the hearing had concluded and the record closed—hence disrupting the orderly presentation of evidence and the timely resolution of the dispute. Additionally, the second request to the ombudsman for "whatever records of [Dr. W's] she was able to get" was inappropriately broad and unfocused, compounded by the fact that the hearing officer did not notify the insurance carrier until after the records were received and admitted into evidence.

In order to maintain a neutral forum, a hearing officer's decision to reopen the record should typically be to clarify other evidence offered by a party—or, at least, other evidence should point to the missing evidence as key to a well-informed resolution of the dispute. Instead, the hearing officer's open ended and untimely request was essentially a "fishing expedition" for more evidence largely unconnected to the evidence offered by the parties. Under these circumstances, we hold that the hearing officer's second request for additional records was procedurally unfair to the carrier and constituted an abuse of discretion. Accordingly, we will not consider any of these records that were erroneously admitted by the hearing officer after the CCH.

The claimant testified at the CCH that he continued to treat with Dr. W, and that Dr. W told the claimant he could not immediately return to work. The claimant also testified that he stopped seeing Dr. W because the carrier had denied the claim, and the

claimant was not sure if he could return to work because he has not talked to a doctor. As noted above, the hearing officer stated in his March 16, 2016, letter that he "had no evidence on which to base a determination of disability." In light of the hearing officer's request for evidence on the issue of disability, he was not persuaded by the claimant's testimony or the records in evidence to establish a period of disability. The hearing officer relied upon the documentation he requested and obtained from the ombudsman after the CCH. Because that documentation was erroneously admitted by the hearing officer and cannot be used to support his determination, we reverse the hearing officer's determination that the claimant had disability beginning on November 11, 2014, and continuing through the date of the CCH, and we render a new decision that the claimant did not have disability beginning on November 11, 2014, and continuing through the date of the CCH.

SUMMARY

We affirm the hearing officer's determination that the claimed injury did not occur while the claimant was in a state of intoxication, as defined in Section 401.013, from the introduction of a controlled substance, so that the carrier is not relieved of liability for compensation.

We reverse the hearing officer's determination that the claimant had disability beginning on November 11, 2014, and continuing through the date of the CCH, and we render a new decision that the claimant did not have disability beginning on November 11, 2014, and continuing through the date of the CCH.

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

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge