APPEAL NO. 161283
FILED AUGUST 23, 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 May 9, 2016, with the record closing on May 26, 2016, in Abilene, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by determining that: (1) the compensable injury of (hearing officer), extends to an aggravation of scapholunate ligament instability; and (2) the compensable injury of (hearing officer), does not extend to a dislocation of the right wrist, aggravation of scaphoid fracture, or an aggravation of avascular necrosis of the proximal fragment of the scaphoid.

The appellant/cross-respondent (claimant) appealed that portion of the hearing officer's extent-of-injury determination that was adverse to him, contending that the evidence does not support that portion of the hearing officer's determination. The respondent/cross-appellant (carrier) responded to the claimant's appeal, urging affirmance. The carrier cross-appealed that portion of the hearing officer's extent-of-injury determination that was adverse to it, contending that the evidence does not support that portion of the hearing officer's determination. The carrier also contended that the hearing officer abused his discretion in excluding the report of (Dr. S). The claimant responded to the carrier's cross-appeal, urging affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on (hearing officer), and that the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. H) as designated doctor on the issue of extent of the compensable injury. The claimant testified he was injured when his right hand was smashed between a dolly and a truck.

The carrier offered Exhibits A through F at the CCH. The claimant objected to Carrier's Exhibit B, a report from Dr. S, on the basis that Dr. S was not properly appointed by the Division as a post-designated doctor required medical examination (RME) doctor under 28 TEX. ADMIN. CODE § 126.5 (Rule 126.5). It was uncontested that Carrier's Exhibit B was timely exchanged prior to the CCH. The carrier argued at the CCH that the claimant waived its right to object to Dr. S's report because the issue of whether Dr. S was properly appointed as the RME pursuant to Rule 126.5 was not certified as an issue prior to the CCH. The hearing officer held the record open until

May 26, 2016, to determine whether Dr. S's report would be admitted or excluded. On that date the hearing officer issued a post-hearing "Order Excluding Report of [Dr. S]," ordering that Dr. S's report was excluded because "[t]he RME by [Dr. S] was not approved in accordance with Division [r]ules and the [Act]," and "[p]ursuant to Rule 126.5(b), the Division shall not consider a report of an RME doctor that was not approved or obtained in accordance with Division [r]ules."

The carrier argues on appeal that the hearing officer abused his discretion in excluding Dr. S's report because: (1) the issue of whether Dr. S was properly appointed as the RME pursuant to Rule 126.5 was not raised at the benefit review conference (BRC) and was not certified as an issue prior to the CCH; and (2) Section 410.165(b) mandates that a hearing officer shall accept all written reports by a healthcare provider.

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).

Section 410.151(b) provides that an issue that was not raised at a BRC may not be considered unless the parties consent or the Division determines that good cause existed for not raising the issue at the BRC. Rule 142.7(a) provides, in part, that a dispute not expressly included in the statement of disputes will not be considered by the hearing officer. Rule 142.7(c) provides, in part, that a party may submit a response to the disputes identified as unresolved in the benefit review officer's report in writing no later than 20 days after receiving the benefit review officer's report. Rule 142.7(d) provides, in part, that the parties may, by unanimous consent, submit for inclusion in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. Rule 142.7(e) provides:

> Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. The hearing officer will allow such amendment only on a determination of good cause.

* * * *

(2) An unrepresented claimant may request additional disputes to be included in the statement of disputes by contacting the [Division] in any manner no later than 15 days before the hearing.

It is undisputed that there was no response to the benefit review officer's report and that the carrier did not consent to add the issue of whether Dr. S was properly appointed as the RME pursuant to Rule 126.5. There is no evidence that the claimant requested an additional dispute be included in the statement of disputes prior to the beginning of the May 9, 2016, CCH.

We review the hearing officer's ruling to add an issue on an abuse-of-discretion standard, that is, whether the hearing officer acted without reference to any guiding rules or principles. APD 031719, decided August 11, 2003, *Morrow*, *supra*. Ignorance of the law does not excuse the failure to raise an issue at the BRC. APD 94253, decided April 18, 1994. The Appeals Panel has strictly applied Rule 142.7 unless there is a knowing waiver of its provisions by both parties. APD 93593, decided August 31, 1993. *See also* APD 081791, decided February 12, 2009.

In the case on appeal the hearing officer did not add the issue of whether Dr. S was properly appointed by the Division as the RME pursuant to Rule 126.5 and made no findings of fact, conclusions of law, or a decision on that issue. The hearing officer was correct in doing so. However, the hearing officer excluded Dr. S's report on the basis that he was not properly appointed by the Division as the RME pursuant to Rule 126.5, an issue that was not before him to decide. Section 410.165(b) provides that the hearing officer shall accept all written reports signed by a healthcare provider, which includes Dr. S. We hold that the hearing officer in this case abused his discretion in excluding Dr. S's report. Accordingly, we reverse the hearing officer's determinations that: (1) the compensable injury of (hearing officer), extends to an aggravation of scapholunate ligament instability; and (2) the compensable injury of (hearing officer), does not extend to a dislocation of the right wrist, aggravation of scaphoid fracture, or an aggravation of avascular necrosis of the proximal fragment of the scaphoid, and we remand these issues to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to admit Carrier's Exhibit B, Dr. S's report. The hearing officer is to consider that report, along with the other evidence, and make a determination whether the compensable injury of (hearing officer), extends to an aggravation of scapholunate ligament instability; a dislocation of the right wrist; aggravation of scaphoid fracture; or an aggravation of avascular necrosis of the proximal fragment of the scaphoid.

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 **LM INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge