APPEAL NO. 92606

A contested case hearing was held in (city), Texas, on August 5, 1992, (hearing officer) presiding. The hearing officer found that the claimant, who is the appellant in this case, suffered an injury to her back during the course and scope of her employment on (date of injury), but that she did not report her injury to her employer within the prescribed time limits of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act) and thus that the respondent, carrier herein, is not liable for benefits under the 1989 Act. On appeal, the claimant challenges those findings of fact and conclusions of law relating to timely notice. In addition, she alleges that the hearing officer committed error in refusing to subpoena a key witness for claimant.

DECISION

We reverse the decision and order of the hearing officer and remand to allow him to make the determinations required by Commission rule on issuance of the subpoena as requested by claimant.

The claimant, who worked as a relocation coordinator for (employer), testified that she injured her back on Thursday, (date of injury), when she bent over to pick up files which were on the floor of her office. She stated that she was already upset that day because of the size of the quarterly bonus check she had received. She said she went into the restroom at work where she became sick. At that point she was unable to find her supervisor, (Mr. W), so she told a coworker, (Ms. C), that she was leaving work because she didn't feel well, and that her back was killing her. In a recorded statement made to carrier's adjuster, she said she told Ms. C "I don't know what I did to my back." When she got home she called work and spoke to Mr. W and told him basically the same thing she had told Ms. C. On cross-examination she stated that she told Mr. W that "when I picked up those files I did something to my back."

The claimant said she stayed home from work the next day, a Friday, and the following Monday. During that time she was in contact with both Ms. C and Mr. W, keeping them apprised of how she was feeling and the fact that she had made a doctor's appointment. She returned to work Tuesday, May 21st and worked most of the day, but did not talk to Mr. W again as he had resigned.

Claimant saw (Dr. R) on May 22nd. A myelogram indicated she would need back surgery, which was scheduled for June 20th. On June 19th she was called into a meeting with (Ms. S), employer's personnel administrator, and (Ms. F), one of employer's vice presidents. At that meeting, she was told that when she had exhausted her paid leave she would be replaced, but that she could apply for future positions with employer as they arose. Following that meeting, she said she contacted an attorney who advised her to put her workers' compensation claim in writing. The same day, she drafted a letter to Ms. C and distributed it to other personnel, including Ms. S. The letter instructed Ms. C to file a workers' compensation claim on claimant's behalf.

In 1976 claimant had suffered a serious back injury in a work-related accident in another state. However, she said her father had filed that claim for her as she was in the hospital, and she stated that she was not familiar with requirements of the Texas workers' compensation law. She stated that on her health insurance form she had stated that her injury was work related, and that the employer filed the form. However, she said her doctor did not question her about this and her health insurer continued to pay her medical claims until October of 1991.

Ms. S testified that it was employer's practice to explain company policy regarding illness leave to employees before they left to take such leave. For that reason, she said, she and Ms. F met with claimant on June 19th. Ms. S said she had first learned claimant would be out with back surgery about three weeks prior to the meeting, but that she didn't know it was related to an on-the-job injury until about 5 p.m. on June 19th, when she received a copy of the letter written by claimant. The letter, which was dated June 19th, stated, "[d]ue to the injury I sustained on (date of injury), I am requesting this office to file a Workman's Compensation claim on my behalf."

Mr. W, who appeared pursuant to a Commission subpoena, confirmed that he spoke with claimant on the afternoon of May 16th, and at times thereafter, but that she never told him her back problems were related to an occurrence at work. He said that Ms. C reported to him, and that if someone reported a job related injury to her it would be her responsibility to tell him. He said Ms. C was not in a direct supervisory position over claimant; that the two worked on the same team, and that Ms. C was a senior coordinator.

In her appeal, the claimant challenges the following findings of fact:

Findings of Fact

8.On or about 17 (month year) [claimant] notified [Mr. W] and [Ms. C] that she was ill and would not be into work that day but did not specifically tell either of them that she hurt her back in a job related injury.

9.[Ms. C] was not [claimant's] supervisor at [employer] and did not report an injury to any supervisor or manager on behalf of [claimant].

13.[Claimant] did not have good cause not to notify her employer within 30 days, after 16 (month year) that she suffered an on the job injury.

14.Neither [employer] nor [carrier] knew that [claimant] suffered an on the job injury on 16 (month year) before 19 June 1991.

Claimant also complains on appeal--and complained at the contested case hearing--that the hearing officer "for no apparent reason" denied her request to subpoena Ms. C to help corroborate her testimony. As noted above, Mr. W appeared at the hearing pursuant

to a Commission subpoena.

The hearing officer's file contains a May 22, 1992 letter from claimant's counsel, requesting that hearing subpoenas be issued for Ms. C and for (LF), carrier's adjuster who took statements from claimant and her coworkers. On May 26th, a virtually identical letter was sent to the hearing officer, requesting a hearing subpoena for Mr. W. Both letters state claimant's counsel's belief that, because the parties to which the subpoenas would be issued would be partial to carrier, the required testimony "could not properly be elicited by affidavit or otherwise." Both letters also request, in the alternative, the opportunity to take oral depositions of the parties named therein. The file further discloses, without elaboration, that an order granting a subpoena for Mr. W was signed on June 19, 1992. The record does not disclose why no subpoena was issued to compel the presence of Ms. C.

The Commission rule on subpoenas, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.12 (Rule 142.12), provides certain prerequisites to requesting a subpoena by a party which is represented by counsel, including that the request be in writing and that it identify why the evidence sought is relevant. Rule 142.12(c)(1). The rule also requires a showing of good cause. Rule 142.12(b)(2). Finally, the rule provides that the hearing officer may deny a request for a hearing subpoena upon a determination that the testimony may be adequately obtained by deposition or written affidavit. Rule 142.12(d).

Clearly, the import of this rule is that a subpoena is not to be issued automatically, but rather as a final resort where the same testimony or other evidence cannot be obtained through other means. While the party requesting the subpoena must make the required showings, and while some latitude vests in the hearing officer in determining whether the request will be granted or denied, the hearing officer should make known his reasons for denial, by order or otherwise. *See* Texas Workers' Compensation Commission Appeal No. 92613, decided December 28, 1992 (hearing officer's discussion of motion examined to see whether valid reason to deny subpoena existed). *Compare* Texas Workers' Compensation Commission Appeal No. 92380, decided September 14, 1992 (denial of subpoena not raised at contested case hearing, regarded as waived on appeal). We are not holding that there could never be a situation where a hearing officer's determination could not be implied; however, the instant case involves virtually identical requests, both timely. Under these circumstances, it was error for the hearing officer to deny one request while granting the other, without making the requisite findings.

The hearing officer's decision and order is reversed and remanded to allow the hearing officer to consider and rule on claimant's request to subpoena Ms. C, pursuant to Rule 142.12, and for any further disposition not inconsistent with this opinion. Pending resolution of the remand, a final decision has not been made in this case.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge