APPEAL NO. 92664

This case arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993). A contested case hearing was held on November 18, 1992, in (city), Texas, (hearing officer) presiding. The sole issue was whether claimant, who is the appellant in this case, reported a work-related injury within 30 days of the alleged injury's occurrence on (date of injury). The hearing officer held that the claimant failed to inform any person employed in a supervisory capacity with her employer, the (employer), a self-insured governmental entity that will be referred to herein as "carrier," and which is the respondent in this case, that she allegedly sustained an injury any time prior to the expiration of 30 days from (date of injury). The hearing officer accordingly ordered that claimant take nothing in this action.

In her request for review, the claimant complained of the hearing officer's exclusion from evidence of three exhibits which claimant contended prove her case, along with a coworker's statement she requested be pulled from her claims file. She also contended that she reported her injury to the carrier's director of transportation, who chose not to forward her report of injury to anyone at carrier. Claimant also appears to complain in this appeal about her failure to receive medical benefits for an earlier claim which she contends were awarded at an August 17, 1992 contested case hearing. Any issues from that hearing are not properly before this panel, and should be addressed to the Commission ombudsman or claimant's disability determination officer. No response was filed on behalf of carrier.

DECISION

We reverse the decision of the hearing officer and remand for the following purposes: for further development of the record on the issue of timely notice; for consideration of whether an October 20, 1992 letter from claimant, which was officially noticed by the hearing officer, was relevant to this case; and, for clarification of what claim file documents the hearing officer officially noticed.

Claimant testified that she was employed by carrier as a school bus driver on (date of injury), on which date she intervened in a fight between two students on her bus. She stated that one student hit her in the face and back, kicked her, and stomped on her feet. She sought aid from carrier's bus barn dispatcher, (Ms. W), who escorted the bus back to school. There, claimant told the principal, (Mr. J), about the incident. The same day she attempted to see (Mr. G), the director of transportation, but was not able to talk to him that day. Someone in his office gave her a bus conduct report form to fill out, which she said she turned in to (Mr. G) the next day. She said (Mr. G) wanted to know what had happened on the bus, and that she told him about the incident and her injury. He told her to fill out an accident report form, which she turned in on February 10th.

The claimant, who had allegedly suffered job-related injuries in incidents other than the one occurring on (date of injury), continued to work at her job until May 1, 1992. She said she did not immediately see a doctor for her feet, which she continuously had to soak

because of infected toenails she said arose from the incident. While being treated in an emergency room for an unrelated illness, claimant said the doctor there told her that she needed to see a foot doctor. She said, however, that she did not want anything to be done to her feet until school was out. Medical records from (Dr. M) indicate that on July 23rd the claimant underwent two procedures, a partial radical toenail avulsion, and hammertoe arthroplasty fifth digits bilaterally. The preoperative diagnosis stated that her ingrown toenails and hammertoe were caused by her feet being stomped by a student, and had been aggravated by wearing shoes. Following the surgery the claimant was seen several times by (Dr. M), and was referred for physical therapy.

At the hearing the claimant attempted to introduce into evidence three exhibits, all of which carrier objected to because it had not seen them before. These exhibits included bus conduct reports concerning the (date of injury) incident; a completed incident/ accident report signed by claimant on (date); and a June 16, 1992 affidavit by claimant's coworker, (Ms. J), concerning the incident. The pertinent rule of the Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13), provides that, no later than 15 days after the benefit review conference, parties shall exchange with one another certain information, including all documents which a party intends to offer into evidence at the hearing. The rule further provides that thereafter the parties shall exchange additional documentary evidence as it becomes available. With respect to documents not previously exchanged, the hearing officer is required to determine whether good cause exists for a party not having previously exchanged such information to introduce it at the hearing. Rule 142.13(c)(1)-(3). The claimant in this case argued that she had provided documents, including the excluded exhibits, to the carrier in May, June, and July of 1992, that she had received signed cards in return indicating receipt, and that carrier's representative and its attorney had the documents at the benefit review conference on September 30th. (The benefit review conference report, which was a hearing officer's exhibit, did not reflect whether any documents were considered at the conference.) Claimant asked that the hearing officer take official notice of her claim file which she said would show receipt of the documents by the carrier. The hearing officer's decision shows she took official notice of "relevant contents of [claimant's] claim file." She ruled at the hearing that the three exhibits offered by claimant had not been timely exchanged, and that no good cause had been shown for failure to do so.

Carrier's witness, (Mr. H), an administrator with carrier, stated that he was not aware that claimant was injured as a result of the (date of injury) incident until May 15th, when he said he received by certified mail a 27-page letter from claimant. He testified that normally he receives all the accident reports upon their submission, and that he did receive from (Mr. G) an accident report regarding an earlier injury of claimant's, but that to the best of his knowledge he had not received one concerning the (date of injury) injury. He said he never receives bus conduct reports. When asked about a March 27th meeting at which both he and claimant were present, he said they discussed incidents which had occurred prior to that date, but he could not recall specifically whether claimant's foot injury was brought up. An audio tape of this meeting, of which the hearing officer took official notice, reveals that in

the course of discussing a later incident with a student on a bus, claimant described the (date of injury) incident, saying a student "was beating me up, stomping my feet." Although the quality of the audio was poor, it did not appear that there was any further discussion of this incident.

The 1989 Act provides that an employee or someone acting on his or her behalf must notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Article 8308-5.01(a). Commission Rule 122.1(c) states that any notice to the employer may be given to any employee of the employer who holds a supervisory or management position. The hearing officer held that the claimant in this case failed to inform any person employed in a supervisory or management position that she incurred an injury on (date of injury). In so holding, the hearing officer may have given more credibility to carrier's witness, who stated he did not have direct knowledge of claimant's injury until May 15th. However, the hearing officer also chose not to believe claimant's testimony that she had, within 30 days, informed (Mr. G), carrier's director of transportation, that she had suffered a job-related injury. This is because, as the hearing officer stated in her decision, ". . . claimant was not only an unreliable witness, but has previously submitted falsified documents to the Commission in support of her myriad of pending claims. The hearing officer is not of the opinion that claimant's testimony or documentary evidence constitutes the preponderance of the credible evidence which would be necessary for claimant to prevail." In this regard, the hearing officer took official notice of an October 20, 1992 letter to the hearing officer wherein the claimant confessed to having "all my medical information typed into a detail (sic) letter [which] was wrong." While the claimant's letter mentioned the (date of injury) incident, it is not clear whether any alleged wrongdoing on her part was committed in connection with this case.

In a previous decision, while recognizing that conformity to legal rules of evidence is not necessary at a contested case hearing, the Appeals Panel stated that unduly prejudicial matters should not be considered. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. In that case, which involved a claimant's use of false documentation to gain employment, we noted Rule 608(b) (Tex. R. Civ. Evid. 608(b)), which generally precludes cross-examination of, or proof by, extrinsic evidence of specific instances of conduct for purposes of attacking a witness' credibility. We would also note another rule of evidence, Rule 404, which provides that evidence of a person's character generally is not admissible for the purpose of proving he acted in conformity therewith, and that evidence of other wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, although it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* First Southwest Lloyds Insurance Company v. MacDowell, 769 S.W.2d 954 (Tex. Civ. App.-Texarkana 1989, writ denied).

While the letter detailing claimant's alleged wrongdoing may have been probative evidence in this case, that fact is not clear from the letter itself nor from the hearing officer's statement that claimant had "previously submitted falsified documents . . . in support of . . .

pending claims." On remand, the hearing officer should consider whether, under the rules of evidence, the letter should have been made a part of the record in this case, as evidence bearing on the claimant's credibility.

As noted above, claimant testified consistently that she informed carrier's director of transportation, both verbally and in writing, that she had been injured on (date of injury). (Also as noted, the incident/accident form was excluded from evidence.) Carrier's witness, on the other hand, testified that he did not know of an injury until May 15th and that "to the best of my knowledge" an accident report was not received. No evidence was elicited concerning claimant's contacts or discussions with other supervisory or management personnel (*e.g.*, (Mr. G) or the school principal) concerning their knowledge of an injury. In the limited situation such as this where the evidence is generally balanced and there appears to be other readily available evidence, e.g., the person to whom a report was allegedly made, the record can be further developed in an effort to provide such evidence. This is contemplated by the 1989 Act, which requires the hearing officer to preserve the rights of the parties and to ensure full development of facts required for the determination to be made. Article 8308-6.34(a), Rule 142.2. We thus also remand for further development of evidence on the issue of notice.

Finally, we find that the hearing officer's official notice of "relevant contents of claim file" is insufficiently specific to permit this panel to review the record, and we instruct the hearing officer, in her decision on remand, to specify what, if any, documents were noticed. This is especially pertinent in this case, where the claimant contended at the hearing and on appeal that documents in the file supported her position.

The decision and order of the hearing officer is reversed and remanded with instructions that the hearing officer:

1. further develop the record on the issue of timely notice, where the record was devoid of statements or testimony of supervisory personnel claimant contended she informed of her injury;

2. specifically consider whether claimant's October 20, 1992 letter detailing wrongdoing was probative in this case;

3. clarify precisely what documents contained in the claim file were officially noticed by the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge