APPEAL NO. 93463

On April 12, 1993, a contested case hearing was held in (city), Texas, with (hearing officer), presiding. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The issues at the contested case hearing were whether the appellant (claimant herein) was injured in the course and scope of her employment on (date of injury), and, if so, whether or not the claimant notified the respondent, her employer and a political subdivision which is statutorily self-insured (college herein), of her injury in a timely manner. The hearing officer found that the claimant was not injured in the course and scope of her employment and did not timely report an injury.

The claimant appeals arguing that there is evidence that she was injured in the course and scope of her employment and that she had good cause for failing to report her injury within thirty days because she thought her injury was trivial until her doctor informed her otherwise. The claimant attaches a number of documents to her request for review which were not admitted into evidence at the hearing. The college responds that there is sufficient evidence in the record to support the findings of the hearing officer and that the Appeals Panel should not consider evidence not presented at the hearing.

DECISION

We reverse the decision of the hearing officer and remand for the further development of evidence consistent with this decision.

The facts of the case are well summarized in the hearing officer's Decision and Order in the Statement of Evidence which is adopted for purposes of this decision. Claimant testified she worked in the college's daycare center and injured her left elbow on (date of injury), while getting toys out of an outside storage shed to be used by her students at recess. The claimant testified that on the day of injury, she first told her assistant (Ms. P) what had happened, and later told her supervisor, (Ms. G). The claimant also stated that at lunch break she made a written note concerning the incident and informed Ms. G of this.

The claimant testified that at first she thought her injury was trivial, but after a couple of days, she had increased pain and called (Dr. L) who indicated that she was "booked," but called in a prescription. The claimant testified that she kept working, but also kept trying to set up an appointment with Dr. L without success. According to the claimant's testimony, after contacting (Ms. H), another official of the college, she was able to get an appointment with Dr. L in July 1992. Dr. L states in her medical report that the claimant reported problems with her left arm but "denies trauma."

The claimant testified that during the period she has worked for the college she has had several injuries, but this is the only one for which she did not file a written accident report. She stated that she originally reported the injury orally to Ms. G, and was unsure if it was proper procedure to fill out an accident report after making an oral report.

Ms. G testified that she did not recall the claimant ever reporting the accident in question to her, and she believes she would have remembered because the mechanism of the accident (being struck by a wooden cow) was so unusual. She further testified that had the accident been reported to her she would have documented the accident, made sure a written accident report was filled out and sent the claimant to the nurse. Ms. G also stated that after the last day of student examinations in May, the daycare center was closed to children until the summer semester began in June. She testified that she could not recall what day in May in 1992 was the last day of student examinations.

The director of the daycare center, (Ms. A) testified that after the last day of student examinations for the spring semester, the daycare center is closed until the first day of the summer semester. Ms. A testified that in 1992 the last day of examinations for the spring semester was May 8th and that the summer semester did not start until June 1st. Ms. A testified that there were no children in the daycare center on (date of injury), which contradicts the claimant's testimony that she was injured on May 13th, while getting toys for the children's recess.

The claimant in rebuttal testified that there were at least ten children in her classroom on (date of injury). This claim is supported by a written statement by Ms. P. The hearing officer kept the record open for a week to allow the college to produce additional documents showing whether the daycare center was open on (date of injury). Additional documents were admitted showing that the daycare center was closed to children on (date of injury). There is no indication as to whether these records were provided to claimant. The claimant in her request for review attaches documents to attempt to establish that the daycare center was open to children on (date of injury). Included in these documents is a lesson plan showing a topic for each week of the semester including the week of May 11-15.

We have previously said that the Appeals Panel will not consider new evidence on appeal, but is limited to the record developed in the case below. Article 8308-6.42(a) (1989 Act); Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992. However, in the present case, we cannot allow, in the interest of justice, the evidence of the claimant attached to her request for review to go unnoticed.

There was conflicting testimony at the hearing as to whether this accident took place. This was in fact primarily what was contested at the hearing. The college's witnesses that testified that the daycare was closed on (date of injury), and the college's own counsel states "this the first I had heard of this." Realizing from the testimony of the college's witnesses the college's counsel could have produced additional documentation showing the daycare was closed, the hearing officer held the record open for a week to allow the college to produce further documentation to this effect. Up to that point, we have no quarrel with the hearing officer. The problem is that having left the record open for one side, he fails to require that this evidence be exchanged with the claimant leaving her without the opportunity

to either object or refute this evidence. Such a procedure may be harmless where there is really no objection or refutation available, but here we have an instance where the claimant has produced a document which tends to refute the documents admitted by the hearing officer.

Under these circumstances in the interest of justice we must reverse and remand to allow the trier of fact to weigh the evidence from both sides. 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 Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Worker's Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Thomas A. Knapp
Appeals Judge