APPEAL NO. 93749

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On July 26, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) was injured in the course and scope of employment (repetitive physical trauma--carpal tunnel syndrome) and gave timely notice of the injury. Appellant (City) asserts that evidence was incorrectly admitted and was insufficient to support the determination that the injury was in the course and scope of employment and that timely notice was given. Claimant replies that she disagrees with the appeal.

DECISION

We affirm.

At the hearing, the parties agreed that the issues were whether claimant was injured in the course and scope of employment and whether timely notice to the employer was given.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

On appeal, City asserts error in admission of claimant's exhibits 2, 2A, 3, 3A, 4 and 4A for failure to follow the time provisions for exchange of documents set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13). Carrier also attacks the sufficiency of the evidence to support the findings as to injury and notice.

The Appeals Panel determines:

That the carrier's assertion of error as to claimant's exhibits 2 and 2A is upheld, but such error in this case does not render the decision reversible.

That the admission of claimant's exhibits 3, 3A, 4, and 4A was not error because an implied finding of good cause is made based on the hearing officer's ruling and the claimant's uncontroverted evidence that the documents were received three days before the hearing.

That the evidence sufficiently supports the findings of injury in the course and scope of employment and timely notice of that injury to the employer.

Claimant worked as a clerk for the City for 13 years; her duties included writing, typing, and since April 1991, using a computer. She first saw (Dr. N) in April 1991, for pain in her shoulders, arm and wrist; his records indicate that claimant first noticed a problem in December 1990 with no cause known, but that in April 1991, her pain was increasing. Dr. N, as shown by claimant's exhibit 1, dated March 11, 1993, said that the injury dated from

(date of injury), and was work related. Medical records of Dr. N pertinent to treatment given claimant in April, May, and June 1991, introduced by the City, do not indicate a basis for the arm problems; two of these records, Carrier Exhibit 2 and 3 state specifically that the cause was not known at that time.

Claimant testified that Dr. N did not tell her what caused her discomfort until March 1993, but treated her for an extended period of time under her health insurance. He had prescribed a neck brace for her to wear during some period of time between April 1991, and March 10 or 11, 1993, when he told her the condition was work related. Claimant's testimony that she told the City of the injury in 1993, was not controverted. She had been able to keep working and never missed work, always going to the doctor after her workday was over. After Dr. N told her the cause, claimant then saw (Dr. A) in late June 1993, who ordered tests that were performed in July 1993. Dr. A's records and tests which he ordered make up claimant's exhibits 3, 3A, 4, and 4A; claimant indicated these four exhibits were received on July 23, 1993. Dr. A noted right carpal tunnel syndrome, cervical and thoracic muscle strain, and right shoulder impingement syndrome; his treatment plan was to obtain an MRI and EMG/nerve conduction studies. The MRI found only minimal changes in the right shoulder, but the EMG pointed to a right median nerve carpal tunnel syndrome.

When claimant attempted to introduce her exhibits 2 and 2A, the City objected, citing lack of timely exchange. (*See* Rule 142.13 which provides for exchange of documents within a specified time in order to warrant admission in a contested case hearing.) Claimant indicated that she sent the documents in question to the Texas Workers' Compensation Commission in (city) as soon as she received them. She did not state that she sent a copy to the other party or that anyone in authority, such as the doctor who held the records, had represented to her that a copy had been provided to the City. The hearing officer did not mention "good cause" but simply "noted" the objection and admitted the two exhibits. Rule 142.13(c) provides that the hearing officer will determine whether "good cause" exists when documents have not been exchanged. This rule implements Section 410.161 of the 1989 Act (previously Article 8308-6.33(e) of the 1989 Act) which also provides that failure to exchange precludes admission absent a finding of good cause. We observe that neither the rule or the statute provides that a failure to exchange can be dealt with by a hearing officer "noting" the objection thereto and admitting the document.

In this case the hearing officer did not develop the reason why claimant chose to send a copy to the Commission, but a mistake in reading the rules or the law does not provide good cause under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993, which discussed a mistaken belief in the identity of the employer as not good cause for failure to timely notify; this appeal also commented that ignorance of the law is not good cause for failure to timely notify. A valid rule has the same force and effect as legislation. *See* Southwest Airlines Co. v. Bullock, 784 S.W.2d 563 (Tex. App.-(city) 1990, no writ). Sending documents to the Commission

was not a showing of good cause for admission of those documents. In contrast, Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992, held that the hearing officer abused his discretion is failing to admit documents not exchanged by the claimant on a showing that the claimant's doctor had told him that he had sent a copy of the same medical records to the carrier in question.

Admission of claimant's exhibit 2 and 2A was error because there was no determination of good cause and the facts do not allow this panel to imply a finding of good cause based on the decision to admit and the facts presented to the hearing officer. The error, however, constitutes non-reversible error because the medical records of Dr. N, other than claimant's exhibits 2 and 2A, the testimony of claimant, and the medical records of Dr. A provide sufficient evidence to find a compensable injury and that the claimant gave timely notice after learning the basis for her occupational disease. The admission of exhibits 2 and 2A did not cause rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

The admission by the hearing officer of claimants' exhibit 3, 3A, 4, and 4A, while not handled as specified by the 1989 Act and the applicable rule since there was no finding of good cause, can be resolved on appeal. The hearing officer did admit these exhibits after claimant explained that they were received on July 23, 1993 (the hearing was on July 26, 1993, a Monday). From this set of facts, the Appeals Panel may imply a finding of good cause by the hearing officer and rule that admission was not arbitrary. *See* Texas Workers' Compensation Commission Appeal No. 92129, decided May 14, 1992. *Also see* Texas Workers' Compensation Commission Appeal No. 92382, decided September 16, 1992, which in addition to discussing the hearing officer's failure to rule as to good cause prior to admission of documents not exchanged, also noted that the record was "utterly devoid of the good cause showing"; no implied finding of good cause was then made. *See also* Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992, which found good cause for admission of records received by the party offering them only three days before the hearing.

Claimant's testimony as to her discomfort, Dr. N's opinion in 1993 that the condition was work related, Dr. A's diagnosis of carpel tunnel syndrome and the EMG which is consistent with carpel tunnel syndrome provide sufficient support for the finding of repetitive physical trauma in the course and scope of employment even without the information included in claimant's exhibits 2 and 2A. Similarly, the exhibits of Dr. N admitted by the City indicate that Dr. N did not know what the basis of the malady was in April, May, and June 1991 and provide some corroboration for claimant's testimony that she was not told of the work related nature of the occupational disease until March 1993. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165 of the 1989 Act. He could believe claimant did not know of the work relationship until March 1993 and that, in the circumstances, she should not have known of the cause until being told by

her doctor.

Finding that the error in the case at the hearing was not reversible and that the decision and order are based on sufficient admissible evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge