APPEAL NO. 94109

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 3, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the case should be returned to the benefit review officer to consider whether compensability was contested within 60 days and cancelled the hearing. Appellant (school) asserts on appeal that the hearing officer erred in sending the case back to the benefit review officer and in not providing a decision on the issue at hearing. There is no indication that respondent (claimant) replied.

DECISION

We reverse and remand.

This hearing was held on January 3, 1994. The issue identified at the hearing was whether claimant was injured on (date of injury), in the course and scope of her work in the cafeteria of the school. This was the only issue reported from the benefit review conference (BRC) held on December 2, 1993. At the hearing, the hearing officer noted that there was no response to the BRC report by either party. The record indicates no agreement by the parties to add an issue, and neither party asked that an issue be added in any way. *See generally* Section 410.151 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). The evidence presented by both parties was heard or admitted, and the hearing proceeded to conclusion. After closing the hearing at its conclusion, the hearing officer then issued his "Order Cancelling Hearing and Returning Case to the Benefit Review Officer," which stated, in part, that a threshold issue was whether the carrier had contested compensability within 60 days; no decision on the issue before the hearing was provided. The hearing officer's decision did not specifically make findings of fact or conclusions of law; no determination as to whether benefits were due was made although such a decision was appropriate in view of the issue before the hearing officer. *See* Section 410.168.

Section 410.151(a) provides that "a party to a claim for which a benefit review conference is held . . . is entitled to a contested case hearing." Section 410.151(b) then states that an issue may <u>not</u> be considered that was not raised at the BRC or that was resolved there unless the parties consent or the Texas Workers' Compensation Commission (Commission) determines there is good cause for not raising it at the BRC. Rule 142.7 further defines issues that can be considered at a hearing:

(a)Statement of disputes. The statement of disputes is a written description of the benefit dispute or disputes to be considered by the hearing officer. A dispute not expressly included in the statement of disputes will not be considered by the hearing officer.

(b)Statement of disputes after a benefit review conference. The statement of disputes for a hearing held after a benefit review conference includes:

(1)the benefit review officer's report, identifying the disputes . . .;
(2)the parties responses . . .;
(3)additional disputes by unanimous consent . . .; and
(4)additional disputes presented by a party . . . if the hearing officer determines . . . good cause.

As stated, the parties indicated that neither filed a response to the BRC report. The record of hearing shows no indication that either party attempted to add an issue; neither party suggested that the other join in consenting to add an issue; neither party asked or even indicated to the hearing officer that it wanted another issue added, and no evidence of good cause was offered, as is necessary to accompany a request, had one been made. We note that the hearing officer in his order points out that there was no discussion at the BRC of whether compensability had been timely disputed.

When the school was putting on its evidence, the hearing officer did question (PQ), an employee of the claims service that acted as the "third party representative" on behalf of school, as to her testimony that indicated there was more than four months passage of time from the accident date to the time it was contested. The ombudsman assisting claimant did ask questions in cross-examination as to benefits being paid during the period prior to contesting and elicited testimony that after PQ met with certain witnesses, benefits were still paid. The ombudsman also asked questions of (Ms. D), the school's superintendent, after she had traced the events which caused the delay in controverting the claim. Neither the ombudsman nor the claimant ever indicated, however, that a dispute should be added; the ombudsman in final argument specifically referred to the one issue before the hearing officer, whether claimant was injured in the course and scope of employment; his argument then did not reference the delay by school in controverting compensability. Rule 142.7(e)(2) does make special provision for an unrepresented claimant to request an issue, but still requires that the request be made "no later than 15 days before the hearing." The record provides no evidence that this was done. As stated, even if some type of request for an added issue had been made, no information as to good cause was provided, as required also by Rules 142.7(b)(4) and (e).

In Texas Workers' Compensation Commission Appeal No. 91113, decided January 27, 1992, a hearing officer found no injury as set forth in the issue before the hearing, but ordered the case back to a BRC to consider whether a repetitive trauma injury occurred. In reversing this part of the hearing officer's decision, JP pointed out the broad authority of hearing officers and did not conclude that a hearing officer could never issue such an order. He did observe, however, that the parties did not dispute whether repetitive trauma took place. Without a dispute, that opinion stated that there was no basis for the hearing officer to direct the parties to a BRC.

The hearing officer used the term "threshold" issue to describe whether the school had contested compensability within 60 days in his order cancelling the hearing. Texas Worker's Compensation Commission Appeal No. 92330, decided August 31, 1992, did not use the word "threshold" issue, but did observe that whether or not compensability was

challenged within 60 days was not a "sub-issue" under the compensability issue at the hearing. In addition, there is nothing in the definition of "injury" that requires a decision as to the 60-day contesting rule comparable to the definition of "disability" which requires that a compensable injury be present. *See* Sections 401.011(16) and (26).

The appeals panel has indicated that the provisions of Section 409.021 (formerly Article 5.21) that impose the 60-day period upon a carrier to contest compensability can be waived under appropriate circumstances. *See* Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991, and Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. Appeal No. 91057 specifically stated that if an issue concerning whether carrier disputed compensability within 60 days was not raised at the BRC, it would not be considered except with the consent of the parties or upon a showing of good cause.

With the language of Section 410.151(a) indicating an entitlement to a hearing, the requirements of Rule 142.7 as to issues, the Appeals Panel precedent regarding when a hearing officer may not send a case back to the benefit review officer and the application of waiver to the 60-day dispute rule in question, the hearing officer erred in cancelling the hearing, without deciding the issue before him, and sending the case to a benefit review officer.

We are aware that some cases exist in which an issue before the hearing officer has not been decided. Texas Workers' Compensation Commission Appeal No. 92176, decided June 10, 1992, and Texas Workers' Compensation Commission Appeal No. 92198, decided July 3, 1992, both affirmed decisions in which the issue of maximum medical improvement (MMI) was found not to be "ripe" for decision. Both considered an issue that was brought before the hearing officer, MMI. In both cases the hearing officer found that failure to follow the rules for the development of a determination as to MMI made it impossible to determine that MMI had been reached. Since Section 401.011(30) in defining MMI indicates that it is a point which will be reached in regard to an injury, not that it may or may not occur depending on the case, it was appropriate for the hearing officer to determine the issue was not ripe. In so saying, we point out that a similar result would have occurred if the hearing officer in those cases had simply held that MMI had not been shown to have been reached.

The decision, made in this case in the form of an "Order Cancelling Hearing and Returning Case to the Benefit Review Officer," is reversed. Evidence before the hearing officer should be considered and findings of fact, conclusions of law, and a determination of whether benefits are due should be made regarding the issue at hearing, whether claimant was injured in the course and scope of employment. While further development of the evidence may not be necessary, it is an option open to the hearing officer. Since reversal and remand necessitates issuing a new decision 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 the new decision is received, pursuant to Section

410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge