APPEAL NO. 950162

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was convened in (city), Texas, on September 16, 1994, with (hearing officer) presiding as hearing officer (Hearing Officer A), to take evidence on the sole disputed issue, namely, whether the back condition of appellant and cross-respondent (claimant) resulted from a compensable injury sustained on (date of injury). The claimant failed to appear at that CCH. Hearing Officer A heard the testimony of witnesses (Ms. BP) and (Ms. AP) offered by cross-respondent and appellant (carrier), admitted the two carrier exhibits introduced, and adjourned the hearing after stating that the Texas Workers' Compensation Commission (Commission) would attempt to contact the claimant and set a hearing to provide claimant an opportunity to show good cause for her failure to appear. On December 7, 1994, another hearing officer, (Hearing Officer B), convened a CCH, heard claimant's good cause showing, and ruled that he did not find good cause for her failure to appear. Hearing Officer B advised the parties that his ruling would preclude claimant from prevailing on the disputed issue but that he would take her evidence on the merits of the issue for appellate purposes in the event she should appeal the good cause ruling and prevail. Hearing Officer B then heard claimant's testimony as well as that of her daughter, (Ms. SL), and admitted her documentary evidence. The hearing officer also heard the testimony of two carrier witnesses, (Ms. SB) and (Mr. WB) but excluded carrier's documentary evidence, already admitted by Hearing Officer A, on his own motion on relevance grounds. Hearing Officer B also failed to take official notice of or otherwise put into evidence the record and evidence from the first hearing. In his decision Hearing Officer B found that although the claimant's evidence would establish that her back condition was caused by the repetitive nature of her work, her evidence could not be considered because she failed to show good cause for her failure to appear at the first CCH. Thus, he decided that her back condition was not a result of the compensable injury she sustained on (date of injury).

Claimant's appeal seeks review of the good cause ruling and asks that the Appeals Panel decide the merits of the disputed issue for claimant based on the finding that her evidence met her burden of proof. The carrier's appeal, while supporting the good cause ruling, challenges on sufficiency of the evidence grounds the two findings and the conclusion addressing the disputed issue. The carrier further complains that Hearing Officer B's decision fails to mention any testimony presented by the carrier, including the two witnesses who testified at the first CCH, and does not reasonably reflect the record of all the proceedings below.

DECISION

Reversed and remanded.

We first address the "no good cause" ruling of Hearing Officer B. In evidence was a letter from the claimant's attorney to Hearing Officer A, dated September 12, 1994, advising that the September 16th CCH setting conflicted with her hearing schedule and

requesting that the CCH either be "dismissed without prejudice" in which case she would then seek a new setting, or be reset for sometime in October. At the second CCH, claimant's attorney represented, in essence, that she got the impression from a telephone conversation with Hearing Officer A that he would grant claimant a continuance of the September 16th CCH because she had only recently been engaged by claimant; that on the day before the CCH she followed up on that telephone conference with a written request for a continuance; that also on the day before the hearing she traveled to another state to be with and assist her brother who had fallen and fractured his ankle and injured his arm, and who was in the hospital; that also on the day before the CCH, after claimant's attorney was already in the other state, Hearing Officer A's secretary called her office to advise that the CCH was still set for the following day; and that claimant's attorney then advised claimant not to appear. Claimant's attorney regarded this situation as a personal emergency and as constituting good cause for her client's failure to appear. She also stated she did not understand why a CCH could not simply be "nonsuited" by a claimant just like a case in the courts and observed that the Commission field offices do not apply the rules in the same fashion. Also in evidence was claimant's attorney's letter to Hearing Officer A, dated September 23, 1994, which referred to the "misunderstanding" concerning whether the CCH "had been continued pursuant to an oral agreement the [sic] you and I had made in phone conversation a couple of weeks prior to that hearing." The carrier took no position on the matter not having been privy to the attorney's discussions and letter to Hearing Officer A. Notwithstanding the obvious potential impact of a continuance on the other party, claimant's attorney represented that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.3(b) (Rule 142.3(b)) generally permitting ex parte communications between a party and a hearing officer on "procedural issues" included communications concerning a continuance. However, Rule 142.10(c), which specifically governs continuances, requires that a request for a continuance made before a CCH by a represented party be in writing, be sent to the Commission no later than five days before the CCH, and be delivered to all parties.

Hearing Officer B stated that he found no "emergency" present in the matter, found no compliance with Rule 142.13, found no evidence that a continuance had been granted by Hearing officer A, and found that parties have a responsibility to be present unless a continuance has been granted. Accordingly, he ruled there was no good cause for claimant's nonappearance. Reviewing this ruling for abuse of discretion, we find none. *See generally* Gibralter Savings Association v. Franklin Savings Association, 617 S.W.2d 322 (Tex. Civ.App.-Austin 1981, writ ref'd n.r.e.); Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985); Morrow v. H.E.B., Inc. 714 S.W.2d 297 (Tex. 1986).

Because he found no good cause for claimant's failure to appear at the first hearing, Hearing Officer B advised the parties that his ruling would preclude claimant from prevailing on the disputed issue. He apparently reasoned that because claimant had not shown good cause for her failure to appear at the first CCH, she forfeited her opportunity to put on her evidence at that time in an effort to meet her burden of proof. He advised

the parties that he would nonetheless take additional evidence on the disputed issue for appellate purposes in the event his ruling was appealed and reversed.

In Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, the hearing officer convened a hearing to hear the parties' presentations respecting whether the claimant had good cause for not appearing at the first CCH, where the carrier presented its evidence on the disputed issues. The hearing officer ruled that the claimant had not shown good cause and that ruling was not appealed. The hearing officer then convened a second CCH, took evidence on the disputed issues from both parties, and went on to decide the disputed issues on the merits including a determination that the claimant's wrist and psychiatric injuries were compensable. The carrier appealed asserting, among other things, that because the claimant had failed to show good cause for his failure to appear at the first CCH, the hearing officer should have decided the claimant's impairment rating on the evidence presented at that hearing. The Appeals Panel observed that the carrier's assertion was "apparently based on the premise that no evidence on the disputed issue adduced at the [second] CCH should be considered." Noting that the carrier cited no authority for such contention, the decision went on to state:

> Neither the 1989 Act nor the Commission's rules require the ultimate sanction of barring a party's evidence at a subsequent hearing for failure to appear at a prior hearing, whether or not good cause was shown. Rather, Section 410.156(b) provides that the failure of a party to attend a CCH will constitute a Class C administrative violation, the penalty for which is found in Section 415.022(3). *And see* [Rule 142.11]. Under the circumstances of this case, we do not find the hearing officer to have abused her discretion in considering claimant's evidence on the disputed issue.

In Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995, the carrier failed to appear at the first CCH where the hearing officer took the claimant's evidence and argument. Following a later show cause hearing the hearing officer determined that the carrier failed to show good cause for its failure to appear, closed the record without receiving the carrier's evidence on the merits, and issued a decision based on the evidence received at the first CCH. The carrier not only appealed the good cause ruling but asserted abuse of discretion in the hearing officer's failure to fully develop the facts in the case. The Appeals Panel reviewed the factual basis for the hearing officer's good cause ruling and did not disturb it. However, finding the decision in Appeal No. 941679, *supra*, controlling with respect to taking the evidence of a party who failed to show good cause for not appearing at the first CCH, the Appeals Panel reversed and remanded for further development of the evidence. The Appeals Panel noted that neither case involved "repeated failures to appear at a scheduled CCH."

Finding our decisions in Appeal Nos. 941679 and No. 950044, *supra*, controlling, we hold that Hearing Officer B erred in failing to consider claimant's evidence on the merits of the disputed issue.

Turning now to the evidence on the disputed issue, claimant testified that she had worked for the employer, which manufactured electronic components, since June 1989; that her work, for the most part, had involved performing quality control on computer boards; and that in performing her duties she sat in a chair on rollers, reached to the table to her left, picked up the boards which had been manufactured by machines, turned to the microscope on her work station, inspected the wiring and parts on the boards, made any necessary soldering or component repairs or replacements, and then placed the boards on the table to her right. She said this work involved thousands of repetitious movements throughout her eight hour shifts. Claimant also testified that in approximately January 1993 she was moved to a work station located in an area of the plant where the concrete floor was uneven and sloped towards the wall, and that this condition caused her chair to roll. She said that to compensate for this situation, she had to brace her feet against the desk to remain properly positioned in front of the microscope. She also said that at some time she began using a pillow to prop up part of her body in the chair. She further stated that in approximately March or April 1993 she began to experience back pain, which at first she attributed to the stress in her life from her husband's numerous operations; that in May 1993 she sought treatment from her family doctor, (Dr. M); that after several visits Dr. M inquired about her activities; that she asked him if the uneven floor at work could be the cause of her back pain; and that he responded that it could. She said that the next day she told her supervisor, Ms. AP, about the problem and Dr. M's thoughts, even showing her the pillow, and that Ms. AP then moved her chair. It was claimant's position that over time such repetitious activities at work including moving in her chair on the uneven floor resulted in her back condition.

At the earlier CCH, Ms. BP, a coworker, testified to the effect that sometime in 1993 she observed claimant walking slowly and dragging her feet, and that claimant had told Ms. AP she had moved her husband's bedroom to a different location in the house and thought she hurt her back in the process. Ms. AP, claimant's supervisor, testified that sometime in 1993 claimant had asked to be moved to another location because the floor area where she worked was unlevel, and that she moved claimant the next day. Ms. AP also testified that a year or two earlier claimant's daughter, Ms. SL, had called for her mother stating that claimant had hurt herself moving a big potted plant, that claimant thereafter missed several days of work, and that when she did return to work she was walking slowly and said her back hurt. Ms. AP further testified that claimant moved her ill husband's bedroom furniture to another location in their house and that she had seen claimant move heavy pieces of furniture in her house. Ms. AP also testified that to do her work claimant would not have to twist but would have to move her chair to the microscope.

Ms. SB, wife of employer's owner, testified at the second CCH that she had known claimant since 1989, that she knew claimant had many antiques and used to move a lot of furniture, that she had seen claimant move furniture in her home, and that claimant would come to work bent over and they would talk about it. Ms. SB could not, however, state a date or dates she had seen claimant walking bent over at work. Mr. WB, the

owner of the business, testified that he had no personal knowledge of claimant's back injury and first learned of it when claimant's husband called him, probably in January 1993. He said the carrier's loss prevention manager surveyed the plant floor in the area where claimant worked and found only a nearly undetectable slope of one inch over ten feet. Claimant testified that when she first spoke to Mr. WB about her back injury, he responded, "B--- S---." Claimant generally denied having had prior back injuries or problems and specifically denied having hurt her back at home lifting a heavy potted plant or moving heavy furniture. She further denied that Ms. BP and Ms. AP ever saw her move a heavy potted plant or heavy furniture and she denied having told Ms. SB that she hurt her back at home. Ms. SL, a former coworker, also testified and generally corroborated her mother's testimony about her activities at home and at work.

According to Dr. M's records, he saw claimant on May 17, 1993, and diagnosed acute lumbar strain. On July 1, 1993, Dr. M added sciatica to the diagnosis. (Dr. H), a neurologist who evaluated claimant on January 13, 1994, reported that she has experienced numbness and pain in her lower extremities for the past year which has gradually increased in severity, as well as numbness in her hands for the past several weeks. Dr. H's diagnosis included numbness and pain of the lower limbs, possibly representing radiculopathy. After certain diagnostic testing was accomplished, Dr. H reported on (date of injury), an abnormal EMG study consistent with bilateral, chronic L5 radiculopathy. He further reported that "the low back distress is accentuated by her persistent sitting." Dr. H reported on January 28, 1994, that subsequent studies revealed a disc herniation and bilateral carpal tunnel syndrome (CTS). (Dr. S), an orthopedic specialist, reported on February 16, 1994, that a CT scan showed "a fairly significant disc protrusion at the L4/5 level . . . " While Dr. S felt claimant's CTS and reflex sympathetic dystrophy of the upper extremities was "more than likely due to excessive and repetitive activities on the job" and work related, he said her back problems were "more difficult to ascertain" and that he could not say whether or not they were work related without a history of specific injury.

Claimant testified that after she agreed to be examined by a doctor selected by the carrier, she was examined by (Dr. W), and that after he reported finding a relationship between her work and her back condition, the carrier disagreed with him. In his April 27, 1994, report Dr. W stated that "it is my opinion that this finding [herniated nucleus pulposus at the L4-5 level] is related to the positioning and repetitive action of the patient's job description." He further reported, variously, that claimant said she informed her employer of the back pain on "(date)" and "(date of injury)," that the employer provided the date of injury as "(date)" and indicated it was the last day she worked, that there was no specific injury, and that the pain developed over the course of months, and that he felt her back was "aggravated on the date reported." There was no disputed issue concerning the date of the injury.

Notwithstanding that Hearing Officer A on September 16, 1994, admitted carrier's exhibit A (unanswered carrier interrogatories to claimant) and exhibit B, a copy of Dr. M's

May 17, 1994, report (also in evidence as a claimant exhibit), Hearing Officer B excluded them from evidence on his own motion because he found them wanting in relevance.

Hearing Officer B's decision indicates he viewed Dr. W's report as establishing that claimant's back problems resulted from her injury of (date of injury), and that he anticipated that if his ruling on the good cause issue were reversed, the Appeals Panel could then proceed, based on his findings, to render a decision in claimant's favor on the disputed issue. Regrettably, we are unable to do so. The carrier's appeal basically questions whether the evidence developed at the first CCH was even considered by Hearing Officer B. It is fundamental that a hearing officer consider all the evidence admitted in reaching findings. His action in excluding the previously admitted carrier exhibits, together with the silence of his record and his decision respecting the status of the September 16th CCH record and the evidence then adduced, compels the conclusion that Hearing Officer B did not consider the evidence admitted on September 16th. Thus, we are required to reverse and remand the case for Hearing Officer B to consider all the evidence and after such consideration issue a new decision with such factual findings and legal conclusions as he deems appropriate.

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

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge