APPEAL NO. 990063

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 22, 1998. Finding of Fact No. 1 contains stipulations and Conclusion of Law No. 1 pertains to jurisdiction and venue. The hearing officer also made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. Claimant [respondent] was injured in the course and scope of employment on _____.

3. As a result of the injury sustained on _____, Claimant has been unable to obtain and retain employment at wages equivalent to the preinjury wage from January 8, 1998 continuing to the date of this hearing.

CONCLUSIONS OF LAW

2. Claimant sustained a compensable injury on _____.

3. Claimant has had disability from the injury sustained _____ from January 8, 1998 continuing to the date of this hearing.

The appellant (carrier) requested review, contended that the findings of fact are not findings of fact but are merely conclusions of law, urged that the hearing officer committed reversible error in denying its request to subpoena two witnesses, and requested that the Appeals Panel reverse Findings of Fact Nos. 2 and 3 and Conclusions of Law Nos. 2 and 3 and render a decision in its favor or remand for the hearing officer to make additional findings of fact and conclusions of law. The claimant responded; urged that the findings of fact, conclusions of law, decision, and order of the hearing officer are supported by the evidence; argued that the findings of fact are abbreviated but are findings of fact; urged that the hearing officer did not err in denying the request to subpoena witnesses; and requested that the decision of the hearing officer be affirmed.

DECISION

We reverse and remand.

The claimant testified that he worked for the employer as a truck driver; that on _____, he went to the location of a beer company to pick up recyclable material; that when he was walking to get to the back of the truck he stepped in a round drainage hole on the dock that did not have a cover on it; that his right foot went into the hole; that he fell to

the right, twisted his back, and put his hands on a wall to keep from falling to the ground; and that he looked up and saw two employees of the beer company, that they asked him if he was alright, and that he said that he did not know. He said that he drove to the facility of the employer, that the dispatcher saw that he was limping and asked what had happened, and that he told her that he fell in a hole at the beer company. The testimony of the dispatcher is consistent with that of the claimant. The claimant stated that the employer was very busy; that he kept working even though he was in pain; that he obtained a list of doctors from the employer's secretary; that he saw Dr. B on January 8, 1998; and that Dr. B took him off work and has not released him to return to work. He testified that he has not returned to work because of his pain, that he helps his uncle with barbeque, that he has used his vehicle that has a trailer hitch to pull a barbeque pit owned by his uncle, that he is not paid by his uncle, and that his uncle may give him a couple of dollars when he needs money.

An Initial Medical Report (TWCC-61) from Dr. B dated January 8, 1998, states that claimant stepped in a drain hole at the beer company, twisted his right leg, and had pain in his low back, right knee, and right ankle. On February 12, 1998, Dr. B reported that after he saw the claimant on January 8, 1998, the claimant developed severe pain in his low back, right knee, and right ankle and that his diagnosis was right knee and ankle strain and lumbar radiculitis. In a report of an MRI dated March 26, 1998, Dr. F said that his impression was no focal protrusion, mass effect, or high signal annular tear in the lumbar spine and mild to moderate facetal arthrosis bilaterally at L5-S1 and on the left at L4-5. In a report dated March 31, 1998, Dr. B stated that the claimant's work status was temporary total disability. In a follow-up medical report dated August 20, 1998, Dr. B said that he considered the claimant to be temporarily totally disabled since his initial evaluation on January 8, 1998, until the present.

Surveillance reports indicate that on July 16, 1998, the claimant walked and drove without showing any signs of disability; that he went to a barbeque stand; that he had on a pair of white work gloves; that he attempted to attach a trailer with a barbeque pit on it to his vehicle; that he began holding his lower back as he walked to the barbeque stand; that he made a telephone call; that another person helped him hook the trailer to the car; and that the trailer was taken to a car wash where the other person washed the barbeque pit. An investigative report indicates that the claimant has a criminal record that includes a conviction for habitual felony theft in 1991 and 1992.

Photographs of the loading area of the beer company are in evidence. They show an incline in front of the loading dock so that a transport vehicle would be low enough so that items on the dock could be loaded into a vehicle. An adjuster interviewed Mr. G and Mr. A, employees of the beer company, on April 10, 1998, and transcripts of those interviews are in the record. Mr. G said that he knew that the claimant was claiming an injury; that the claimant backed the truck to the loading dock; that Mr. A was loading the vehicle; that he, Mr. G, was on the dock behind the truck; that the claimant was standing in the pit beside the truck; that there are no stairs to use to get up on the dock; that he did not see the claimant limping or acting like he was hurt; and that the claimant did not tell him

that he was injured. Mr. A said that he did not see the claimant fall in the hole; that a grate is normally over the hole, but that he did not think it was on the hole that day; that there would be no reason for the claimant to go where the hole is; that the claimant told him that he fell in the hole and hurt his ankle; that the claimant was limping and he asked the claimant if he would be able to drive; and that the claimant said that he would and drove away.

We first address the contention that the hearing officer's findings of fact are not findings of fact but are merely conclusions of law. In Texas Workers' Compensation Commission Appeal No. 94367, decided May 11, 1994, a hearing officer made two findings of fact that are similar to those made by the hearing officer in the case before us. The carrier contended that the findings of fact related to injury in the course and scope of employment and disability were not sufficient and were merely a paraphrase of the law. The Appeals Panel wrote:

> We do note that the hearing officer's findings of fact regarding injury are sparse, however, the hearing officer's statement of evidence makes clear her position. It would have been desirable for the hearing officer to have expressed her findings more in detail, however, we believe the carrier was sufficiently aware of the facts as found by the hearing officer to intelligently prepare an appeal.

In the case before us, the hearing officer stated in her statement of the evidence that while at the beer company facility the claimant stepped into an uncovered drain hole at one of the loading docks and injured his right foot, right ankle, right leg, right knee, and low back. While, as in Appeal No. 94367, it would have been preferable for the hearing officer to have included those matters in the findings of fact, it was not reversible error for her not to have done so.

We next address the request for subpoenas for Mr. G and Mr. A. At the hearing the attorney representing the carrier stated that on September 10, 1998, the carrier asked the Texas Workers' Compensation Commission (Commission) to issue subpoenas for Mr. G and Mr. A; that the request stated that the good cause was because Mr. G and Mr. A gave accounts of what occurred that were different than what the claimant contended happened; that the credibility of the claimant was questioned by those statements; that the benefit review conference (BRC) report the benefit review officer (BRO) based his recommendation partly on credibility; that credibility should be judged by having live testimony; and that a call to the Commission revealed that the request was denied because good cause was not shown. The attorney asked the hearing officer why good cause was not shown. She stated that the last statements that the attorney made about the BRC report and the BRO's comment pertaining to credibility were not included in the request for subpoena and that the mere fact that a witness or a potential witness gives a different account than does the claimant does not show good cause for issuing a subpoena. The attorney stated he needed the witnesses to present the carrier's case. The hearing officer said that since the carrier made its objection regarding the denial of the request for

subpoenas she would state for the record that the Commission rules provide that the hearing officer may accept witness statements in lieu of live testimony and that she would make her rulings based on the evidence before her. Neither the request for the subpoenas nor the hearing officer's denial of the request are in the record.

Section 410.163(b) provides in part "[a] hearing officer may permit the use of summary procedures, if appropriate, including witness statements, summaries, and similar measures to expedite proceedings." Section 410.165(b) provides "[a] hearing officer may accept a written statement signed by a witness and shall accept all written reports signed by a health care provider." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 142.2(1) and (2) (Rule 142.2(1) and (2)) provide that the hearing officer is authorized to issue subpoenas and rule on requests. Rule 142.2(4) states that the hearing officer is authorized to use summary procedures as provided by Rule 142.8. Rule 142.8, **Summary Procedures**, provides:

> (a) In order to expedite the presentation of a case, the hearing officer may allow summary procedures, including but not limited to the use of:
>
> (1) sworn witness statements;
>
> (1) summaries of evidence;
>
> (2) medical reports;
>
> (3) agreements; and
>
> (4) stipulations.
>
> (2) The hearing officer may allow the use of summary procedures:
>
> (1) on its own motion; or
>
> (2) at the request of a party.
>
> (3) A party may request the use of summary procedures in any manner and at any time before the hearing.

Rule 142.12(b) states that the Commission may issue a subpoena on its own motion or at the request of a party if the hearing officer determines that a party has a good cause. Rule 142.12(d) provides:

> Special provisions for hearing subpoenas. A request for a hearing subpoena shall be sent to the commission and delivered to the parties, as provided by '142.4 of this chapter (relating to Delivery of Copies to All Parties), no later

than 10 days before the hearing. The hearing officer may deny a request for a hearing subpoena upon a determination that the testimony may be adequately obtained by deposition or written affidavit.

Rule 142.2(14) states that the hearing officer is authorized to "take any other action as authorized by law, or as may facilitate the orderly conduct and disposition of the hearing." The Commission rules address witness statements used in Section 410.163(b), but do not address "summaries, and other similar procedures to expedite the proceeding." The hearing officer based her ruling on the use of statements, and it is not evident how the other provisions of Section 410.163(b) would apply. Review of provisions of 1 JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM (1991) related to contested case hearings reveals that the parties are to be afforded due process, that affidavits and signed witness statements are to be admitted, that a summary is to be based principally upon witness statements and records, and that summary procedures are to be used if appropriate to expedite the particular proceeding. MONTFORD also makes references to 2 Tex Jur 3d concerning expediting administrative proceeding and 2 Tex Jur 3d contains comments that even though rules are relaxed in administrative proceedings to cross-examine adverse witnesses and to examine and rebut all evidence applies to administrative hearings and that the determination of the credibility of the witnesses is within the providence of the agency. A determination of whether or not good cause existed is reversed only if there is an abuse of discretion. In determining whether there is an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 93564, decided August 20, 1993. The transcripts of the interviews of Mr. A are not signed by anyone. The request for subpoenas was not denied upon a determination that the testimony may be adequately obtained by deposition or written affidavit as provided for in Rule 142.12(d). The hearing officer stated that the Commission rules state that she may accept witness statements in lieu of live testimony. Rule 142.8(a) does state that summary procedures including sworn witness statements may be used and that summary procedures are not limited to those listed in the rule, but the rule does not specifically say that witness statements may be used in lieu of testimony in all cases. Clearly, summary procedures permit the use of sworn statements and affidavits, when appropriate. But the law and the rules pertaining to summary procedures do not preclude a party from requesting that witnesses testify at the hearing and that the Commission issue subpoenas for witnesses. Once that request has been made, the provision that summary procedures may be used is not sufficient alone to deny the request for witnesses testimony. The reasons for the request for witnesses testimony and the reasons for using summary procedures must be weighed. That was not done in the case before us. Because of the credibility question, the carrier requested that Mr. G and Mr. A be subpoenaed. While it is difficult to determine whether the hearing officer erred in not finding good cause to issue the subpoena without having the request for subpoena in the record, the stated reason of the hearing officer indicates that she simply considered the use of summary procedures, did not weigh that against the reasons for requesting that witnesses testify, and did not follow all Commission rules in denying the request for the subpoena. She abused her discretion. We reverse the decision of the hearing officer and remand for her to issue subpoenas for Mr. G and Mr. A

to testify at the hearing; to hear that testimony; and to render findings of fact, conclusions of law, a decision, and an order based upon all of the evidence.

Pending resolution of the remand, 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 Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge