

## APPEAL NO. 991851

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A benefit contested case hearing (BCCH) was convened on August 3, 1999. The issue reported as unresolved at the benefit review conference (BRC) is “[i]s the Claimant’s low back injury related to, or caused by, the compensable injury of (injury 1)?” At the request of the respondent (claimant) and over the objection of the appellant (carrier), the hearing officer added the issue “[d]id the Carrier contest the compensability of the alleged injury on or before the 60th day after receipt of notice?” The carrier made a motion for a continuance to develop evidence on the added issue. The hearing officer denied the motion for a continuance, gave the carrier until noon the next day to send in evidence on the added issue, and gave the claimant until 5:00 p.m. that day to respond to any evidence provided. The hearing officer determined that the claimant’s low back injury is neither related to nor caused by the compensable injury of injury 1, but that carrier did not dispute compensability. The Decision and Order of the hearing officer was distributed on August 10, 1999, and was deemed to be received by the claimant on Monday, August 16, 1999. Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE §102.5(h) (Rule 102.5(h)). The claimant did not file an appeal. In his response to an appeal filed by the carrier, the claimant stated that he did not agree with the hearing officer’s determination that his back injury is not related to his accident on injury 1. The response filed by the claimant is dated September 9, 1999; was timely filed as a response to the request for review filed by the carrier, but was not timely filed as an appeal of the determination that the claimant’s back injury is neither related to nor caused by the compensable injury of injury 1. That determination became final under the provisions of Section 410.169.

Concerning the added issue, the hearing officer made the following findings of fact and conclusions of law and rendered the following decision:

### FINDINGS OF FACT

7. On December 29, 1998 Carrier received notice that Claimant was alleging that his low back condition was causally related to his compensable injury and was a part of the compensable injury of injury 1.
8. Carrier sent notice to Claimant that it disputed that the low back was a part of the compensable injury on injury 2, but failed to file a notice of dispute with the Commission [Texas Workers’ Compensation Commission].
9. Carrier did not file a notice of dispute, nor was the Commission otherwise notified that Carrier disputed the compensability of the Claimant’s low back condition, within 60 days of the date Carrier received written notice that the low back was alleged to be a part of the compensable injury.

## CONCLUSION OF LAW

4. Carrier did not contest the compensability of the alleged injury on or before the 60th day after receipt of notice and has waived the right to contest compensability of the Claimant's low back injury.

## DECISION

Claimant's low back injury is neither related to nor caused by the compensable injury of injury 1, but Carrier waived the right to contest the compensability of the low back injury by failing to file a dispute of compensability with the Commission within 60 days of the date Carrier received written notice that the low back injury was alleged to be a part of the compensable injury.

The carrier appealed. First, it contended that the hearing officer could not add the issue of timely contest of compensability by the carrier because he did not make a finding of good cause to add the issue. It also contended that it was denied due process because it was not able to adequately prepare its position on the added issue, that the hearing officer abused his discretion in denying its motion for a continuance, and that Findings of fact Nos. 8 and 9 are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The carrier requested that the Appeals Panel reverse the portion of the hearing officer's decision stating that the carrier waived its right to contest compensability of the claimed back injury and render a decision that the hearing officer improperly added the issue concerning waiver. In the alternative, the carrier requested that the Appeals Panel reverse the determination that the carrier waived the right to contest the compensability of the claimed back injury and remand for a new BCCH on that issue. The claimant responded, urged that the hearing officer did not err in adding the issue, contended that the carrier was given ample time to produce evidence on the added issue, argued that the evidence is sufficient to support the hearing officer's determinations related to the added issue, and requested that the Appeals Panel rule in his favor.

## DECISION

We reverse and remand.

We first address the question of whether the hearing officer erred in adding the issue concerning timely contest of compensability by the carrier. The BRC was held in another city on June 29, 1999; the BRC report is dated the same day, and was distributed by the Commission to the parties on July 12, 1999. In a letter dated July 19, 1999, addressed to the hearing officer with a copy to the carrier, the claimant wrote "I would like to add to my claim that [carrier] did not file a timely dispute of my back claim." At the BCCH, the hearing officer stated that the claimant filed a response to the BRC report and requested that an issue of whether the carrier timely contested compensability of the claimed back injury be added. The record contains the following:

HEARING OFFICER: . . . . Now, with that understanding, what's the Carrier's position on the motion to add an issue?

[MR. B, ATTORNEY REPRESENTING THE CARRIER]: The Carrier's position is that the issue should not be added, because under Rule 142.7(c)(2) [claimant] didn't explain his position on that issue. In other words, he did not explain when he thought that the Carrier had notice of his low back injury.

The Carrier has a position on that, but we don't know [claimant's] position. And because we didn't know [claimant's] position as required under the rule, we weren't able to, I guess, develop any kind of response.

HEARING OFFICER: [Ombudsman], the Claimant's response?

[OMBUDSMAN] The Claimant's response would probably be that it was discussed at the [BRC]. And the Carrier in their TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim] indicates that they received notice of the low back condition about December 29th from a medical report dated December the 8th. And as of today, no TWCC-21 has been -- this TWCC-21 has not been received by the Commission and entered into the Commission's system.

And the rule indicates that the Carrier will file a [TWCC-21] with the Commission and with the Claimant, or the employee rather, within 60 days of written notice.

HEARING OFFICER: All right. [Mr. B], does the Carrier dispute that this matter was discussed at the [BRC] and brought forward at that time?

[Mr. B]: I didn't see any -- I didn't, of course, attend the BRC. However, I didn't see any notes regarding this issue being brought up at the BRC. I did also talk to the adjustor as far as the TWCC-21 that's referred to, and she says that is [sic] telephonically transmitted to the Commission. And it was also sent out, I believe, on that same date to the Claimant.

Now, as far as, again, marshaling proof on that, that's just my information I got from the adjustor because I didn't know exactly, again, what the position was going to be from the Claimant as far as what they're disputing.

HEARING OFFICER: Did you talk to [Mr. W, the attorney who represented the carrier at the BRC] concerning whether or not this issue was raised at the [BRC]?

[MR. B]: I did not. I just read his report.

HEARING OFFICER: I'm going to accept the Claimant's assertion that this matter was brought up at the [BRC] as true. And as much as the Claimant did request that this matter be added as an issue on July the 19th, I'm going to grant the motion to add the issue.

The claimant requested that the issue be added. The carrier did not consent to having the issue added and the unanimous consent provisions of Rule 142.7(d) do not apply. Rule 142.7(e) provides in part:

Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. The hearing officer will allow the amendment only on a determination of good cause.

The burden was on the claimant to show good cause to have the requested issue added. In its appeal, the carrier stated that the claimant's probable response is not probative evidence that the issue was discussed at the BRC. The carrier also stated that the attorney representing the carrier at the BCCH was asked by the hearing officer if he spoke with the attorney who represented the carrier at the BRC and that the hearing officer did not ask the ombudsman who assisted the claimant at the BCCH if she spoke to the ombudsman who assisted the claimant at the BRC. The claimant did not testify as to what was discussed at the BRC. In his response to the BRC report, the claimant does not say what was discussed at the BRC. The hearing officer stated that he was going to accept the claimant's assertion that the issue of whether the carrier timely contested the compensability of the claimed back injury was brought up at the BRC. While he did not make a determination that good cause existed to add the issue, such a determination may be inferred. In Texas Workers' Compensation Commission Appeal No. 980683, decided May 21, 1998, the claimant and the carrier acknowledged that the issue that was requested to be added was discussed at the BRC, and the Appeals Panel held that the hearing officer did not abuse his discretion by finding good cause to add the issue based of the acknowledgment of the parties. In the case before us, the claimant contended that the issue of whether the carrier timely contested compensability of the claimed back injury was discussed at the BRC and the carrier contended that it was not. While an ombudsman assisting a party and an attorney representing a party may make representations, the better practice is to present evidence on what occurred at the BRC. The hearing officer asked the attorney representing the carrier at the BCCH if he had spoken to the attorney who represented the carrier at the BRC. He did not ask a similar question of the ombudsman who assisted the claimant at the BCCH. Nor did he ask the claimant if the issue was discussed at the BRC. It appears that the hearing officer was placing a burden on the carrier that it did not have. It is not clear why the ombudsman used the words she did or why she did not offer the testimony of the claimant. We reverse the determination of the hearing officer to add the issue of whether the carrier timely contested the compensability of the claimed back injury. Because of the unusual circumstances of the case before us, we remand for full development of the evidence related to whether the issue of whether the carrier timely contested the compensability of the claimed injury was discussed at the BRC

and for the hearing officer to make a determination on whether good cause existed to add the issue.

At the BCCH, the attorney representing the carrier stated that the carrier did not know the position of the claimant on the issue of timely dispute by the carrier. However, he stated that he had spoken with the adjuster handling the case and was aware of a TWCC-21 that was completed. Apparently, the carrier had a good idea of the claimant's position, even though it is possible that the claimant may have been contending that the carrier received earlier notice of the claimed back injury. We have reversed the determination that the issue of whether the carrier timely contested compensability of the claimed back injury and have remanded on that issue. We also reverse the determination that the carrier did not timely contest compensability of the claimed back injury and remand for further consideration of that issue. Since the Appeals Panel is using its only remand in this case, the hearing officer should make determinations to resolve the issue of whether the carrier timely contested compensability of the claimed back injury even if he determines that good cause does not exist to add the issue and does not add the issue. In view of the short deadlines placed on the parties by the hearing officer at the BCCH convened on August 3, 1999, on remand each party shall be afforded the opportunity to present evidence on the issue of whether the carrier timely contested compensability of the claimed back injury and there should be no question of due process being afforded to the parties.

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 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.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge