

APPEAL NO. 992007

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 13, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____, and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury on _____, and did not have disability. The claimant appeals, urging that the hearing officer erred in finding that he did not sustain a compensable injury and did not have disability, and in failing to allow the claimant to enter in evidence witness statements from his coworkers, and requesting that the hearing officer's decision be reformed. The respondent (carrier) replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Reversed and remanded.

The claimant testified that on _____, while performing concrete work, he was carrying a form weighing more than 500 pounds with two coworkers when one of the coworkers let go, causing him to injure his low back; that he continued working that day; that the next day he only worked for three hours because his foot went numb and he fell; and that he told his supervisor, who sent him to Dr. G. According to the claimant, Dr. G told him that he had injured two discs and a ligament and took him off work. In May 1999, the claimant sought treatment with a doctor closer to his residence, Dr. S. The claimant testified that he has been unable to work since _____.

The carrier argued that the claimant did not sustain an injury on _____, or _____, and presented the testimony of Mr. B to support its position. Mr. B, the personnel and safety director, testified that he investigated the claim and no injury was reported on _____. Mr. B said that he went to the job site, spoke with the crew, and no one saw anything. Pursuant to an Employer's First Report of Injury or Illness (TWCC-1), on March 29, 1999, the claimant reported an injury from falling on a slab on _____. Dr. G's records indicate that on _____, the claimant gave history of "severe acute low back pain for two weeks now after lifting on the job on March 30, 1999." Dr. S's report for a date of visit of May 7, 1999, is the first medical record which indicates an _____, date of injury.

The claimant asserts that the hearing officer erred in excluding witness' statements contained in Claimant's Exhibit No. 4. The benefit review conference (BRC) was held on June 15, 1999. The claimant argued that the witness' statements were timely exchanged by the claimant's previous representative (IWAC) as indicated by cover letter dated June 24, 1999, but did not have any proof of mailing. The carrier argued that although the cover

letter does indicate the correct address of carrier's counsel, it was not received, and stated "I do not have it in my file and do not recall receiving the exchange from IWAC." The hearing officer excluded Claimant's Exhibit No. 4 based on the carrier's representation that his office did not receive the documents.

The parties must exchange witness' statements with each other not later than 15 days after the BRC and thereafter as they become available. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 142.13(c)(1)). The hearing officer is authorized to accept documents and rule on the admissibility of evidence at a CCH. Section 410.163(a)(4); Rule 142.2(8). Our standard of review for regarding the efficacy of the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. If the hearing officer abused his discretion, it is not reversible error unless the party raising the point of error shows that the exclusion of the documents was reasonably calculated to and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 941533, decided December 30, 1994.

We conclude that the hearing officer abused his discretion in not admitting these documents after the carrier's objection. The carrier acknowledged that the document was properly addressed. The carrier's assertion that it did not have the documents in its file, or recall receiving the documents, does not indicate that the claimant's representative did not exchange the document by mail on June 24, 1999. Further, we cannot say that such was harmless error in this case. The documents excluded were witness' statements from coworkers that were key to claimant's case because they contained evidence that claimant was injured at work on _____. Therefore, we reverse the hearing officer's decision and remand the case for the hearing officer to admit, review, and consider Claimant's Exhibit No. 4, along with the other evidence in the record, to assign whatever weight he deems appropriate to all of the evidence, and to reconsider and resolve the issues of whether the claimant sustained a compensable injury on _____, and had disability.

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.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge