APPEAL NO. 000052

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 15, 1999, a hearing was held. The hearing officer determined that appellant's (claimant) compensable injury of _____, did not extend to her right shoulder, her cervical spine, and her lumbar spine; there was no disability. Claimant asserts that the factual determinations are in error; that the hearing officer erred in not allowing claimant to provide rebuttal evidence; and that the hearing officer erred in allowing the respondent (carrier) to call certain witnesses by telephone; claimant states that the hearing officer is biased and states that if there is a remand, that it be directed to another hearing officer. Carrier replied that the decision should be affirmed.

DECISION

We reverse and remand.

Claimant worked for (employer) on _____, the date of a compensable injury. Claimant testified that she was working in a temporary custodial position; on _____, she was using a two-wheeled dolly to move more than one computer, perhaps three or four. She testified to pushing the dolly until reaching a doorway at which time she turned the dolly to pull it through. At some point at that doorway area, one or more computer boxes shifted or fell from the dolly. Claimant generally said that she tried to hold the boxes with both hands with the handle of the dolly resting against her stomach/chest area. She also said that she fell against a wall and then slid to the floor landing on her buttocks.

Claimant was cross-examined concerning her initial report at the time of the accident, as set forth by the employer's nurse, which indicated a large bruise on the upper right arm. There was no dispute that claimant continued to work and first sought medical/chiropractic treatment on July 13, 1999. There was no dispute that claimant sought either a part-time or full-time (or either) permanent custodial position with the employer in late June 1999. Claimant was also cross-examined about how she, the dolly, and the boxes moved so as to cause an injury to her neck and low back; claimant's reply referred to "unloading boxes" and when she was further asked about "unloading boxes," claimant said, "it could be that."

On redirect examination, claimant stated that she was terminated on July 13, 1999, the day she sought chiropractic care. She said she was told she was terminated because she refused to take a part-time permanent position and because she was "ill." In answer to questions from the hearing officer, claimant said that she had been working light duty, prior to seeing a doctor, on the order of her supervisor. An MRI was taken of the right shoulder; the report concluded, "mild degenerative changes, acromioclavicular joint, otherwise negative scan."

The employer's nurse, Ms. R, testified by telephone. (At the inception of the carrier's announcement that it would call Ms. C and Ms. R by telephone, the hearing officer asked if claimant objected and claimant did not object--therefore claimant's assertion on appeal of error in allowing the testimony of Ms. C and Ms. R was not preserved and will not be considered.) Ms. R testified that her report of claimant's visit on April 30, 1999, which lists only a bruise on the right upper arm, is accurate insofar as it relates what claimant reported to her through an interpreter, who is a teacher, Mr. B, and insofar as it relates what she, Ms. R, observed. Ms. R agreed that since she does not speak Spanish, she cannot say whether Mr. B translated accurately or not. Ms. C's testimony raised a question about whether claimant had been terminated or not.

We agree with the claimant that the hearing officer denied her request to testify again, in rebuttal, after carrier had called its witnesses. Claimant's assertion that the hearing officer commented about "playing a game" was not heard on the audiotapes of this hearing. There was a spirited exchange between the hearing officer and claimant's counsel about whether claimant could offer rebuttal, by testifying again, after carrier called its witnesses. We agree that it was reversible error to deny claimant the opportunity to provide evidence in rebuttal through her own testimony. Review of the audiotapes does not lead to the conclusion that the hearing officer was biased; his other rulings, questions of counsel, and questions to claimant and Ms. R do not indicate any bias on his part. Therefore, our order remanding for the hearing officer to allow the claimant to present evidence in rebuttal does not require that another hearing officer be detailed to determine the issues of extent of injury and disability. After hearing the additional evidence, the hearing officer will issue findings of fact and conclusions of law, based on all the evidence, that address the two issues.

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.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge