

APPEAL NO. 000094

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 (CCH) was held on December 7, 1999. It is undisputed that the appellant (claimant) sustained a compensable injury on _____. The hearing officer determined that the claimant's compensable injury does not extend to or include his left knee; that the claimant's compensable injury has not prevented him from obtaining and retaining employment at wages equivalent to the wage he earned prior to _____; and that the claimant did not have disability. The claimant appealed; explained why he received the Decision and Order of the hearing officer on January 11, 2000; stated that the hearing officer kept the record open for the respondent (carrier) to present a deposition he gave in an earlier lawsuit concerning an automobile accident and that the hearing officer considered the deposition without giving him the opportunity to respond to the deposition; contended that the hearing officer erred in using the deposition to state that his credibility was ruined; urged that the evidence is sufficient to prove that his compensable injury extends to his left knee and that he had disability; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier replied; contended that the claimant did not file a timely appeal; stated that the claimant did not object to the record being kept open, did not request that the CCH be reconvened, and did not offer any response; urged that the evidence is sufficient to support the decision of the hearing officer; and requested that it be affirmed.

DECISION

We reverse and remand.

In his appeal, the claimant stated that he received a copy of the Decision and Order of the hearing officer on January 11, 2000, after he spoke with the ombudsman who assisted him; that he tried to contact the ombudsman in December and was told that she was out for the holidays; that he called her on January 5, 2000, and was told that she was in a CCH; that his address is (City 1), Texas; that a copy of the decision was mailed to him at, City 1, Texas; and that he filed his appeal on January 14, 2000. The notice advising the claimant when the CCH would be held was sent to an address in (City 2), Texas. The hearing decision cover sheet contains the City 2 address. At the CCH, the claimant testified that his address was, City 1, Texas. The letter dated December 14, 1999, sending a copy of the decision to the claimant indicates that it was sent to him at, City 1, Texas. The claimant timely filed his appeal.

The claimant testified he had previously worked for the employer; that this time he had worked for the employer for about three days before the incident on _____; that on that day, there was an explosion; that melted steel was blown into the air; that he ran to avoid the steel; that he was hit and burned; that he stumbled; that while running, he turned to get behind a building to use it as a shield; that after the incident, his left knee was sore, but he was concerned about the severe burns he sustained; that he was treated at an emergency room; that he went to an industrial clinic the next day and was released to

return to work at light duty by a nurse practitioner; that he took hydrocodone for pain; that about five minutes after he took the medication, he would sleep for about four hours; that while performing light duty he mostly slept; that he was released to return to work on April 20, 1999; and that he quit the job because he did not want to do that type of dangerous work any more. The claimant said a few days after the accident he noticed that his left knee was sore and stiff; that he did not think much of it at the time; that he quit taking the pain medication when he was released to return to work; that after he stopped taking the pain medication, he started developing severe knee problems; that he saw an attorney about a third party law suit; that he told the attorney about the extreme pain; that he was referred to Dr. S; that he also saw Dr. C, a chiropractor; and that he did not notice the swelling in the knee until he saw Dr. C. He testified that he had no problems with his left knee before the incident; that he did not have a prior left knee injury; that he never made a claim of any kind in relation to his left knee; that a few days before the incident, he had an employment physical examination and a Department of Transportation physical examination; and that the examinations did not reveal any problems with his knees.

Mr. M, the manager of the employer, testified that he investigated the incident that occurred on the premises of another employer; that during the initial investigation, the claimant did not mention a knee injury; that on the morning of the CCH, the claimant's supervisor told him that the claimant had a lawsuit for a knee injury incurred in a 1993 or 1994 automobile accident; and that he had not had the opportunity to investigate the information about the lawsuit. Mr. M said that the claimant's testimony about what he did on light duty was "not far from the truth," that the claimant had worked for the employer before, and that he had recent physical examinations.

After the testimony of Mr. M, the hearing officer asked the claimant if there was additional information she should be aware of before she considered his case. He said that the lawsuit mentioned resulted from his vehicle being rear ended; that it was for low back and neck injuries; and that it had nothing to do with his knee, feet, or hands. The hearing officer asked the claimant where and when the lawsuit was filed. The claimant provided the county and the year in which he thought it was filed. He said that he had a copy of the judgement, the depositions, and "other stuff" at home. The hearing officer gave the carrier until December 15, 1999, to provide additional evidence.

The report from the emergency room dated _____, and the reports of the nurse practitioner dated April 13 and 20, 1999, do not mention the claimant's knee. An initial medical consultation from an unidentified source dated May 7, 1999, states that the claimant was running to get away from melted steel; stepped on something that threw him off balance and resulted in his twisting his left knee; that the knee started hurting a couple of days later; and that the claimant had pain, stiffness, and swelling of the left knee. In an Initial Medical Report (TWCC-61) dated July 27, 1999, Dr. S described the same mechanism of injury and diagnosed left knee strain, effusion, and internal derangement. In a report of a functional capacity evaluation dated August 3, 1999, Dr. S stated that orthopedic tests indicated ligamentary pathology laterally and medially along with effusion, that an MRI was appropriate, and restrictions the claimant had that prohibited heavy work.

Carrier's Exhibit No. 5, that was admitted after closing statements were presented by the parties, contains pages 1 and 18 through 39 of a deposition of the claimant taken on July 20, 1995. It indicates that the claimed injuries were to the neck and back and that the claimant was seen by Dr. F and other doctors. On page 38, the claimant was asked "[d]id you know [Dr. F] before you went to see him on November 8th, 1994? Had you met him before?". The claimant responded "I met him once before. I had a problem with my knee, and I had him look at it. I got my knee hit and did something to my knee and had him look at my knee." The claimant was asked about playing football in high school and stated that he was not big enough, did not play much, and had hurt his left knee and right foot. He was asked what happened to them and the following response is on page 39 of the deposition:

On my left knee, I really don't know what's done to it. I went to a couple of doctors and had it checked but none of them could make up their mind on the knee. But on my right foot, I broke my right foot and had surgery to put it back together.

The claimant said that the surgery on his foot was during his first year in junior high school and that he played a little bit of football his freshman year. The remainder of the deposition is not in the record. In his appeal, the claimant commented about the knee injury and stated that the hearing officer never gave him the opportunity to respond to the deposition.

Concerning the deposition that was entered into the record after the CCH closed, both the request for review filed by the claimant and the response filed by the carrier contain information that is not in the record. That fact is indicative of problems that arise when a document; and in this case, an incomplete document; is admitted and considered without offering the parties the opportunity to present other evidence or comment on information in the document. In rendering this decision, we did not consider information in the appeal and the response that is not in the record of the CCH.

In Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993, the Appeals Panel had remanded the case to the hearing officer. That hearing officer obtained a response from the designated doctor, did not provide the response to the parties, did not provide the parties an opportunity to rebut or comment on the response from the designated doctor, and rendered another decision. The Appeals Panel noted that due process applies to administrative hearings; held that the failure to provide the parties with the new evidence, along with the opportunity to comment on or rebut such evidence, constituted reversible error; stated that it had used its one remand; reversed the decision of the hearing officer; rendered a decision that the disputed issues had not been resolved; and said that another CCH should be held to resolve the disputed issues without holding another benefit review conference. In Texas Workers' Compensation Commission Appeal No. 93724, decided September 28, 1993, the hearing officer obtained another document from the designated doctor and decided the disputed issues without providing the document to the parties and giving them the opportunity to at least comment on the document. The Appeals Panel reversed the decision of the hearing officer, remanded for the parties to be given the opportunity to comment on the document, and stated that under

the circumstances of the case the parties did not have to be given the opportunity to present additional evidence.

In the discussion section of her Decision and Order, the hearing officer wrote:

Although the existence of a prior left knee injury, in and of itself, would not necessarily preclude a decision in Claimant's favor with respect to the issue of the extent of Claimant's injury, since a compensable aggravation of an underlying condition may constitute a compensable injury, the fact that Claimant appears to have misrepresented his medical history with respect to his left knee causes the Hearing Officer to be disinclined to accept the remainder of Claimant's testimony at face value.

We note that the complete deposition is not in the record. From reading the part that is in the record, it appears that the claimant's back and neck, and not his knee, were claimed to have been injured in the 1994 automobile accident. The mention of the claimant's left knee arose because of a question concerning how he knew Dr. F. In the quotation set forth earlier in this decision, the claimant indicated that he did not "know what's done" to his left knee and that the doctors could not make up their mind on the knee. Injury to his knee was not an issue in the lawsuit for which that deposition was taken. It does not appear that follow-up questions concerning the knee were asked when the deposition was taken. Even though the claimant indicated that he had a copy of the 1995 deposition at home, he should have been provided the document that the carrier had admitted into evidence; given the opportunity to present the entire deposition and any other evidence related to it, including his testimony; and afforded the opportunity to make comments concerning it. If the claimant had presented additional evidence, the carrier should have been afforded the opportunity to rebut and comment on it. We reverse the decision of the hearing officer and remand for the hearing officer to conduct another CCH and assure that both parties are provided due process.

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.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge