APPEAL NO. 031909
FILED SEPTEMBER 5, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 12, 2003. Respondent 1 (claimant) did not appear at the hearing or respond to the letter subsequently sent by the Texas Workers' Compensation Commission (Commission) requesting that she contact the Commission within 10 days to request that the hearing be reconvened. The hearing record was closed on July 10, 2003. The hearing officer determined that the claimant's _____, compensable injury does not extend to the cervical spine. The appellant (subclaimant) appeals this decision, asserting that the hearing officer erred in excluding its exhibits and that the hearing officer participated in an ex parte communication with the attorney representing respondent 2 (carrier). The subclaimant additionally complains that the hearing officer "also argued that the lay representative had no authority to assist the sub claimant." Neither the claimant nor the carrier responded to the subclaimant's appeal.

DECISION

Affirmed.

The subclaimant complains on appeal that the hearing officer did not conduct the hearing "properly and justly" as evidenced by his comments to the lay representative assisting the subclaimant and an "indication of ex parte communication" with the carrier's attorney. The record reflects that the hearing officer admonished the lay representative at the initiation of the proceedings, stating that "[t]here is no exception under the act for you to appear on behalf of a client, a third party" and asking whether she "realize[d] you're practicing law without a license?" The hearing officer then notified the lay representative that if she chose to proceed with assisting the subclaimant, he would "be obligated to turn you into the State Bar for practicing law." The hearing officer pointed to no specific authority supporting his position. It should be noted that the lay representative never held herself out as a lawyer and clarified that she was acting in the role of assistant and that her employer had provided similar assistance to other subclaimants in the past. The lay representative indicated that despite the hearing officer's admonishments, she wished to proceed with assisting the subclaimant and the hearing officer allowed her to do so. While we do not necessarily agree with the viewpoint taken by the hearing officer in this regard, we perceive no reversible error in his actions, as he allowed the lay representative to assist the subclaimant and proceeded with the hearing.

The subclaimant makes the assertion of ex parte communication between the hearing officer and the carrier's attorney after the hearing. Specifically, the subclaimant states that as the lay representative was leaving the hearing room, she noticed that the "carrier representative was having a conversation with the [hearing officer] about the case." The subclaimant did not include any evidence that the hearing officer and the

carrier's attorney discussed the merits of this case during that conversation. We will not presume that a discussion of the merits of the case occurred absent some evidence to that effect. While we strongly encourage hearing officers and other participants in contested proceedings to avoid even the appearance of impropriety, under the facts of the present case, we perceive no reversible error. Accordingly, we find no basis to reverse and remand for a new hearing based upon the subclaimant's assertion of impropriety. *See* Texas Workers' Compensation Commission Appeal No. 950141, decided March 15, 1995.

The subclaimant contends that the hearing officer erred in excluding all of its exhibits. The record reflects that the carrier objected to the admission of these documents on the basis that they had not been exchanged with the carrier as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). It appears from the record that the subclaimant possessed a facsimile cover page at the hearing purporting to show that the exhibits had been exchanged with the adjustor assigned to the claim. This cover sheet was not offered into evidence at the hearing and was not provided by the subclaimant on appeal. We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the exclusion of evidence, an appellant must first show that the exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Given that the record is void of documentation substantiating when and to whom an exchange was made, we perceive no abuse of discretion in the hearing officer's exclusion of the subclaimant's exhibits based on lack of timely exchange.

Extent of injury is a factual question for the hearing officer to resolve. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). As the record contains no evidence supporting the assertion that the claimant's compensable injury includes the neck, we cannot agree that the hearing officer erred in making his decision.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Margaret L. Turner
Appeals Judge