

APPEAL NO. 033330
FILED FEBRUARY 9, 2004

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 November 24, 2003. The hearing officer determined that appellant's (claimant) _____, compensable injury does not extend to her low back condition after June 12, 2002. Claimant appeals the determination on procedural, evidentiary, and sufficiency of the evidence grounds. Respondent (carrier) urges affirmance.

DECISION

We reverse and remand.

On appeal, claimant alleges certain procedural irregularities and asserts that the hearing officer improperly admitted carrier's documents into evidence. As for the procedural irregularities, claimant asserts that the hearing officer failed to make a complete record of the proceedings, and that important issues were discussed off the record. As for the evidentiary error, claimant asserts that the hearing officer erred in admitting carrier's documents into evidence because they were not timely exchanged and because a subpoena was improperly issued and executed.

Claimant contends that an initial hearing was held where carrier asked for, and received, a continuance. Claimant appears to assert that the granting of the continuance was improper. Claimant asserts that the hearing officer failed to make a record of this proceeding despite a request for her to do so. Claimant asserts that the same thing occurred at the second hearing. That is to say, a lengthy conversation occurred prior to going on the record despite the hearing officer being asked if it should be made part of the record. Claimant contends that the Appeals Panel is now unable to adequately review this case because most of her argument never made it on the record. We agree with claimant's contention that important conversations regarding motions and evidentiary matters should be made part of the record. If they are not, the Appeals Panel will be unable to determine whether or not a hearing officer has abused his or her discretion.

In the instant case, the hearing officer granted carrier a continuance. At the second hearing, the hearing officer admitted all of carrier's exhibits which claimant objected to as not being timely exchanged, and obtained by the improper issuance of a subpoena. Claimant contends that a lengthy discussion was conducted between the parties and the hearing officer prior to going on the record. We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or 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). We find that claimant has sufficiently shown the necessity of a remand in this case.

Because there is no record of what occurred at the first hearing, and claimant alleges that some discussion occurred off the record at the second hearing, we cannot determine whether or not the hearing officer abused her discretion in admitting Carrier's Exhibit Nos. 19 and 20. These two exhibits were clearly not timely exchanged, and the hearing officer made no findings regarding good cause. Carrier's Exhibit Nos. 19 and 20 were crucial to carrier's case and if they had excluded, a different decision might have resulted. The purpose of Carrier's Exhibit Nos. 19 and 20 was essentially to show that any and all medical treatment which claimant currently requires is due to an intervening injury on (date of intervening injury). We note that Claimant's Exhibit No. 2 contains a letter from claimant's treating doctor to carrier dated August 4, 2003, in which the treating doctor discusses the (date of intervening injury), injury. It appears that carrier had knowledge as of the receipt of that letter of the (date of intervening injury) incident. We likewise cannot tell if claimant objected to the continuance at the first hearing. There is some indication that the continuance may have been granted by agreement.

The hearing officer's determination that the compensable injury of _____, does not extend to claimant's low back condition after June 12, 2002, is reversed and the case is remanded back to the hearing officer. On remand, the hearing officer is directed to make findings of fact regarding good cause for the late exchange of Carrier's Exhibit Nos. 19 and 20 and the reason for and circumstances surrounding the granting of the continuance and the granting of the subpoena for the medical records contained in Carrier's Exhibit Nos. 19 and 20.

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 Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Credit General Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge