APPEAL NO. 950190

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 20, 1994, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) injured her back in the course and scope of employment on (date of injury), when she moved a piece of aluminum; he also found disability from January 14, 1994, through the date of hearing. Appellant (carrier) asserts on appeal that the hearing officer misplaced the burden of proof; carrier also said that the great weight of the evidence was against the decision. Claimant replied that the decision should be affirmed.

DECISION

We reverse and remand.

Claimant states she injured her back on (date of injury) while working for (employer). She agreed that she had had a laminectomy in 1984 or 1985, and pointed out that she has had surgery on two occasions since the injury in question, in February and May, 1994. She described the injury as feeling a "pull" in her back when she was lifting aluminum off a table onto a rack at the end of her shift; she did not describe either how big it was or how much it weighed.

Claimant testified that she told another worker at the time, i(Mr. S), that she pulled something in her back. She also said that after being told by her doctor on January 12th that he could not see her until January 14th, she called a supervisor, (Mr. H), and told him she could not come to work. She said he told her to come in the next day and fill out forms. When arriving the next day, she was told she was terminated. She said on that day she talked to (Mr. SC) and told him of the injury, but he said she was terminated. Claimant said she could not work since her doctor took her off work when she called him on January 12th. Claimant agreed that she had a history of absenteeism and had received a written warning and suspension previously. Two friends of claimant testified they saw her "hurting" after her shift on (date of injury), stating that she told each she hurt herself on the job.

Carrier produced (Mr. A), who talked about the employment application claimant submitted, which included no history of back surgery; Mr. H, who said claimant never called to say she could not come to work and never told him anything of an injury until after she was terminated; and Mr. SC, who said he had told claimant of her termination before she mentioned any injury. The carrier also provided statements of other employees, which the hearing officer describes as either not credible or not contradictory of the claimant.

The evidence is for the hearing officer as fact finder to weigh and to consider the credibility thereof. *See* Section 410.065. The carrier raises a valid issue, however, about the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991; Texas Workers' Compensation Commission Appeal No. 92118, decided May 1, 1992; and Texas Workers' Compensation Commission Appeal No.

92245, decided July 22, 1992, all make it clear that the burden of proof is on the claimant to show that an injury occurred in the course and scope of employment. The record indicates that the hearing officer correctly stated at the beginning of the hearing that the burden of proof was on claimant on both the issues of injury in the course and scope of employment and disability.

The problem arises when the hearing officer stated in "Discussion" of his opinion:

> The carrier failed to meet their burden of disproving claimant's assertion that she sustained a compensable injury.

None of the findings of fact or conclusions of law are worded in a way that would show whether the hearing officer was following his statement on the record or his erroneous declaration quoted above in assigning the burden of proof. In Texas Workers' Compensation Commission Appeal No. 91048, decided December 2, 1991, a questionable reference to "affirmative defense" in "Discussion of the Law" was not reversible, because, "looking at the record and decision as a whole, we have no doubt that the hearing officer viewed the burden of proof to establish a compensable injury to be on [claimant]." That we cannot do in this case; the statements are contradictory and no findings or conclusions reflect what standard the hearing officer applied. *Compare to* Texas Workers' Compensation Commission Appeal No. 94090, decided March 4, 1994, which did not find reversible error when a hearing officer placed the burden of proof in a sole cause question on the incorrect carrier (of two), but pointed out that the finding was affirmable regardless of which carrier had the burden.

The decision and order of the hearing officer are reversed and the case is remanded for a determination of whether or not the claimant proved that she sustained a compensable injury and disability based on the evidence of record. The evidence may be reconsidered and findings of fact should be made upon consideration of the evidence in light of the burden of proof being upon claimant to show a compensable injury. Since reversal and remand necessitates issuing another decision, 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 the new decision is received, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No 92642, dated January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge