

APPEAL NO. 972651

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 6, 1997. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury to his low back on _____, and that he had disability as a result of his compensable right knee injury from May 13 to May 22, 1997. In his appeal, the claimant asserts error in the hearing officer's having denied his motion to add an issue as to the sufficiency of the respondent's (carrier) contest of compensability. In its response, the carrier maintains that the hearing officer properly did not add the issue because the claimant did not comply with the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) in requesting that the issue be added. The claimant's appeal is limited only to the alleged procedural error. He did not appeal the hearing officer's determination that he did not sustain a compensable low back injury on (alleged date of injury), and that determination has become final under Section 410.169.

DECISION

Reversed and remanded.

Our factual recitation will be abbreviated because only the issue of whether the hearing officer erred in not adding an issue as to the sufficiency of the carrier's contest of compensability is before us. Hearing Officer's Exhibit 1 is the benefit review conference (BRC) report. That report reflects that in addition to arguing that he sustained a compensable low back injury, the claimant argued that the carrier had waived the right to contest the compensability of a low back injury because its dispute did not meet the specificity requirements of Rule 124.6(a)(9). In addition, the report reflects that the benefit review officer (BRO) made a recommendation on the question of whether the carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) was sufficiently specific to contest compensability.

On October 14, 1997, the claimant sent a document entitled "Claimant's Formal Statement of Position and Additional Issues" to the Texas Workers' Compensation Commission (Commission) and to the carrier. That document states that the "Claimant disagrees with the Benefit Review Officer's framing of the issue and recommendation list." In addition, that document states, in relevant part:

Carrier's only point of dispute indicated in its TWCC-21 is whether the Claimant gave 30 days notice of injury to the back. Whether the Claimant sustained a compensable injury was not raised by the Carrier and should not be an issue.

Although the hearing officer did not specifically state that basis for her denial of the claimant's motion to add the issue of the sufficiency of the carrier's contest of

compensability, it appears that she denied the motion because the claimant did not comply with the requirements of Rule 142.7(e) in making the request to add the issue in that he did not establish good cause to add the issue or make a timely request 15 days before the hearing.

The hearing officer's decision not to add an issue under Rule 142.7 is reviewed under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 941178, decided October 19, 1994. The recent case of Texas Workers' Compensation Commission Appeal No. 972656, decided February 4, 1997, also addressed an issue of whether a hearing officer erred in refusing to add an issue. Specifically, Appeal No. 972656 stated:

In Texas Workers' Compensation Commission Appeal No. 960175, decided March 7, 1996, the Appeals Panel wrote that "the purpose of rule 142.7 is to provide for addition of disputes not identified as unresolved in the BRO's report, and that no good cause need be shown for issues which were not "additional." We believe that the BRC report itself contains uncontradicted evidence that the issue of a bona fide offer of employment was identified as unresolved. Therefore, consistent with Appeal No. 960175, we conclude that the carrier did not have to show good cause to have this issue considered by the hearing officer at the CCH convened on November 20, 1997.

In this instance, the BRC report clearly demonstrates that the issue which the party is attempting to add was identified as unresolved at the BRC in spite of the fact that the BRO did not list it as a separate issue. As such, as noted in Appeal No. 972656, *supra*, the claimant was not required to establish good cause to add the issue because it was not an "additional" issue within the meaning of Rule 142.7. Accordingly, to the extent that the hearing officer required the claimant to establish good cause to add the issue of the sufficiency of the carrier's contest of compensability, she abused her discretion by imposing a requirement on the claimant which is not provided for in Rule 142.7.

Next, we consider the question of whether the claimant's request to add the issue was timely filed. We have already determined that the issue which the claimant was attempting to add in this case was not an "additional issue" within the meaning of 142.7(e) because it was identified as unresolved in the BRC report. Therefore, the argument could be made that the requirement of Rule 142.7(e)(1)(D) that the request to add the issue be sent to the Commission 15 days prior to the hearing is not specifically applicable. Nevertheless, because we believe that the claimant has satisfied that requirement in this instance, we need not resolve the question of whether or not the time deadline is applicable to the request to add an issue that is not an "additional issue" under Rule 142.7. The hearing was held on November 6, 1997, and the claimant sent the document entitled "Claimant's Formal Statement of Position and Additional Issues" to the Commission on October 14, 1997, more than 15 days before the hearing. The claimant did not make an explicit request to add the issue in that document and the better practice would certainly have been to clearly articulate the request. However, we believe that when that document is read in conjunction with the BRC report to which it was responding, it was adequate to

serve as a request to add the issue, which was identified and unresolved at the BRC but not separately listed by the BRO. To the extent that the hearing officer denied the request because it was not timely filed, she abused her discretion in doing so because the evidence establishes that a request was timely made.

For the foregoing reasons, we reverse this case and remand it back to the hearing officer. On remand, the hearing officer should address the issue of whether the carrier's contest of compensability met the specificity requirement of Rule 124.6(a)(9). 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 Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge