APPEAL NO. 92055

On October 30, 1991, in (city), Texas, a contested case hearing requested by appellant (claimant below) was convened by (hearing officer). Respondent was present through counsel as were two witnesses for respondent. Appellant did not appear at this hearing and the hearing officer had no explanation for his absence. The hearing officer took official notice of the Benefit Review Conference report which had been mailed by the Texas Workers' Compensation Commission (Commission) Hearings & Review Division, to appellant by letter dated October 3, 1991, addressed to appellant at (address), (city), Texas (zip code), and to respondent. This transmittal letter advised the parties that the contested case hearing was set for 9:00 a.m. on October 30, 1991, at the Commission's (city) field office. The hearing officer offered respondent the options of then presenting its evidence or continuing the hearing. Respondent elected to proceed and presented the testimony of two witnesses and five exhibits. At the conclusion of the hearing the hearing officer stated he would attempt to contact appellant to determine whether appellant desired to continue to pursue his claim and, if so, he would schedule another hearing to give the appellant an opportunity to present evidence.

A hearing was subsequently set for December 16, 1991, which the hearing officer convened at 1:45 p.m. Once again, respondent was present through counsel with the same two witnesses and appellant was again absent without explanation. No additional evidence was adduced at the second hearing which was promptly adjourned.

The hearing officer issued a Decision and Order on January 13, 1992, which determined that appellant was not injured in the course and scope of his employment and was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The Commission's Hearings & Review Division transmitted this decision by letter dated January 22, 1992, to appellant at the same address to which its letter of October 3, 1991, with the hearing setting, had been sent. Appellant responded to such letter and decision by timely filing a written request for review contending, *inter alia*, that he didn't receive notice of the hearing.

DECISION

We do not find error in the hearing officer's having proceeded with the contested case hearing to a conclusion under the circumstances of this case. Finding that the Decision and Order are not against the great weight and preponderance of the evidence, we affirm. No good cause has been shown by appellant to persuade us to disturb the hearing officer's decision to proceed with the hearing to a conclusion. The Commission's letter of October 3, 1991, containing the setting of the hearing on October 30, 1991, was mailed to appellant at the same address as was the Commission's letter with the hearing officer's decision to which appellant did respond with his written appeal. Article 8308-6.31 (1989 Act) entitles a party to a claim for which a benefit review conference is held to a contested case hearing, requires the Commission to schedule a hearing in accordance with Article 8308-6.12(b) or (c), and permits the Commission to grant a continuance if requested in writing and upon a

showing of good cause. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 141.7(d) (TWCC Rules) requires the Commission's director of the hearings division to furnish to the claimant and to the carrier, by first class mail or personal delivery, a copy of the benefit review officer's report and notice of the date, time, estimated duration, and location of the contested case hearing. TWCC Rule 102.4(a) provides that "[A]ll notices, reports, and written communications to a claimant . . . shall be mailed to the last address supplied, either on the employer's first notice of injury, any claim form filed by the claimant, or by a claimant's letter." TWCC Rule 102.5(h) provides that "[F]or purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed." The record before us is devoid of any request for a continuance, written or otherwise, and contains no evidence whatsoever demonstrating good cause for a continuance let alone for appellant's unexplained failure to appear at the two sessions of the hearing. While the hearing officer regrettably did not make as a part of the hearing record whatever evidence of written and telephonic communications he or his staff may have had with appellant concerning the setting of the second session of the hearing and appellant's failure to appear at the first session, he did state on the record that he would schedule a second session if successful in an effort to contact appellant. We can infer from his setting of the second session of the hearing that the hearing officer did indeed communicate with appellant. We are satisfied from the record before us that the Commission provided appellant with notice of both hearing sessions consistent with the requirements of the 1989 Act and the Commission rules. The record before us contains no showing whatsoever of good cause for appellant's failure to attend either session of the hearing. All we have is appellant's unsupported assertion on appeal that he "did not receive notice of the hearing on his case as indicated in the order; and if he had, he would have appeared to offer evidence in his behalf." We find no abuse of discretion in the hearing officer's bringing the hearing to a conclusion and issuing a decision. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985). *And see* Texas Workers' Compensation Commission Appeal No. 91052 (Docket No. HL-00001-91-CC-1) decided November 27, 1991.

Turning to the merits of the appeal, appellant contends that he sustained two distinct injuries in the course and scope of his employment, namely, the "consequences of inhaling and/or coming in physical contact with chemicals on his job site," and, "as the result of being struck by a drilling auger, which he reported in his initial report . . . ." The position of the parties at the benefit review conference, which appellant attended, and the recommendation of the benefit review officer were stated in the benefit review conference report in evidence as follows:

CLAIMANT'S POSITION: Claimant states that he inhaled fumes which "burned up his brain" and caused sores, headaches, and chest pain. Claimant also states that he was hit in the back by a 200 lb. auger.

CARRIER'S POSITION: Carrier states that the job site is carefully monitored for fumes and there were none. Claimant insisted and was allowed to wear protective clothing although it was not necessary and none of the other

workers wore such clothing. None of the other workers complained of problems. Carrier also states that claimant was not hit by the auger.

BENEFIT REVIEW OFFICER'S RECOMMENDATIONS AND COMMENTS: The symptoms which claimant attributed to chemical exposure were diagnosed as herpes simplex and a common cold. The symptoms which attributed to a back injury are documented only by claimant's subjective complaints. Claimant states that he does not remember the details of his injury and treatment because chemicals must have "burned his brain."

At the hearing respondent introduced the testimony of the employer's director of human resources, (CB), and its director of health and safety, (RA). Also introduced were the signed, sworn statements of the employer's driller, (ED), a drilling helper, (WC), and the site geologist, (KR). According to this evidence, appellant was hired by (Employer), as a helper on a drilling crew assembled by Employer to drill for soil samples in an old railroad yard in (city), Texas, for soil contamination testing for the property owner. Appellant was apparently hired in (city), Texas, on February 19, 1991, traveled to the job site in (city) on February 20th, became insubordinate and was relieved of his duties at about 12:30 on February 22nd, and was fired by Employer in (city) later that month. About an hour after he was dismissed, the medical clinic used by Employer called CB to advise that appellant was there complaining of headache and fever blisters. Appellant was instructed to return to CB's office so that a report of his injury could be prepared. According to CB, appellant walked into her office with no evident injury and advised he had been exposed to chemicals at the (city) job site which caused his headache and a fever blister. As he began to leave her office, appellant stopped, recalled he had also been hit on the back and leg with an auger at the job site by the foreman, and hunched over and limped out of the room.

The health and safety director, RA, who has a degree in chemistry and an advanced degree in public health, testified that the diesel fuel contamination found at the job site was so slight (0 - 20 parts per million) that the only protective equipment required consisted of gloves, hardhat, safety boots, safety glasses, and coveralls and not the respirator and special disposable coveralls appellant insisted on wearing at the site. Further, the inhalation of diesel fuel fumes could cause headache and dizziness but not herpes simplex or skin irritation. The written, signed, sworn statements of the driller, the other helper, and the geologist all stated that to the best of their knowledge, all having been present, appellant was not struck with an auger or otherwise injured at the job site. After careful consideration of the evidence, we find probative evidence sufficient to support the hearing officer's findings of fact, conclusions of law, and decision that appellant was not injured in the course and scope of his employment. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951).

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge