

APPEAL NO. 92237

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On May 1, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that the commission mailed a notice of the contested case hearing to be held on May 1, 1992 to claimant, appellant herein, that appellant failed to show that his average weekly wage was \$353.92, and that the proper average weekly wage is \$277.56. Appellant states that he did not receive proper notice at the last address he gave the commission by telephone, that he did not work at least 30 hours per week, that partial days or weeks should not be counted to determine average weekly wage, and that the average weekly wage of a similar employee be considered to reach his average weekly wage.

DECISION

Finding that the record does not contain evidence to support Finding of Fact No. 4 that notice of the hearing was sent to the appellant, we reverse and remand.

The record does not contain a copy of the notice referred to by the hearing officer as being mailed to appellant on March 23, 1992. The notice of the benefit review conference, dated February 5, 1992, was made part of the record as Hearing Officer

Exhibit No. 1, but it is insufficient to support Finding of Fact No. 4 even though it refers to the hearing by saying: "contested case hearing: . . . date: May 1, 1992 . . . time & place-- TO BE DETERMINED."

While section 13 (notice) of the Administrative Procedure and Texas Register Act (APTRA), TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1991), does not apply to the 1989 Act, case law addressed requirements for notice before APTRA was enacted. Highway Trans. Co. et al v. Southwestern Greyhound Lines, 124 S.W.2d 433 (Tex. Civ. App.-Austin 1939, writ refused) described notice as a necessity in some instances. That case considered use of a bus station by competitors and said that absent a statutory requirement, notice and a hearing were not essential to orders of a general nature. Conversely, it said that no statutory requirement was necessary to require notice and a hearing to issue a specific order affecting particular property. That court went on to add, "(t)he right to notice and hearing are not satisfied unless notice of time and place of such hearing are given . . ."

The 1989 Act at Article 8308-6.12(e) provides for written notice to be given to the parties prior to the benefit review conference. Article 8308-6.12(b) also provides that a contested case hearing be scheduled at the time the benefit review conference is scheduled. The commission by Rule 142.6(c) [Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.6(c)], then provided that written notice of the hearing be furnished to the parties. It added that all notices to the claimant be mailed to the last address claimant supplied (Rule 102.5(a)), and

provided examples of sources, in writing, from which that last address could be obtained (Rule 102.4(a)).

We do not view the notice of the benefit review conference which stated the date of the contested case hearing to be May 1, 1992, to be sufficient evidence, in the record, of notice of the contested case hearing because it did not provide a definite time and place. Similarly we cannot view the "Statement of Case" of the hearing officer that says notice was given by mail on March 23, 1992, as evidence upon which she could base her Finding of Fact No. 4. While the commission can act at hearing without attendance of a party, the record must contain evidence that applicable articles and rules concerning notice have been followed when that situation presents itself. The appeals panel considers the record of the hearing, the appeal, and the response to the appeal. Article 8308-6.42(a) of the 1989 Act.

We reverse and remand for the reasons stated above. Pending resolution of the remand, a final decision has not been made in this case.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge