APPEAL NO. 93234

An attempt to hold a contested case hearing was undertaken in (city), Texas, on January 21 and February 1, 1993, (hearing officer) designated as the hearing officer. The issues before him involved whether the appellant (claimant) reached maximum medical improvement (MMI) and his impairment rating. The hearing officer determined that the claimant reached MMI on December 7, 1992, with a seven percent impairment rating. The claimant's appeal is confusing to comprehend; however, he clearly states that "on the phone hearing I did not get my right to put my evidence (sic) and my prove (sic) in the hearing at all." The respondent (carrier) did not file a response.

DECISION

Finding the "hearing" in this case so deficient as to amount to no hearing at all, we reverse and remand for a new hearing and for further consideration and development of the evidence.

Although it certainly is not clear from the "record" in this case, it appears that a contested case hearing was set for January 21, 1993, following a benefit review conference on December 10, 1992 wherein the issues of MMI and impairment rating remained unresolved. For whatever reason, the claimant was not in attendance on January 21, 1993, and the tape recording begins with the claimant and the hearing officer talking on the phone. The hearing officer states that a representative of the carrier is present and then goes on to discuss a telephone conference hearing. There is nothing apparent in the record that either party agreed to such a procedure presupposing it had been properly arranged. In any event, the hearing officer indicated that the claimant was being given 10 days to mail anything he wanted the hearing officer to consider and that he was to call the hearing officer in 10 days. Parenthetically, the claimant injured his back while employed in Texas, subsequently went to Oklahoma City, but maintained a mailing address at his sister's home in (city) Texas. The next portion of the recording of the proceeding apparently occurs on February 1, 1993 (not stated in the record), and has the claimant and hearing officer on the phone with no one else present. The hearing officer announced that he could not set up a conference and that he intended to take the testimony of the claimant, record it, give the recording to the carrier and let them give him, the hearing officer, its response. The hearing officer indicated that the carrier "elected to do the whole thing by telephone." While it is clear that the claimant was angry with the Commission, there is nothing orally or in writing that he ever agreed to the procedure described. Indeed, the folly of such a loose procedure is found in the claimant's statement in his appeal as set out above.

While there are provisions for summary procedures in a contested case hearing (Tex. W. C. Comm'n 28 TEX. ADMIN. CODE § 142.8 (TWCC Rule 142.8)) such as using sworn witness statements, summaries of evidence, medical reports, agreements, and stipulations, such provisions cannot be used to avoid a hearing all together. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.31(d) (Vernon Supp. 1993) (1989 Act) provides that the Commission shall adopt rules under which contested case

hearings are conducted and Article 8308-6.34(f) and (i) in setting out the contested case hearing procedures provides that all parties are required to attend the contested case hearing and absent good cause could be subjected to an administrative fine and that except for procedural matters, a party and a hearing officer may not communicate outside the contested case hearing except in writing with copies provided to all parties. The TWCC Rules implementing the 1989 Act do not sanction the procedure employed in this case which in effect did away with a "hearing" at all. We fail to see how parties' rights, and for that matter, their responsibilities as envisaged by the 1989 Act and TWCC Rules can be ensured by the procedures invoked here. The procedure utilized does not satisfy the minimum due process requirements of the dispute resolution system contemplated by the 1989 Act. That is not to say that where reasonably necessary an informed and properly agreed to conference type hearing, with all necessary arrangements to ensure the appropriate development of the evidence and positions of the parties including the examination and cross-examination of witnesses appearing to provide testimony and the proper exchange and introduction of relevant documentary evidence, could not be utilized within the provisions of the 1989 Act and TWCC Rules. This was not the situation here even though we note the hearing officer was faced with a difficult set of circumstances.

For these reasons, the decision is reversed and remanded for further consideration and development of evidence.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge