APPEAL NO. 93900

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) On August 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. After keeping the record open until September 3, 1993, she determined that appellant (claimant) reached maximum medical improvement (MMI) on November 19, 1992, with seven percent impairment. Claimant refers on appeal to the court decision that found the 1989 Act unconstitutional and asks how decisions can be rendered "under that cloud?" Claimant also notes that he had written the (city) office to see about getting another impairment evaluation, but has heard nothing in reply. (Claimant's reference to requesting another impairment evaluation is considered as an attack on the report of the designated doctor.) Claimant then asserts that he was not properly notified of the hearing -he states, "I received the letter after the hearing" and later refers to whether the notice was sent certified mail. He takes issue with Finding of Fact No. 1 that states he lived within 75 miles of (city) at the time of the injury and with Finding of Fact No. 3 which states that he was working on a grate when injured. Otherwise, claimant only questions payments for mileage from City to (city) for the benefit review conference, which was not an issue before this hearing.

DECISION

We reverse and remand.

At the hearing, the hearing officer and the attorney for carrier agreed that the issues were when did claimant reach MMI, and what is the impairment rating. Claimant was not present.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

The hearing officer admitted into evidence with no objection hearing officer exhibits one through four at the hearing and then added five and six after the hearing but before closing the record on September 3, 1993. (Hearing officer Exhibit 5 was a letter from the hearing officer to claimant after the hearing asking him why he failed to attend the hearing; hearing officer Exhibit 6 was the notice directing claimant to see the designated doctor.)

HEARING OFFICER EXHIBITS

1.A cover letter to the benefit review conference report (with the report attached). The letter is dated July 7, 1993, and is addressed to claimant at (address), (city) City, (state) (zip code); it specifies that a contested case hearing will be held on August 23, 1993, at 9:00 a.m. in the (city) Field Office at (address).

3.A letter from the claimant dated 7-19-93; claimant questions why his case was moved. He infers that he had not received the notice dated July 7th by

stating that, "I should be scheduled in the future for a contested case hearing." He also states that he had requested the contested case hearing be held in (city), Texas. He questions the AMA guides ("Guides to the Evaluation of Permanent Impairment", third edition, second printing, dated February 1989, published by the American Medical Association) and asks for another medical evaluation, citing a conflict of interest since the designated doctor "works for you, too." Claimant provided a return address on this letter of (address), (city) City, (state) (zip code).

2.A letter dated July 20, 1993, from the (city) office of the Texas Workers' Compensation Commission (Commission) to "Ms B, (address), (city) City, (state), (zip code). This letter again states that the hearing was to be held on August 23, 1993, at the (city) Field Office,(address), at 9:00 a.m. It added that the hearing could be conducted by telephone and stated that parties could send documents to the hearing officer. It asked each party to call the administrative assistant "if you want to participate that way" (by phone). It gave an extension for the assistant and for the ombudsman, but no telephone number for the office itself.

4.A report by the designated doctor, (Dr. C), who found that claimant's impairment was seven percent and stated agreement with claimant's treating doctor, (Dr. H), that MMI had been reached on November 19, 1992. The seven percent rating was based on a specific disorder, lumbar disc bulging at two levels. Claimant's range of motion testing was not valid in all areas of the spine, cervical, thoracic, and lumbar. "Inconsistent patient effort" was mentioned as a basis for these results. Within this report is a section marked "other" which contains a letter from (Dr. K) to (Dr. W) dated October 3, 1991, (10 days after the injury of (date of injury)). Dr. K at that time referred to claimant's address as (address), Texas, 78613, and stated that claimant tripped over a grate while working as a security guard for (business). (City, Texas, is located to the immediate northwest of (city), Texas.)

Venue in Texas is prescribed by statute. *See* 72 TEX. JUR. 3d, Venue § 4. The power to change venue is statutory. *See* TEX. JUR. 3d, Venue § 120. Generally, venue may be changed when the parties consent. *See* TEX. JUR. 3d, Venue § 122. A right to venue may be waived. *See* TEX. JUR. 3d, Venue § 114. Failure to comply with venue requirements was said to constitute reversible error. *See* TEX. JUR. 3d, Venue §178.

Section 410.005(a) provides, "Unless the Commission determines that good cause exists for the selection of a different location, a benefit review conference or a contested case hearing may not be conducted at a site more than 75 miles from the claimant's residence at the time of the injury."

The record reveals no evidence to support Finding of Fact No. 1 that the claimant lived within 75 miles of the (city) office of the Texas Workers' Compensation Commission on (date of injury). Claimant indicated in his letter of July 19, 1993, that he wanted the contested case hearing to be held in (city), Texas, even though he then lived in (city) City, (city). With the erroneous finding as to residence at the time of injury and the evidence of record that claimant wanted the hearing in (city), the Appeals Panel cannot find that claimant waived venue, that the parties consented to change, or that a finding of good cause for change can be implied from the evidence. (While the record does not further address why the hearing was held in (city), we note that (city) is closer to claimant's address at the time of hearing than is (city).)

The decision and order are reversed and the case is remanded. Facts may be developed as to the address of claimant at the time of the injury. If the claimant resided more than 75 miles from (city) at the time of injury, then the question of good cause for the selection of a different site should be explored and a finding thereon made. Since Section 410.005 makes a finding of good cause a condition to holding a hearing more than 75 miles from the residence of claimant at the time of injury, a determination of good cause to hear the case in (city) will still necessitate a rehearing, even though the notice provided to claimant prior to the hearing of August 23, 1993, complied with the statute and applicable rules. Reconsideration and development of the evidence, findings of fact, and conclusions of law may be appropriate as determined by the hearing officer. 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 the 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.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge