

APPEAL NO. 94208

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On January 26, 1994, a contested case hearing was convened in (city), Texas, with (hearing officer) presiding. The claimant was not in attendance. The following day, claimant appeared at the (city) field office of the Texas Workers' Compensation Commission (Commission). The hearing officer held a short hearing to determine if claimant had good cause for his failure to appear the previous day. The hearing officer determined that he did not, and dismissed the hearing.

The claimant appeals, arguing that he did not get the notice of setting. The carrier responds that the determination of no good cause is supported.

DECISION

We affirm the hearing officer's decision and order, and affirm also his implied findings against the merits of claimant's case on the three issues before the hearing officer.

There were three issues reported as unresolved by the benefit review conference (BRC) officer: whether the claimant sustained a compensable injury on (date of injury), while employed by (employer); whether he had the inability to obtain and retain employment equivalent to his pre-injury wage as a result of that injury; and whether he gave timely notice to his employer. The BRC report indicated that claimant contended he sustained a perianal fistula from work-related activity, and that he had once before been treated for the same condition.

At the January 26, 1994, session of the hearing, the carrier showed up with four witnesses from out of state. The date, time, and place of the hearing had been included in the cover letter distributed with the report of the benefit review officer (BRO). The notice

was mailed December 14, 1993 (according to the records of the Commission), and showed claimant's address as (address). Because the claimant did not attend, the hearing officer announced that he would not take evidence because the claimant had the burden of proof. The ombudsman in attendance at this hearing stated she had attempted to contact claimant through two telephone numbers he had given, and that she also sought to contact him through his doctor, both with negative results.

The claimant testified, through a Spanish translator and also to some extent in English, on January 27, 1994 that the (state) address was his correct address, that he had no other problems with mail delivery, and that at this address he had received the notice of setting for the BRC report. This notice (dated October 28, 1993) stated that the date of the contested case hearing was "January 27, 1994" at a time and place "to be determined." The claimant stated that his understanding from this notice was that the hearing would be held January 27, 1994, at 10:30 (the time the BRC was set, in a separate portion of the notice.)

Logs from the contact portion of the case file indicated that claimant was in contact twice with the ombudsman after the contested case hearing itself to discuss that claimant intended to find an attorney. Both contacts are logged prior to the date that the notice of the January 26, 1994, hearing was sent out.

The hearing officer evidently chose to believe that claimant had received the letter which indicated that the hearing was set for January 26, 1994, and found as fact that claimant was properly notified of the date, time and place of the hearing. We find sufficient support for this in the record.

At the January 26, 1994, hearing, the hearing officer announced he would send a notice to the claimant asking him to show cause within 10 days as to why the hearing should not be dismissed "with prejudice." In his decision, the hearing officer dismissed the hearing, without any statement one way or the other as to "prejudice." However, the hearing officer found as fact that claimant did not present evidence relating to the disputed issues. Because the hearing officer is required to issue determinations on the issues presented, we can imply findings adverse to the claimant on the merits of the injury, disability, and notice issues. Obviously, when no evidence is presented, there could no preponderance of evidence in favor of these claims. We note that the BRO records that claimant failed to present evidence on the injury and disability even when he was in attendance at the BRC.

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge