APPEAL NO. 950044
FILED FEBRUARY 21, 1995

This appeal is considered under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 21, 1994, a contested case hearing (CCH) was convened to consider the two issues of when respondent (claimant) reached maximum medical improvement (MMI) and claimant's impairment rating (IR). Appellant (carrier) did not appear at the hearing; therefore, the hearing officer accepted claimant's evidence and heard argument on behalf of the claimant. Thereafter, the hearing officer set a show cause hearing for December 12, 1994, to permit carrier an opportunity to explain why it had not appeared at the hearing. At that hearing, the hearing officer determined that carrier did not demonstrate good cause for its failure to attend the November 21st hearing; therefore, she closed the record, without receiving carrier's evidence on the merits, and issued her decision on the basis of the evidence presented by claimant at the prior hearing. Specifically, the hearing officer determined that the Texas Workers' Compensation Commission (Commission)-selected designated doctor's report was not overcome by contrary medical evidence because there was no other medical evidence in the record. Thus, she adopted the designated doctor's January 12, 1994, date of MMI and his 15% IR. Carrier appeals arguing that the hearing officer erred in not finding that it had established good cause for its failure to appear at the November 21, 1994, hearing and alternatively, that the hearing officer abused her discretion in not fully developing the facts in this case before issuing her decision and order.

DECISION

We reverse and remand.

In arguing that it had satisfied its burden of establishing good cause for its failure to appear at the hearing, carrier asserts that (City representative), its (City) representative, had inadvertently failed to forward the notice of the November 21, 1994, hearing to (Mr. S), the adjuster handling this claim. In turn, Mr. S did not apprise the attorney, who was to represent the carrier at the hearing, of the hearing date. The record indicates that the hearing in this case was originally set for October 3, 1994, however, carrier requested a continuance, which was granted on September 28, 1994. In the order granting the continuance, the hearing officer reset the case for November 21, 1994, and that is the document which carrier's (City) representative apparently failed to forward to Mr. S. At the hearing, Mr. S testified that he knew that the continuance had been granted, but did not know the date of the reset hearing.

It is well settled that the issue of whether good cause exists is ordinarily a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93102, decided March 22, 1993. "The test for the existence of good cause is that of ordinary prudence; that is, the degree of diligence that an ordinarily prudent person

would have exercised under the same or similar circumstances." Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994. In Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986), the Texas Supreme Court noted:

> Determination of good cause is within the sound discretion of the trial court. That determination can only be set aside if that discretion was abused. Smithson v. Cessna Aircraft, Co., 665 S.W.2d 439, 442 (Tex. 1984).
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> To determine if there is an abuse of discretion, we must look to see if the court acted without reference to any guiding rule and principles. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985), *cert. denied* 476 U.S. 1159, 106 S. Ct. 2279 (1986).

In this instance as the hearing officer correctly noted, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(b) establishes that the (City) representative is the entity to which all notices and communications addressed to a carrier are to be sent. Thus, the order of continuance was properly sent to the carrier through its (City) representative in this case. The fact that there was an administrative error on the part of the (City) representative does not operate to excuse carrier's failure to appear at the hearing, particularly in light of the adjuster's testimony at the show cause hearing that he knew that carrier's request for a continuance had been granted; he was simply unaware of the date of the rescheduled hearing. We note an ordinarily prudent person, after requesting and receiving a continuance, might well have made an inquiry at that point to determine the date of the hearing. While we accept the carrier's assertion that the mistake was "mere inadvertence and not gross negligence or an intentional disregard for commission procedures," we cannot accept carrier's argument that as such the hearing officer was required to find that its admitted inadvertence established good cause for the failure to appear at the hearing. Nor can we agree that the hearing officer abused her discretion in finding that carrier's excuse did not rise to the level of good cause.

However, after the hearing officer entered her decision in this case, the Appeals Panel decided the issue of whether a party, who failed to establish good cause for his failure to appear at the hearing, was, therefore, precluded from offering evidence on the merits of the case at a subsequent hearing. In Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, a case involving a claimant who, without good cause, failed to appear at the scheduled CCH, we stated:

> Neither the 1989 Act nor the Commission's rules require the ultimate sanction of barring a party's evidence at a subsequent hearing for failure to appear at a prior hearing, whether or not good cause was shown. Rather, Section 410.156(b) provides that the failure of a party to attend a [hearing] will constitute a Class C administrative violation, the penalty for which is found in Section 415.022(3).

The claimant was allowed to present evidence at a rescheduled hearing. The decision in Appeal No. 941679 is controlling in this case which also does not involve repeated failures to appear at a scheduled CCH. Accordingly, we reverse the decision and order of the hearing officer and remand the case for further development of the evidence and reconsideration of the disputed issues on the basis of all of the evidence, including that of the carrier.

For the foregoing reasons, we reverse the decision and order of the hearing officer and remand the case for the development of the evidence and further consideration of the evidence and findings. Pending resolution of the remand, a final decision has not been made in this case. However, 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 the request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge