APPEAL NO. 950083
FILED MARCH 1, 1995

On December 7, 1994, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue before the hearing officer was whether the respondent's (claimant's) condition which resulted in a colostomy is a result of the compensable injury he sustained on _____. The appellant (carrier) failed to appear at the hearing. The claimant presented its case and the hearing officer set a show cause hearing for December 16, 1994, to permit the carrier to show cause why it did not appear at the CCH. At the show cause hearing, the hearing officer determined that the carrier failed to demonstrate good cause for failing to appear at the CCH on December 7, 1994, and she closed the hearing record and issued her decision on the basis of the evidence presented by the claimant at the December 7th CCH. The hearing officer determined that the claimant's perforated colon constituted a compensable injury. The carrier contends that it did have good cause for failing to appear at the hearing and that the claimant failed to meet his burden of proof.

DECISION

Reversed and remanded.

The CCH was originally set for October 18, 1994. On October 19, 1994, the carrier requested a continuance stating that it had been unable to attend the October 18, 1994, CCH because of flooded roads and it requested a continuance. The carrier noted in its written motion that it had advised the hearing officer of its inability to attend the hearing due to the flooded roads prior to filing its written motion. The record does not reflect whether the CCH was actually convened on October 18, 1994. In an order dated October 19, 1994, the hearing officer granted the carrier's request for a continuance and she continued the hearing to December 7, 1994. The CCH was convened on December 7, 1994, and the claimant and the claimant's attorney appeared at the CCH but not the carrier or its attorney. The claimant presented his evidence and arguments and the hearing officer then set a show cause hearing for December 16, 1994, to determine whether the carrier had good cause for failing to appear at the December 7th CCH. At the show cause hearing, the carrier's attorney testified that his law firm had not received notice of the date the hearing was continued to. He did not know whether the carrier received notice of the new hearing date.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(d) (Rule 142.10(d)) provides, in part, that with regard to a continuance "[t]he hearing officer will rule on the request, and notify all parties of the ruling." Thus, the hearing officer correctly noted in her decision that it is the parties, and not their attorneys, who are to receive notice. She also correctly noted that Rule 156.1 contemplates that notice to a carrier's Austin representative is notice

from the Texas Workers' Compensation Commission to the carrier. We observe that Rule 102.5(b) provides that, unless otherwise specified by rule, all notices and communications to insurance carriers will be sent to the carrier's Austin representative as provided by Rule 156.1. *See* Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995, wherein we stated that Rule 102.5(b) "establishes that the Austin 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 Austin representative in this case." We also observe that Rule 102.5(h) provides that for purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed.

In the Statement of the Case portion of her decision the hearing officer states that the carrier was notified of the time, date, and place of the CCH, and in the Discussion portion of her decision she states that there is nothing in the record to indicate that the carrier's Austin representative did not receive a copy of her order granting the continuance and resetting the CCH. However, the "Order On Request For Continuance," which is in evidence, does not indicate when it was sent out or to whom it was sent, and there is no evidence in the record that the order was sent to the carrier (or to its Austin representative) as is recited in the hearing officer's decision. In Texas Workers' Compensation Commission Appeal No. 92237, decided July 22, 1992, we held that the hearing officer's statement in her decision that notice of the hearing was given by mail on March 23, 1992, was not evidence upon which she could base her finding that notice of the hearing was sent to the claimant in that case, and we reversed and remanded the case. *See also* Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992, wherein we held that the Commission should not impose the deemed receipt provision of Rule 102.5(h) unless it has complied with its own rules regarding communications from the Commission. We reverse and remand the present case for further consideration and development of evidence on the issue of whether the carrier had good cause for failing to appear at the CCH on December 7, 1994.

After determining that the carrier had not shown good cause for failing to attend the December 7th CCH, the hearing officer closed the record, without receiving the carrier's evidence on the merits, and issued her decision based on the evidence presented by the claimant at the CCH held on December 7th. In a recent decision, Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, we reviewed a case wherein the hearing officer found that the claimant did not have good cause for failing to attend the CCH, but allowed the claimant to present evidence on the merits of the case at the hearing where she took evidence regarding good cause for failing to attend the CCH. On appeal the carrier asserted that the claimant's evidence on the disputed issue should not have been considered by the hearing officer. We disagreed and affirmed the hearing officer's decision in favor of the claimant. Soon after that case was decided, we decided Appeal No. 950044, *supra*, wherein the carrier failed to appear at the CCH, the hearing

officer held a show cause hearing and found that the carrier did not have good cause for failing to appear at the CCH, and the hearing officer closed the record, without receiving carrier's evidence on the merits, and issued her decision on the basis of the evidence presented by the claimant at the prior hearing. We upheld the hearing officer's decision that the carrier had not shown good cause for failing to appear at the CCH. However, we reversed and remanded the case stating that:

> 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:
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> 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).
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> 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.

We find our decisions in Appeal Nos. 941679 and 950044, *supra*, to be controlling under the circumstances presented in the instant case, which also does not involve repeated failures to appear at a scheduled CCH. Consequently, in addition to remanding the case for further consideration and development of the evidence on the good cause issue, we remand for further development of the evidence and for reconsideration of the disputed issue regarding the extent of the claimant's injury on the basis of all of the evidence, including that of the carrier.

The hearing officer's decision and order are reversed and the case is remanded.

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 a 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.

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge