APPEAL NO. 951209
FILED SEPTEMBER 7, 1995

Following a contested case hearing (CCH) held on April 26, 1995, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), where the appellant (claimant) failed to appear, the hearing officer issued a Decision and Order on May 25, 1995, which resolved the sole disputed issue by concluding that claimant did not have disability from January 15, 1994, through the date of the hearing as a result of the injury he sustained on _____. Claimant, who is incarcerated, has appealed stating that he is arranging to obtain certain medical records for consideration in resolving the disputed issue concerning disability after January 15, 1994. The respondent (carrier) replies asserting that the appeal is untimely and fatally defective, that claimant may not submit new evidence on appeal, and that the hearing officer correctly determined the disputed issue.

DECISION

Affirmed as reformed.

The hearing officer admitted into evidence a benefit review conference (BRC) report dated February 28, 1995, which stated that claimant was not present at the BRC and which did not indicate that claimant was assisted at that proceeding. In that report the benefit review officer (BRO) recommended that claimant did not have disability because of his incarceration. Attached to the BRC report was a Texas Workers' Compensation Commission (Commission) interlocutory order, dated January 31, 1995, which ordered the carrier not to pay temporary income benefits. Accompanying the BRC report was a Commission letter to the parties dated March 9, 1995, which transmitted the BRC report and interlocutory order and advised the parties of the time, date and place for the CCH on April 26, 1995. The letter was mailed to the claimant at the following address: (street, city 1, Texas Zip), which, according to the Commission's records, was the last address provided to the Commission by claimant. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 102.5(a) (Rule 102.5(a)) provides that all Commission notices and written communications to the claimant will be mailed to the last address supplied by the claimant.

According to the hearing record, when the hearing officer inquired as to the whereabouts of the claimant, the carrier represented that it had inquired with the Texas penal authority on April 11, 1995, and had been advised that claimant was incarcerated in a facility in city 2, Texas. The carrier introduced authenticated copies of state court records which indicated that on October 10, 1994, a Judgment Adjudicating Guilt for possession of a controlled substance (which had been deferred since October 20, 1992) was entered due to claimant's violation of a term of his probation and that he was sentenced to three years of incarceration. The hearing officer permitted the carrier to present its evidence on the disputed issue and indicated that a "show cause" letter would be sent to claimant to afford him an opportunity to show good cause for his failure to appear at the CCH. The hearing officer's decision states that a "show cause" letter was sent to claimant on May 2, 1995,

advising that he could show cause for not appearing, that claimant failed to contact the Commission within 10 days of the letter, and that the hearing officer closed the hearing record on May 12, 1995. A copy of the "show cause" letter was not made a part of the hearing record. The Appeals Panel has disapproved of the barring of a party's evidence as a consequence of failing to show good cause for a failure to appear at a CCH. *See e.g.* Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995. However, claimant's appeal does not raise an issue concerning his failure to appear at the CCH and the hearing officer's taking the carrier's evidence and is silent concerning the opportunity to show good cause for the nonappearance. Accordingly, we need not further discuss the matter.

The carrier first asserts that claimant's appeal was not timely filed. Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (Rule 143.3(a)). Rule 143.3(c) provides that a request for review shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after such receipt. The records of the Commission show that claimant's copy of the hearing officer's decision was mailed on June 9, 1995, under cover letter dated June 8, 1995, to an incorrect address in city 3, Texas, and that on June 30, 1995, it was remailed to claimant at the above-stated address in city 1, Texas. Claimant states in his appeal that he received the decision on July 17, 1995, and his appeal was mailed to the Commission on July 22, 1995, and received on July 24, 1995. Accordingly, claimant's appeal was timely filed.

The carrier next asserts that claimant's appeal is "fatally defective" for failing to "clearly and concisely rebut each issue in the hearing officer's decision that the appellant wants reviewed," as required by Rule 143.3(a)(2), and for failing to meet the service requirements of Rule 143.3(a)(4) and Rule 143.3(b). Claimant states in his appeal that the carrier's evidence adduced at the CCH is "not all true" and is "incomplete" and he indicates that other evidence exists which would support his position. These and other statements in the appeal indicate that claimant challenges the sufficiency of the evidence to support the hearing officer's decision and we view them as sufficient to comply with the provisions of Section 410.202(c) and Rule 143.3(a)(2). The Appeals Panel has held that a general appeal is sufficient and will be interpreted as challenging the sufficiency of the evidence. Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 951079, decided August 16, 1995. Further, the Appeals Panel has held that an appellant's failure to serve the respondent is not jurisdictional but does extend the time to respond until 15 days after service is made. *See e.g.* Texas Workers' Compensation Commission Appeal No. 92383, decided October 12, 1992.

No evidence was adduced on behalf of the claimant on the merits of the disputed issue. The carrier introduced a Report of Medical Evaluation (TWCC-69) from Dr. W, dated June 13, 1994, stating that claimant reached maximum medical improvement (MMI) on January 15, 1994, with an impairment rating (IR) of zero percent. In his accompanying "Independent Medical Evaluation" of the same date Dr. W stated that he examined claimant, then 31 years of age, on June 3, 1994; that claimant gave a history of being a laborer on a construction site on _____, "working with a 90 pound jackhammer, bent over shoveling concrete" and developing low back and right shoulder pain; that claimant currently complained of pain in those areas as well as pain in his neck and pain with neck and shoulder motion, and also complained of headaches, right arm numbness, and occasional bilateral leg numbness; and that claimant said he had been tested and treated by several doctors and has not improved at all. Dr. W also reported that claimant said he took "over 100 either Tylenol, Advil or Percogesic a week in addition to his other medication because of his continued pains." Dr. W also referred to the normal results of his physical examination and the normal results of certain diagnostic tests which he reviewed. Dr. W then stated that claimant's symptoms were "way out of proportion to his objective physical findings," that all claimant's tests were normal, that he felt claimant was "suffering from secondary gain syndrome," that claimant had reached MMI in mid-January 1994 with a zero percent impairment, and that claimant "should have been working his regular work since then . . . with no restrictions."

Claimant indicates in his appeal that he is presently making arrangements to obtain copies of certain medical records, apparently from jail and prison infirmaries, which he contends will show that he has received and paid for treatment for his injury from October 1994 to the present. Claimant indicates that the carrier's evidence is incorrect and incomplete and that "[t]he documents to back these legal allegations are in the process of being put together for your visual inspection if admissible." Claimant contends that such documents will provide a reason "to re-open" his case. Claimant attached to his appeal a prison infirmary pass indicating he visited the infirmary on July 14, 1995, and handwritten on the pass, presumably by the claimant, was the statement, "last medical appointment to address the problem." Also attached to the appeal was an undated handwritten note advising claimant of the cost for copies of medical records and asking if he still wanted the copies made. In different writing on this exhibit, again presumably that of the claimant, was the statement, "this is the request for the medical records from this facility which are the recent ones, I've already have copies from Oct 2 94 to Jan 95." No copies of medical records were attached to the appeal. The carrier contends that it is too late for claimant to submit evidence and cites to Appeals Panel decisions which state that new evidence will not generally be considered for the first time on appeal and which also state the several factors considered by the Appeals Panel when new evidence is submitted for the first time on appeal. However, as we have said, while claimant indicated he was in the process of obtaining evidence, none was submitted with his appeal so we need not decide whether any medical records he may eventually obtain would have resulted in our reversal and

remand for their consideration.

Claimant had the burden to prove that he had disability from and after January 15, 1994. Disability is defined in the 1989 Act as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." No evidence was adduced on his behalf. The carrier's evidence indicated that claimant has been incarcerated since October 4, 1994. The Appeals Panel has held that an injured employee does not have disability while incarcerated. *See* Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993; Texas Workers' Compensation Commission Appeal No. 93352, decided June 28, 1993. Further, the only medical evidence in the case, Dr. W's report, stated that claimant was able to perform his regular work as of mid-January 1994. We do not find the dispositive finding of fact and conclusion of law to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The carrier points out that Findings of Fact Nos. 1, 2 and 3 contain the typographical error of referring to the injury date as January 12, 1993, instead of _____, which was the date of injury. These findings are affirmed as reformed.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge