APPEAL NO. 960464

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on February 6, 1996, with the record closing two days later. The issues before the hearing officer, (hearing officer), were: are claimant's cervical spine, rib cage and chest conditions a result of the injury sustained on (date of injury); did claimant have disability from the (date of injury), injury; and what is claimant's average weekly wage (AWW). The hearing officer found that the aforementioned injuries are a result of his injury sustained on (date of injury), that he had disability from this injury beginning October 17, 1995, and continuing through the date of the hearing, and that his AWW is $335.92. The carrier has appealed the hearing officer's findings and conclusions as to the issues of extent of injury and disability. It also alleges error in the hearing officer's having closed the record two days after the CCH without scheduling a show cause hearing and allowing the carrier an opportunity to cross-examine the claimant. The appeals file does not contain a response from the claimant.

DECISION

Reversed and remanded.

Although the decision and order reflects that the claimant appeared and that the hearing was translated for the benefit of the claimant, in actuality the claimant was not present. At the beginning of the CCH claimant's attorney stated that the date of the hearing had been changed to an earlier date than that originally given at the benefit review conference (BRC); that he surmised that the claimant was confused and believed the hearing was still scheduled for the original date; and that he had tried without success to contact the claimant. He requested a determination that the claimant had good cause for failure to appear, and moved for a continuance to allow the claimant to be present. The hearing officer denied the request for continuance, stating that it was the claimant's responsibility to keep the Texas Workers' Compensation Commission (Commission) apprised as to how he could be reached. He also said that the claimant may have had good cause for failure to appear but that that could not be determined until "such time as the claimant comes forward." The claimant's attorney then made a general objection to proceeding, stating that the claimant had the burden of proof on the fact issues involved, the right to present his case first, and the right to consult with counsel and to confront adverse witnesses, all of which would be violated by proceeding in his absence. The hearing officer overruled this objection but stated that he would send a letter giving the claimant an opportunity to ask for a hearing to demonstrate good cause for his absence and to present evidence in his case. He noted that while the claimant might be "prejudiced today," that would be cured by his coming forward within 10 days. At that point, the CCH went forward, with the carrier calling one witness.

Toward the close of the hearing, when invited to present closing argument, the claimant's attorney stated he was hesitant to do so in the absence of claimant's testimony. The hearing officer replied that the attorney had no choice and that "I'm closing you and

resting you." The hearing officer went on to state, "You realize, of course, that there may not be another hearing"; that if there was no request from the claimant for an opportunity to show good cause for his absence and no request to open the evidentiary portion of the hearing, "this case is going to be closed now." The attorney reurged his motion for a continuance, which was denied. He also moved to present closing argument after the claimant's testimony, "assuming that we're going to have a second hearing in this case and assuming that there's an opportunity for the claimant to actually testify." The hearing officer responded that there would be opportunity to present evidence and argument, "assuming that we have another hearing," irrespective of the attorney's argument at the close of this hearing. He also said that both attorneys would have the opportunity to make argument "at a later date." With that, both parties proceeded to closing argument. As noted earlier, the record was closed two days later and the decision and order reflects the claimant's presence.

In its appeal the carrier argues that the evidence, in the form of medical records and testimony of (Mr. U), the employer's health and safety manager, was insufficient to support the hearing officer's determination that the claimant's cervical spine, rib cage, and chest conditions are the result of his compensable abdominal injury of (date of injury), and that he had disability therefrom from October 17, 1995, to the date of the hearing. It also argues that the hearing officer has the obligation to ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made. It cites case law concerning due process and the right to cross-examine adverse witnesses.

The Appeals Panel has addressed somewhat similar situations involving a party's failure to appear at a CCH, and later actions taken by a hearing officer following a show cause hearing. In Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, after a show cause hearing in which the hearing officer found that the claimant had no good cause for failing to appear at the CCH, the hearing officer took evidence from both parties and ultimately decided the disputed issues in the claimant's favor. The carrier appealed, contending that because of the good cause ruling the hearing officer should have decided the issues based solely upon the evidence adduced at the first CCH. The Appeals Panel disagreed, stating that 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 the prior hearing."

In Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995, it was the carrier which failed to appear at a CCH where the hearing officer took the claimant's evidence and argument. Following a subsequent show cause hearing, the hearing officer, determining that the carrier did not have good cause, closed the record without receiving carrier's evidence on the merits and rendered a decision based on the evidence from the first CCH. The Appeals Panel, though affirming the good cause ruling, cited Appeal No. 941679, *supra*, as controlling and reversed and remanded to allow for the further development of the evidence, including that of the carrier. *See also* Texas Workers' Compensation Commission Appeal No. 950083, decided March 1, 1995.

Texas Workers' Compensation Commission Appeal No. 950162, decided March 16, 1995, cited both the above cases in reversing and remanding a hearing officer's determination that a finding of no good cause for the claimant's failure to appear resulted in the claimant's forfeiting the right to put on evidence in an effort to meet her burden of proof.

While the above cases are somewhat different from the instant case (most notably in the fact that the nonappearing party, who apparently was not allowed to fully present his case in chief, nevertheless prevailed on the merits), their clear holding is that a ruling on sanctions for a failure to appear does not preclude a party from presenting evidence. Likewise, it should also not foreclose the other party's opportunity to develop its case through cross-examination or direct examination.

We note that the carrier contends it was never informed of a subsequent proceeding and the decision and order does not reflect that one was held. This appears to be because the hearing officer purported to give the claimant 10 days in which to come forward to request an opportunity to show good cause for his failure to appear and also to present testimony (even though the decision shows that the record was closed two days after the hearing). This procedure appears to be at odds with that followed in prior cases, such as those cited above, in which a show cause hearing, allowing for the determination of good cause followed immediately by the further taking of evidence, was affirmatively set by the hearing officer after written notice to both parties. We believe the latter procedure to be clearly preferable. We therefore reverse the hearing officer's decision and order and remand to allow for that procedure to be followed. 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.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge