APPEAL NO. 962387

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was scheduled for September 4, 1996, in (city), Texas, with (hearing officer) presiding as the hearing officer. The appellant (claimant) was not present at the hearing. The hearing officer determined that the claimant did not have good cause for her failure to attend. In addition, the hearing officer noted that the claimant had the burden of proof and that she did not tender any evidence; therefore, the hearing officer rendered a decision that she did not sustain a compensable injury, that she did not timely notify her employer of her alleged injury and that she did not have disability within the meaning of the 1989 Act. In her appeal, the claimant takes issue with the hearing officer's determination that she did not have good cause for failing to attend the September 4, 1996, hearing and requests that she be given a new hearing. In its response, the respondent (carrier) requests affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

In his decision, the hearing officer states that he contacted the attorney the claimant had retained after the benefit review conference (BRC), (Mr. C), and was told by Mr. C that he had spoken to his client, the claimant, on the morning of the hearing and told her that he had forgotten about the hearing and he would not be attending. In addition, the hearing officer notes that the claimant's husband had contacted (Ms. M), a Texas Workers' Compensation Commission (Commission) ombudsman, on the morning of the hearing and told her that the claimant was too sick to attend the hearing. Apparently, the claimant's husband asked the ombudsman to reset the hearing and gave the ombudsman the name and telephone number of the claimant's treating doctor, (Dr. W), a chiropractor, who could verify that the claimant was too sick to attend. The hearing officer called Dr. W's office and was unable to speak to Dr. W but spoke to Dr. W's nurse, who told the hearing officer that she could not verify that the claimant was too sick to attend the hearing because, although Dr. W had treated the claimant for the injury, the claimant had not been to the office for "several weeks."

In her appeal, the claimant states that she spoke to Mr. C on the morning of September 4th and told him that she had too much pain in her shoulder to attend the hearing. She stated that Mr. C said not to worry because he would contact Ms. M and ask for more time, because he was not ready for the hearing. In addition, the claimant asserts that the hearing officer could not have spoken to anyone in Dr. W's office on September 4th because that day was a Wednesday and Dr. W and his staff are not in the office on Wednesdays.

To the extent that the claimant is challenging the hearing officer's determination that she did not have good cause for her failure to attend the hearing on September 4th, our review does not demonstrate that the hearing officer erred in making that determination. The existence of good cause is generally a factual determination. Texas Workers'

Compensation Commission Appeal No. 950044, decided February 21, 1995. A hearing officer's good cause determination is reviewed on appeal under an abuse of discretion standard. *Id.* To determine if an abuse of discretion occurred, we must look to see if the hearing officer "acted without reference to any guiding rules and principles." Morrow v. H.E.B., 714 S.W.2d 297, 298 (Tex. 1986). While it might have been a better practice for the hearing officer to make a record of the conversations he had with Mr. C and the nurse in Dr. W's office to facilitate appellate review, we do not believe his failure to do so compels a determination that the hearing officer abused his discretion. On the contrary, the hearing officer in this instance made several inquiries about the claimant and her failure to appear at the hearing. In so doing, he received conflicting, inconsistent explanations for her failure to appear. Accordingly, we cannot agree that the hearing officer abused his discretion in determining that the claimant did not have good cause for her failure to appear at the hearing.

The determination that the hearing officer did not abuse his discretion in finding that the claimant did not have good cause for her failure to appear at the hearing does not, however, end the inquiry in this case. We must further determine if the hearing officer erred in closing the record and finding against the claimant, without rescheduling a hearing and according her an opportunity to present evidence on the disputed issues. In Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, the Appeals Panel determined, in a case where the claimant did not appear at the original setting of the hearing and did not establish good cause for her failure to do so, that the hearing officer did not err in permitting the claimant to present evidence at a later hearing. In that case, the carrier argued that the claimant's evidence should not have been considered because the claimant did not establish good cause for the failure to appear at the initial hearing. In rejecting that argument, the Appeals Panel noted that the carrier had not cited any authority for its contention. In conclusion, Appeal No. 941679 states:

> 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). *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.11 (Rule 142.11). Under the circumstances of this case, we do not find the hearing officer to have abused her discretion in considering claimant's evidence on the disputed issue.

There have been several subsequent cases where a party did not attend the hearing and the hearing officer determined that that failure was not excused by good cause. In those cases where the hearing officer thereafter did not permit the party who failed to attend an opportunity to present evidence on the merits, the Appeals Panel reversed the decision and

remanded the case for further development of the evidence, whether or not it upheld the hearing officer's determination of the good cause issue. In Texas Workers' Compensation Commission Appeal No. 962225, decided December 18, 1996, the claimant did not appear at the hearing. The hearing officer sent her a letter asking her why she had not attended the hearing. Upon receiving her response, the hearing officer determined that the claimant did not establish good cause for her failure to attend the hearing and he, likewise, entered judgment against the claimant on the merits of the extent of injury issue. The Appeals Panel reversed the hearing officer's decision and remanded for a show cause hearing on the issue of the claimant's failure to appear as well as for a hearing where the claimant is to be given an opportunity to present evidence on the merits of the extent of injury issue.

In Texas Workers' Compensation Commission Appeal No. 960464, decided April 22, 1996, the claimant did not appear at the hearing but the claimant's attorney was present and presented evidence on behalf of the claimant and the carrier also presented testimony and evidence. The hearing officer found for the claimant and the carrier appealed. The Appeals Panel reversed the hearing officer's decision and remanded the case for a show cause hearing on the failure to appear followed immediately by the further taking of evidence. In so doing, Appeal No. 960464, cited prior decisions, and stated:

> 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.

Similarly, in the case of Texas Workers' Compensation Commission Appeal No. 950308, decided April 12, 1995, the claimant did not appear at the hearing. A show cause hearing was subsequently set and the claimant was advised that the only purpose of that hearing would be to discuss the issue of good cause for his failure to appear at the initial hearing. The hearing officer determined that the claimant did not have good cause for the failure to attend and he also denied the claimant's request for a continuance to present evidence on the merits of the disputed issue. The Appeals Panel noted that the hearing officer's denial of the request of a continuance "was the equivalent of applying the ultimate sanction of barring [the claimant's] evidence on the merits of the disputed issue" and determining that, under the guidance of Appeal Nos. 941679 and 950044, *supra*, that outcome was not authorized for a party's failure to appear. To the contrary, Appeal No. 950308 concluded that the sanction authorized for such a violation was an administrative penalty. *See also* Texas Workers' Compensation Commission Appeal No. 950162, decided March 16, 1995 (determining that the hearing officer erred in not considering the claimant's evidence on the merits of the extent of injury issue, despite its affirmance of the

hearing officer's determination that the claimant did not establish good cause for her failure to appear at the hearing); Texas Workers' Compensation Commission Appeal No. 950083, decided March 1, 1995 (reversing and remanding to permit the carrier, who, without good cause, did not attend the hearing, to present its evidence on the merits); Appeal No. 950044, *supra*, (affirming the determination that the carrier did not have good cause for its failure to attend the hearing and, nevertheless, remanding the case to permit the carrier to present evidence on the merits).

Under the reasoning of the above-cited cases, we believe that the hearing officer erred in closing the record and ruling against the claimant, despite our affirmance of his determination that the claimant did not have good cause for her failure to attend the hearing. While the language in Appeal No. 941679, *supra*, states that neither the 1989 Act nor the Commission's rules "require" the ultimate sanction of precluding a nonattending party from presenting evidence, a more accurate statement of our holding, gleaned from a review of subsequent cases where Appeal No. 941679 was applied, would be that our reading of the statute and the rules indicates that, after a single failure to appear, with or without good cause, the hearing officer is without the authority to do so. Therefore, we reverse the hearing officer's determinations that the claimant did not sustain a compensable injury, did not timely report her injury to her employer and did not have disability and remand the case for another hearing where the claimant is to be given the opportunity to present her evidence on the merits of those issues. We affirm the hearing officer's determination that the claimant did not have good cause for her failure to attend the hearing of September 4, 1996.

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.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge