APPEAL NO. 970121

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 17, 1996, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. There was no appearance at the CCH by the appellant (carrier) and after an eleven-minute hearing, the hearing officer determined that respondent (claimant) had disability from (date), (all dates are 1996) to the date of the CCH, that claimant's average weekly wage (AWW) was $126.00 based on a fair, just and reasonable standard and that claimant had not wilfully intended "to injure himself by leaving the truck on (date of injury)."

Carrier expresses disagreement with certain of the hearing officer's determinations but basically contends reversible error in that the hearing officer failed to allow the carrier to show good cause for its failure to appear or present evidence on the merits. Carrier requests that we reverse the hearing officer's decision and remand the case for a show-cause hearing and to allow carrier to present evidence on the merits. The file does not contain a response from claimant.

DECISION

Reversed and remanded.

As noted above, and alleged by carrier, carrier did not appear at the CCH. One of the hearing officer's exhibits was the notice setting the case for hearing. We note that the case was originally set for December 30th at 1:30 p.m. but that time and date had been marked out and December 17th at 9:00 a.m. had been written in with a hand-written notation "Commission own motion to move Contested Case Hearing Date & Time." There was no evidence, one way or the other, that carrier had been given notice of the new hearing date and time. The hearing officer proceeded to conduct an eleven-minute hearing and when claimant rested his case, the hearing officer, after commenting, "subject to a remand," closed the record and issued a decision. Carrier apparently was not given any opportunity to show good cause much less present evidence on the merits.

The Appeals Panel has addressed the situation where one party or the other does not enter an appearance at the CCH a number of times and more recently in Texas Workers' Compensation Commission Appeal No. 962387, decided January 14, 1997. In that case, and others, we have held that a party may have committed a Class C administrative violation by failing to appear and failing to show cause, but must be given at least one additional opportunity to present evidence on the merits, regardless whether that party had shown good cause for failing to appear. Appeal No. 962387 *cited* Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, a case where the claimant did not appear at the original setting of the hearing and did not establish good cause for failure to do so. The Appeals Panel held 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.

Appeal No. 962387 cites a number of other cases with similar rulings.

Under the reasoning of Appeal No. 962387, *supra,* and cases cited therein, we find that the hearing officer erred in closing the record and ruling against the carrier. We would further note that the hearing officer made no determinations on carrier's failure to show good cause, or even allowed carrier an opportunity to show good cause. 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 preclude the nonattending party from presenting evidence on the merits. Therefore, we reverse the hearing officer's determinations that the claimant had certain periods of disability, that claimant's AWW was $126.00 and that claimant did not wilfully attempt to injure himself and remand the case for another hearing where carrier is to be given the opportunity to present evidence, not only to show good cause for failure to appear but also on the merits.

Parenthetically, we would further note that the hearing officer's determination of the AWW is not supported by the evidence. Claimant clearly testified that he earned $4.50 an hour, eight hours a day, three days a week. In response to the hearing officer's question, claimant reiterated that he never worked more than three days a week. Subsequently, after some discussion, claimant said that "every once in a while [I] worked four days a week - part-time." The hearing officer's discussion that claimant worked 30 hours a week and the determination that "the fair, just and reasonable weekly wage of $126.00 a week calculated as 3½, eight hour days a week at $4.50 an hour" is not supported by the evidence. That determination is also remanded for a determination which is supported by the evidence.

Pending the 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCUR IN THE RESULT:

Robert W. Potts
Appeals Judge