

APPEAL NO. 990028

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 3, 1998, a hearing was held. She closed the record on December 14, 1998, after providing appellant (claimant) 10 days to request a hearing after being absent on December 3, 1998; she then determined that claimant did not sustain a compensable injury, did not timely report an injury, and did not have disability. She also found that claimant was not barred by an election of remedies. Claimant appeals, stating that he did contact the Texas Workers' Compensation Commission (Commission) within 10 days, and says he appeals. The appeals file contains no reply from respondent (carrier).

DECISION

We reverse and remand.

Claimant was not present at the hearing held on December 3, 1998. His appeal states that he telephoned the Commission on December 11, 1998, within the 10 days provided to him in a letter from the hearing officer.

The appeals file contains a copy of a letter from the hearing officer to claimant dated December 3, 1998. That letter tells claimant, "you may contact this Commission office within ten days of the date of this letter to request that the contested case hearing in this matter be reconvened to permit you to present evidence on the issue, and to show cause. . . ." At the bottom of the letter claimant was told, "if you have any questions please contact the hearings clerk MW at" The appeals file also contains a letter from claimant dated December 13, 1998, but also carrying what appears to be a fax dated at its top of "Dec 15 98 03:50p." While 10 days from December 3, 1998, December 13, 1998, falls on a Sunday, the following Monday is December 14, 1998, and it appears that claimant's letter was not provided to the Commission by that time, especially since it is stamped as received on December 16, 1998.

Claimant's letter dated December 13, 1998, to the hearing officer begins by referencing a conversation he had with "MW's" replacement" on December 11, 1998, adding that he told that replacement that his absence was unavoidable because he got lost in the woods.

The Appeals Panel is not a fact finder. We do not know whether claimant's statement is accurate regarding his contact with the Commission on December 11, 1998. We do note that the hearing officer's letter does not say that his response must be in writing, but rather told claimant to "contact" the Commission. Since the hearing officer closed the record on December 14th, it is conceivable that she did not have claimant's letter, apparently faxed on December 15th, at the time she wrote her decision. We believe therefore that the best recourse is for the case to be remanded for another hearing.

In addition to the reason set forth above, Texas Workers' Compensation Commission Appeal No. 962387, decided January 14, 1997, indicates that "after a single failure to appear" the hearing officer does not have authority to preclude the nonattending party from presenting evidence. See *also* Texas Workers' Compensation Commission Appeal No. 960464, decided April 22, 1996, which referred to a process in which a party was given 10 days to request an opportunity to show cause; the Appeals Panel in that case commented that another procedure would be for the hearing officer to "affirmatively set" a hearing date, with written notice to both parties, at which time cause could be considered and, regardless of the outcome concerning cause, evidence on the merits could be presented. *Also see* Texas Workers' Compensation Commission Appeal No. 970121, decided March 4, 1997, which also applied the "single failure to appear" criteria in remanding for another hearing. Another hearing should be set at which time either party may present evidence, regardless of whether claimant's evidence relating to good cause is swallowed or not. The Appeals Panel has not held that should claimant fail to appear for the next hearing set, after adequate notice has been given, that the hearing officer could not then issue a decision.

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.

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge