

APPEAL NO. 990832

On March 24, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the compensable injury extends to reflex sympathetic dystrophy (RSD); and (2) what is the impairment rating (IR) of the appellant (claimant). The claimant requests reversal of the hearing officer's decision that: (1) the compensable injury of _____, does not extend to RSD; (2) the claimant has a zero percent IR; and (3) claimant and her attorney do not have good cause for failure to attend the CCH. The respondent (self-insured) contends that the claimant's request for appeal was not timely filed and requests affirmance of the hearing officer's decision.

DECISION

Reversed and remanded.

The hearing officer's decision was distributed on April 5, 1999. Claimant states that the hearing officer's decision was received on April 7, 1999. The claimant's request for review is date-stamped as being received by the Texas Workers' Compensation Commission (Commission) on April 21, 1999. The claimant's request for review was timely filed within the 15-day filing period. Section 410.202(a).

The claimant and her attorney did not appear at the CCH and no exhibits were tendered on claimant's behalf. The carrier appeared and presented exhibits. The exhibits reflect that claimant sustained an injury to her right hand at work on _____. The benefit review conference (BRC) report reflects that claimant reached maximum medical improvement (MMI) on March 26, 1996. Dr. W examined claimant and reported in April 1994 that claimant had no convincing evidence of RSD. Dr. F examined claimant in March 1996 and reported that claimant had no objective evidence of RSD and that claimant has a zero percent IR. Dr. C reviewed claimant's medical records and reported in July 1998 that the records indicated that there is no objective evidence that claimant has RSD and that claimant has a zero percent IR. Dr. M, the designated doctor chosen by the Commission, examined claimant in August 1998 and reported that he did not find any of the physical signs that would be expected in someone with longstanding RSD and that claimant has a zero percent IR.

The hearing officer properly placed the burden of proof on claimant on the issues in dispute. The hearing officer found that the injury sustained by claimant on _____, does not include RSD and that the designated doctor's finding of a zero percent IR was not overcome. The hearing officer concluded that the compensable injury of _____, does not extend to RSD and that claimant has a zero percent IR. The claimant appeals those findings and conclusions, asserting that she has medical evidence to the contrary.

A February 12, 1999, Commission notice to the parties and their attorneys stated that the CCH was set for March 24, 1999, at 1:00 p.m. At approximately 6:00 p.m. on March 23, 1999, claimant's attorney sent a letter by facsimile transmission to the Commission to the attention of the hearing officer and in that letter requested a continuance of the CCH and noted that the self-insured's attorney, through his assistant, had agreed to a rescheduling of the CCH. The hearing officer was unable to contact the claimant's attorney but did contact the claimant's attorney's legal assistant several hours before the CCH was to be held and told her that the CCH was going to be held as scheduled. As noted by the hearing officer, the claimant's request for continuance did not meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(c) (Rule 142.10(c)). It did not state the reason for continuing the CCH and it was not sent to the Commission no later than five days before the CCH.

The hearing officer learned from a Dispute Resolution Information System entry made by a Commission employee the afternoon of March 23rd and from telephone conversations with claimant's attorney's legal assistant on March 24th that the reason for the request for continuance was that claimant's attorney was to be in a trial on March 24th. The self-insured's attorney indicated at the CCH that he had agreed to a continuance but that he had no problem with how the hearing officer was handling the matter, that is, denying claimant's request for continuance and proceeding with the CCH. The hearing officer expressed doubts as to whether claimant's attorney was actually in a trial, given the timing of the motion for continuance and the manner in which information was imparted to him by the legal assistant. The hearing officer also noted at the CCH that claimant and claimant's attorney had signed a Commission form at the BRC held on February 9, 1999, which stated that the hearing officer would not reschedule or continue the CCH because of any conflicts in schedules that happened after that date.

Section 410.156(a) provides that each party shall attend a CCH and subsection (b) provides that a party commits a violation if the party, without good cause as determined by the hearing officer, does not attend a CCH, and that a violation under this subsection is a Class C administrative violation. Rule 142.11 states that failure to attend a benefit CCH without good cause, as determined by the hearing officer, is a Class C administrative violation, with a penalty not to exceed \$1,000.00. The claimant appeals the hearing officer's finding that claimant and her attorney do not have good cause for failure to attend the CCH. Claimant's attorney states in the request for review that on March 22nd the legal assistant he works with informed claimant that the CCH had been rescheduled and that on March 23rd the legal assistant informed him that she had confirmed that the CCH had been removed from the March 24th docket by speaking with a Commission employee named (Ms. M) and that the legal assistant informed him on March 23rd that the CCH had been rescheduled and that a new CCH date would be provided the following day. Claimant's attorney states that he and claimant relied upon the representations of the legal assistant and he attended several matters pending in court on March 24th and subsequently learned that the CCH had not been rescheduled and had taken place.

In Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995, a carrier failed to appear at a CCH, the hearing officer held a show cause hearing and found that carrier did not have good cause for failing to appear at the CCH, and the hearing officer closed the record, without receiving carrier's evidence on the merits, and issued her decision on the basis of the evidence presented by claimant at the CCH. In Appeal No. 950044, the Appeals Panel upheld the hearing officer's decision that carrier had not shown good cause for failing to appear at the CCH; however, the Appeals Panel reversed and remanded the case stating that:

However, after the hearing officer entered her decision in this case, the Appeals Panel decided the issue of whether a party, who failed to establish good cause for his failure to appear at the hearing, was, therefore, precluded from offering evidence on the merits of the case at a subsequent hearing. In Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, a case involving a claimant who, without good cause, failed to appear at the scheduled CCH, we stated:

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).

The claimant was allowed to present evidence at a rescheduled hearing. The decision in Appeal No. 941679 is controlling in this case which also does not involve repeated failures to appear at a scheduled CCH. Accordingly, we reverse the decision and order of the hearing officer and remand the case for further development of the evidence and reconsideration of the disputed issues on the basis of all of the evidence, including that of the carrier.

In the case presently under consideration, the hearing officer should allow the claimant and the claimant's attorney an opportunity to show good cause for not attending the CCH on March 24th. There is some indication in claimant's request for review that a Commission employee may have informed the legal assistant that works with claimant's attorney that the CCH had been rescheduled or was going to be rescheduled and the circumstances of that assertion may be developed. We find our decisions in Appeal Nos. 941679 and 950044, *supra*, to be controlling under the circumstances presented in the instant case, which also does not involve repeated failures to appear at a scheduled CCH. Consequently, in addition to remanding the case for further consideration and development of the evidence on the matter of good cause for not attending the CCH, we remand for further development of the evidence and for reconsideration of the disputed issues on RSD and IR on the basis of all of the evidence, including that which may be presented by

claimant at the CCH on remand, whether or not the hearing officer finds good cause for claimant's failure to appear at the March 24th CCH.

The hearing officer's decision and order on the issues of RSD, IR, and good cause for claimant's and claimant's attorney's failure to attend the CCH are reversed and the case is remanded to the hearing officer. 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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge