

APPEAL NO. 991453

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 6, 1999, with the record closing on June 8, 1999. The issues at the CCH were average weekly wage (AWW), disability, and whether the Texas Workers' Compensation Commission (Commission) abused its discretion in approving an alternate treating physician. The hearing officer determined that the AWW was \$56.18, that the appellant (claimant) had disability from September 28, 1998, ending on May 6, 1999, and that there was no abuse of discretion in approving the change in treating doctors. The claimant appeals a number of findings of fact and conclusions of law concerning the AWW and disability determinations on both an evidentiary sufficiency basis and a lack of due process in precluding the claimant from presenting all his evidence. The respondent (carrier) urges that claimant has been afforded all due process rights and had continued to thwart the reasonable attempts to permit him to present any additional evidence. Carrier also urges that there is sufficient evidence to support the findings and conclusions of the hearing officer and asks that the decision be affirmed in all respects.

DECISION

Reversed and remanded.

Our reversal is caused by an incomplete record in this case and the remand is for the proper construction or reconstruction of the record. According to the record before us, the CCH in this case was properly set for hearing on May 6, 1999. Upon convening the hearing, it was stated that the claimant had failed to appear. His attorney was present, indicated that he did not know the claimant's whereabouts, although his office had attempted to contact the claimant, and that he thought he would show up shortly. He further indicated that he had talked to the claimant the day before and that the claimant was aware of the hearing. Both the claimant, through his attorney, and carrier presented documentary evidence and the carrier called two witnesses. Although a recess was taken for approximately an hour after the carrier presented its exhibits and the testimony of a witness to attempt to have the claimant appear, the claimant did not appear at the CCH. After a discussion, the hearing officer stated he would send a "10 day letter" to the claimant and the hearing and recording ended. From that point forward, there is no record that has been forwarded to the Appeals Panel. However, in the files there is a copy of a letter dated May 17, 1999, with the indication //S// over the hearing officer's signature block and addressed to the claimant stating:

You failed to appear for a contested case hearing held on May 6, 1999. Your attorney did appear and I allowed evidence to be presented. If you wish to present additional evidence in this proceeding, please contact me within ten days of receipt of this letter or I will issue a decision based on the evidence currently in the record. I am taking the liberty of tentatively scheduling a new hearing but will cancel that date if I do not hear from you.

There is nothing in record to show any scheduling or rescheduling of a CCH or of any further proceedings in the case. The tape recording of the proceedings is blank after the May 6, 1999, hearing. In his Decision and Order, the hearing officer states the claimant was mailed a 10-day letter to which he failed to respond. We conclude from the statement in the carrier's brief that the record in this case regarding this issue is not complete and not before us. In the brief it is asserted that:

The Hearing Officer conducted the Hearing that day to the extent we could go forward with Carrier's case. The Hearing Officer sent a 10 day letter, and the Case was rescheduled for a subsequent CCH on June 8, 1999. Carrier was present and prepared to go forward with the CCH on June 8, but neither the Claimant nor his attorney came to the Hearing. The Hearing Officer indicated no one had heard from the Claimant and called Claimant's attorney from the Hearing Room. It was represented that the Attorney had not heard from him either and they did not plan to attend the rescheduled CCH. Therefore, the Claimant was given two opportunities to present his case to the Hearing Officer, and he did not avail himself of either.

As indicated, there is no record before us concerning a rescheduled CCH or of any proceedings following the conclusion of the hearing on May 6, 1999. The ambiguity in the letter of May 17 about a "tentatively" scheduled hearing or any proceedings thereafter are not a part of the record forwarded. Thus, we necessarily remand for development of or reconstruction of the record regarding this matter. While we have held that failure to appear at an initial hearing does not bar a party from presenting its evidence, Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995; Texas Workers' Compensation Commission Appeal No. 962387, decided January 14, 1997, we have also affirmed action by hearing officers in closing a record and entering a decision where there is a failure to appear at a subsequent scheduled hearing. See Texas Workers' Compensation Commission Appeal No. 971530, decided September 18, 1997; Texas Workers' Compensation Commission Appeal No. 971333, decided September 2, 1997 (Unpublished). Here, there is simply no record or evidence concerning the asserted second scheduled proceeding. We remand on this limited issue. However, in the event there were no subsequent proceedings scheduled or opportunity to present evidence afforded the claimant, the hearing officer should consider further development of the evidence and reconsideration of the AWW and disability issues.

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.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge