

## APPEAL NO. 001315

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 convened on August 20, 1999; November 5, 1999; and May 19, 2000. The appellant (claimant) did not appear at any of the scheduled hearings. (Hearing Officer) presided as hearing officer. He determined that: (1) claimant did not have good cause for his failure to appear at the May 19, 2000, hearing; and (2) claimant did not have disability from November 13, 1997, to November 25, 1997, and from January 29, 1998, to March 2, 1999. Claimant, who is incarcerated, mailed a request for review stating that he "appealed everything." The file does not contain a response from respondent (carrier).

### DECISION

We affirm as reformed.

Claimant did not appear at any of the three convened hearings. Claimant wrote letters to the Texas Workers' Compensation Commission (Commission) dated August 10, 1999; September 7, 1999; and November 15, 1999, stating that he is incarcerated and indicating that he still wished to pursue his claim. On September 28, 1999, the hearing officer wrote a letter to claimant at the address given by claimant as the return address on his September 7, 1999, letter, stating that the August 20, 1999, hearing had been continued in order to give claimant an opportunity to hire an attorney or find someone to act on his behalf. The hearing officer noted that an ombudsman stated at the August hearing that she cannot act on claimant's behalf as his representative. An ombudsman also sent claimant a letter stating that she could not represent him in his absence.

The hearing officer admitted into evidence a benefit review conference (BRC) report dated June 29, 1999, which indicated that claimant was present at the BRC. In that report the benefit review officer (BRO) recommended that claimant did not have disability. Accompanying the BRC report was a Commission letter to the parties dated June 29, 1999, which transmitted the BRC report and advised the parties of the time, date and place for the hearing to take place on August 20, 1999. The letter was mailed to claimant at the following address: (address), which, according to the Commission's records, was the last address provided to the Commission for claimant at that time. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(a) (Rule 102.5(a)) provides that all Commission notices and written communications to a claimant will be mailed to the last address supplied by the claimant. There is no "show cause" letter contained in the record.

The Appeals Panel has disapproved of the barring of a party's evidence as a consequence of failing to show good cause for a failure to appear at a hearing. See *e.g.* Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995. In this case, it appears that the hearing officer treated claimant's letters as requests for continuance, and granted two continuances. The hearing officer wrote to claimant at the address given by claimant as his return address and advised him of the need for

representation of some sort. Claimant did not obtain representation for the hearings and did not appear. No evidence was admitted on claimant's behalf on the issue of disability. The hearing officer determined that claimant did not meet his burden of proof regarding disability. We conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the hearing officer's determination that claimant did not have good cause for failing to appear, we strike that determination because there is nothing to show that claimant was advised of or that claimant knew about this issue or that he was required to show such good cause. In any case, we note that Rule 142.11 generally provides that failure to attend a hearing can result in an administrative violation unless good cause is determined by the hearing officer. Such lack of good cause would not prevent a claimant from presenting evidence. Regarding due process concerns, we note that claimant was given three opportunities to present evidence at a hearing, despite his failure to appear at some hearings.

We affirm that part of the hearing officer's decision and order that determines that claimant did not have disability from November 13, 1997, to November 25, 1997, and from January 29, 1998, to March 2, 1999. We reform the decision and order to strike the hearing officer's determination that claimant did not have good cause for failing to appear at the May 19, 2000, hearing.

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Judy L. Stephens  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Robert W. Potts  
Appeals Judge