APPEAL NO. 002350

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 September 13, 2000. The issues at the CCH were injury, disability, and whether the respondent's (self-insured) contest of compensability was based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The appellant (claimant) did not appear at the CCH, which had been continued a number of times before as outlined both by the hearing officer's decision and by the exhibits attached to the claimant's appeal. (The claimant's exhibits were not admitted into evidence and will not be considered on appeal, but that does not affect our decision.) The hearing officer closed the record and issued a decision determining that: (1) the claimant did not sustain a compensable injury on _____, or on any other relevant date; (2) the claimant has not had disability; (3) the self-insured's contest of compensability is based on newly discovered evidence (a videotape and a surveillance report) which could not reasonably have been discovered at an earlier date, allowing the self-insured to reopen that issue; and (4) the claimant did not have good cause for his failure to appear at the CCH on September 13, 2000. The claimant appeals, contesting these determinations as being against the great weight and preponderance of the evidence, stating that he never received notice of the September 13, 2000, CCH, and stating that the hearing officer did not send out the customary 10-day letter. He argues that he is unaware of any court which proceeds to judgment without a party's being present. The self-insured asserts that the appeal is untimely and questions the claimant's assertion that he did not receive the setting notice.

DECISION

The request for appeal having been untimely filed, the Appeals Panel has lost jurisdiction to consider the appeal.

Although the appeal is untimely, we feel that some discussion of the hearing officer's exercise of discretion to write the decision in the absence of the claimant is in order. We first note that the hearing officer's decision sets out, based upon evidence from the Texas Workers' Compensation Commission (Commission) files that were entered as a hearing officer's exhibit at the September 13 CCH, the protracted procedural history of the case, involving several continuances and the failure of the claimant to attend a previous CCH when he called in that morning (May 4) and asserted that he had a migraine headache. Another continuance was requested for the death of a parent and because the claimant sought to get additional records.

At the January 5, 2000, CCH, the parties offered exhibits which were ruled on and admitted. The claimant objected to some, but not all, of the carrier's exhibits for failure to exchange, noting that the exchange was sent to an old address where the claimant had received his temporary income benefits. The hearing officer admitted the documents, noting that the claimant had provided the address in question. The evidence also included Hearing Officer's Exhibits Nos. 1 through 5. The parties were sworn for testimony. The

ombudsman then requested a recess so that the claimant could review the evidence from the carrier. After the recess, the claimant made a request for a continuance, which was unopposed.

We note that the record reflects that the claimant had initially called in May to ask for a continuance of the June 29th CCH because he would be out of town. This was apparently denied. The June 29th CCH, attended by both parties, began with a request from the carrier for a continuance because the claimant had not complied with a subpoena request for the records of his business; the claimant said that he would agree with this request for a continuance because, he contended, although a partner of his business, he was having trouble getting these records because the CPA had them. The hearing officer initially denied the request for continuance. The claimant said it was likely he could have his business records in 30 days, and the ombudsman then made a request for a recess on behalf of the claimant to analyze some carrier-furnished records that the claimant contended he had only received the previous Saturday. After a recess, the claimant moved for a continuance. The hearing officer expressed his great concern over the delay but then granted the essentially unopposed continuance, stating that another one would not be granted. He also stated that, in case of a "no show" by either party in the future, he would be inclined to close the record and write a decision. (Although the hearing officer recited that documentary evidence was presented at this CCH, this is not included on the tape recording of the CCH; all documentary evidence of the parties had been admitted at the January 5, 2000, CCH.)

At the September 13 CCH, the hearing officer asked the carrier if the claimant had complied with the subpoena and was told that he had not. As the hearing officer indicated, while any one of the reasons given for continuing the CCH would be good cause on its own, the totality of the procedural history (including a continued failure of the claimant to produce subpoenaed documents) persuaded him that the claimant was not diligently prosecuting his claim. While the ombudsman said she had not personally spoken with the claimant (he had been prepared and assisted primarily by another ombudsman), she said she had tried to call him the day of the CCH and was unsuccessful. The September 13 setting was made on June 30 after a joint request for continuance of the June 29 CCH. The Dispute Resolution Information System notes which were admitted into evidence on September 13 as a hearing officer exhibit do not reflect that the claimant called or contacted the field office of the Commission after June 29, 2000, to complain of any failure to receive a notice of a CCH.

Section 410.156 makes clear that attendance of a party is required at a CCH. While the sanction for failure to appear is an administrative penalty, we cannot agree that the hearing officer may never write what is in essence a "default judgment" when a party fails to appear. We would further note that there was evidence already developed at previous hearings, including the claimant's medical exhibits, on which the hearing officer based his decision. The carrier presented no new evidence at the September 13 CCH. The situation here did not present, as in Texas Workers' Compensation Commission Appeal No. 962387, decided January 14, 1997, a "single" failure to appear at the CCH and subsequent

writing of a default decision. By contrast, the claimant here had two opportunities to present live testimony and did not do so, and all documentary evidence upon which the decision was based was admitted at the very first session of the CCH. The hearing officer explained at the September 13 CCH that, because of the procedural history of the case, he was not sending out a "ten-day" letter. This letter is not required by any rules of the Commission.

On the matter of timeliness of the appeal, Section 410.202(a) requires an appeal to be filed within 15 days after the party receives the hearing officer's decision. (The opening paragraph of the claimant's appeal indicates that he may believe the appeal deadline to be 20 days, and he asserts a timely filing within that time.) We note that the claimant asserts that he "first become aware" of the September 13 setting when he received the hearing officer's decision on September 18. He recites this date of receipt not once but twice within his appeal and the date is likewise contained in his attached affidavit. Although the decision was not mailed from Austin until the 18th, it would have been available before then had the claimant called to request it. We are therefore unable to conclude that the claimant is mistaken in his three assertions that he received the decision on September 18. The claimant's appeal was mailed on October 5, which is more than 15 days from the recited receipt date of September 18, and was received by the Commission on October 10, which is more than 20 days from the recited receipt date. The decision of the hearing officer is final in the absence of a timely appeal. Section 410.169.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge