

APPEAL NO. 013216
FILED FEBRUARY 7, 2002

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 November 20, 2001, with the record closing on December 13, 2001. The appellant (claimant) did not appear at the CCH, nor was she represented. The hearing officer was advised prior to commencement of the hearing, by a Texas Workers' Compensation Commission (Commission) ombudsman, that the claimant could not attend because she was incarcerated. Although no testimony was taken, the hearing officer admitted exhibits into evidence, including the benefit review conference report, a Dispute Resolution Information System (DRIS) note, and a 10-day notice letter sent to the claimant.

With respect to the issue before him, the hearing officer determined that the claimant did not have disability resulting from her compensable injury sustained on _____, for the period from March 4, 2001, through the date of the CCH. The claimant appeals the hearing officer's determination. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

The claimant's appeal states that she was unable to attend the CCH because she was incarcerated just prior to the CCH and has remained incarcerated since that time. A 10-day letter generally is sent when a claimant failed to show up for a scheduled proceeding and did not contact the Commission beforehand. The 10-day letter dated November 27, 2001, which was sent to the claimant at what appears to be a rural residential address, rather than an address for a jail, contains this statement: "You did not appear at the hearing, nor did you contact the Commission of your intentions with regard to such." The DRIS note (Hearing Officer's Exhibit No. 2) dated November 19, 2001, proves otherwise, as it reads:

TALKED TO SISTER WHO SAYS CLMT IS IN JAIL AND WILL NOT BE OUT TOMORROW TO ATTEND CCH. EXPLAINED THAT CLMT NEEDED TO SEND LTR TO THE H.O. IF SHE WANTED THIS RESET ONCE SHE IS RELEASED.

It is clear from the record that the hearing officer was provided with the DRIS note prior to the hearing. Contrary to the statement in the 10-day notice letter that was sent by the hearing officer, the Commission was informed of the claimant's intentions with regard to attending the hearing. The DRIS note indicates that the claimant's sister called on the

claimant's behalf to indicate that the claimant was unable to attend the CCH. The information about incarceration put the hearing officer on notice that the claimant was unable to attend due to circumstances beyond her control, and he should have treated it as a request for a continuance. The situation did not call for the issuance of a 10-day letter. In any event, the 10-day letter was sent to a residential address when the hearing officer had reason to believe that the claimant was not at that address. We believe this was unfair to this claimant.

We reverse a hearing officer's determinations on the issues only where they are so against the great weight and preponderance of the evidence to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Under the circumstances of this case, it would be manifestly unjust to allow the hearing officer, who had reason to know that the claimant was unable to attend the hearing, to render a Decision and Order without affording the claimant an opportunity to present her case. Accordingly, the hearing officer's decision is reversed and remanded to allow the claimant a reasonable opportunity to present evidence. We suggest the possibility of a telephonic appearance if the claimant is not free to attend in person.

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, which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the carrier is **TOKIO MARINE AND FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**BRIAN C. NEWBY
400 WEST 15TH, SUITE 200
AUSTIN, TEXAS 78701-1647.**

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Terri Kay Oliver
Appeals Judge