

APPEAL NO. 031938
FILED SEPTEMBER 10, 2003

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 held on June 9, 2003. The hearing officer determined that respondent 1 (claimant) is entitled to lifetime income benefits (LIBs) based on the loss of sight in both eyes; that the appellant (Subsequent Injury Fund (SIF)) is liable for LIBs pursuant to Section 408.162 and those benefits began to accrue on August 10, 1997; and that respondent 2 (carrier) is entitled to reimbursement from the SIF for overpayment of supplemental income benefits. With the exception of the determination that the claimant is entitled to LIBs, the SIF appeals the hearing officer's decision and contends that by not giving it an opportunity to show cause for its failure to appear at the hearing, it was not "afforded due process." The SIF does not allege that it did not receive notice of the hearing. The claimant and the carrier responded to the SIF's appeal.

DECISION

Reversed and remanded.

The record reflects that although the SIF is not listed in the heading of the case as a party, it was notified of the time and date of the hearing, but a representative from the SIF did not appear at the hearing. The hearing officer closed the hearing on the date it was convened and did not send a "show cause" letter to the SIF. The hearing officer did not make a finding regarding good cause for the failure of the SIF to attend the hearing. Texas Workers' Compensation Commission Appeal No. 962387, decided January 14, 1997, indicates that "after a single failure to appear," the hearing officer does not have authority to preclude the nonattending party from presenting evidence. See Texas Workers' Compensation Commission Appeal No. 960464, decided April 22, 1996, which referred to a process in which a party was given 10 days to request an opportunity to show cause; the Appeals Panel in that case commented that another procedure would be for the hearing officer to "affirmatively set" a hearing date, with written notice to both parties, at which time cause could be considered and, regardless of the outcome concerning cause, evidence on the merits could be presented. *Also see* Texas Workers' Compensation Commission Appeal No. 970121, decided March 4, 1997, which applied the "single failure to appear" criterion in remanding for another hearing. That case held that another hearing should be set at which time either party may present evidence, regardless of whether the evidence relating to good cause is found to be credible by the hearing officer.

There is no evidence that a "show cause letter" was sent to the SIF in this case or that another hearing was scheduled. We find our decisions in Appeal Nos. 960464 and 970121 to be controlling under the circumstances presented in the instant case, which does not involve repeated failures to appear at a scheduled hearing. In accordance with our precedent, the hearing officer should schedule another hearing,

order the SIF to attend, afford the SIF the opportunity to show good cause for not attending the prior hearing, and take evidence on the merits of the case. In addition to remanding the case for consideration and development of the evidence on the matter of good cause for failure to attend the hearing, we remand for further development of the evidence and for consideration of the following disputed issues: (1) whether the SIF is liable for LIBs and, if so, on what date should payment of those benefits have begun; and (2) if the SIF is liable for LIBs, is the SIF liable to reimburse the carrier for the amount of income benefits that the carrier overpaid the claimant for which the SIF was liable? Texas Workers' Compensation Commission Appeal No. 030330-s, decided April 2, 2003, may be instructive in the resolution of the disputed issues on remand. As the SIF does not dispute that the claimant is entitled to LIBs based on the loss of sight in both eyes and the carrier did not appeal, the hearing officer need not consider that issue on remand.

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Chris Cowan
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge