

APPEAL NO. 042753  
FILED DECEMBER 15, 2004

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 15, 2004, with the record closing on October 4, 2004. The respondent (claimant) and the claimant's attorney appeared at the CCH, but neither the appellant (carrier) nor its attorney appeared. The hearing officer resolved the disputed issues by deciding that on \_\_\_\_\_, the claimant sustained a compensable injury and that the claimant had disability beginning on April 17, 2004, and continuing through the date of the CCH. The carrier appeals, contending that neither it nor its attorney received the 10-day show cause letter, that it had good cause for failing to attend the CCH, that no evidence supports the hearing officer's findings of fact and conclusions of law, and that the hearing officer's findings of fact and conclusions of law are against the great weight and preponderance of the evidence. The carrier requests that the case be remanded to the hearing officer for further proceedings. The claimant responds that both the claimant and the claimant's attorney received a copy of the 10-day letter, that prior to the CCH the claimant's attorney twice provided the claimant's CCH document exchange to the carrier's attorney, that there is no good cause for carrier's failure to attend the CCH, that there is insufficient evidence that the carrier's attorney did not receive the 10-day letter, and that the hearing officer's findings of fact and conclusions of law are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. The claimant requests that the hearing officer's decision be affirmed.

DECISION

Reversed and remanded.

According to the benefit review conference (BRC) report, attorney 1 represented the carrier at the BRC. Attorney 2 represents the carrier on appeal. Attorney 1 and attorney 2 are both associated with the law firm. The CCH was scheduled for September 15, 2004, and was held on that date. The claimant presented testimony and documentary evidence in support of his claim. Since the carrier did not appear at the CCH, the hearing officer said that he would send a 10-day letter to the carrier. The carrier does not contend that it failed to receive notice of the CCH. Attorney 2 states that the carrier missed the CCH due to a computer glitch in the law firm's calendar program, which inadvertently dropped the CCH off the calendar. Attorney 2 states that the computer glitch has been corrected.

A copy of the 10-day letter is a hearing officer exhibit. It is dated September 15, 2004, and is addressed to the law firm to the attention of attorney 1. The law firm's address is correct. The 10-day letter also contains the name of the carrier and the Texas Workers' Compensation Commission (Commission) box number of the carrier's Austin representative. The claimant's name and the claimant's attorney's name with

their respective addresses are listed in the copy section of the letter. The 10-day letter begins "Dear (Attorney 1)" and states that a CCH on the referenced claim (claimant's) was scheduled for September 15, 2004; that notice of the CCH was mailed to you; that you did not appear at the CCH; that the record was opened, developed, and closed at the CCH; that a proposed decision based on the record will be prepared; that you may contact the Commission office within 10 days of the letter to request that the CCH be reconvened to permit you to present evidence on the issues and to show good cause why you failed to attend the CCH; that if you do not want the CCH reconvened, you do not need to contact the Commission; and that the office will postpone filing the proposed decision, or taking any other action in connection with the CCH until after 10 days of receipt of the letter. The 10-day letter is signed by the hearing officer.

The hearing officer notes in the decision that the carrier failed to appear at the CCH; that following the CCH a letter was sent to the carrier giving the carrier 10 days from receipt to request the CCH be reconvened to allow the carrier to show cause for its absence and to present evidence on the issues; and that as of October 4, 2004, the carrier had not responded and the decision was prepared.

The carrier attaches affidavits to its appeal and states in the appeal that "the evidence clearly shows that the 10-day letter was not received by (the law firm) or the Carrier." The carrier requests that the case be remanded for a CCH "since good cause has been shown for Carrier's failure to attend the hearing."

Attorney 2 states in his affidavit that attorney 1 transferred the case to him after the BRC, that the law firm never received the 10-day letter, that "our" first notice of the missed CCH was when "we" received the decision, and that the carrier had good cause for not attending the CCH because it was inadvertently dropped off "our" calendar due to a computer glitch. Attorney 1 states in his affidavit that he never received a 10-day letter regarding the carrier's failure to attend the CCH, and that "our" first notice of the missed CCH was when "we" received the decision. Also attached to the appeal is an "Affidavit of Non-Existence of Business Record" by DG, who states that he is the custodian of records for "ARCM I" and that as of November 2, 2004 (the date of the affidavit) there is no record of a 10-day letter having been received from the Commission regarding "Missed CCH (a claim number is written next) referencing scheduled 9-15-04." It is unclear what connection "ARCM I" has to the case and the claim number given in DG's affidavit does not match the Commission's claim number for the case or the insurance company number shown on the notice setting the CCH.

The claimant's attorney states in the response that the claimant and the claimant's attorney received their copies of the 10-day letter, with the claimant's attorney's date of receipt being September 16, 2004. The claimant's attorney also asserts that the carrier's attorney had plenty of notice about the CCH due to the claimant's exchange of documents prior to the CCH. The claimant contends that there was no good cause for the carrier's failure to attend the CCH and that there is insufficient evidence that the carrier's attorney did not receive the 10-day letter.

In Texas Workers' Compensation Commission Appeal No. 042634, decided November 29, 2004, the Appeals Panel noted that the purpose of the 10-day letter process is to give the nonappearing party the opportunity to meaningfully participate in the dispute resolution process. In Texas Workers' Compensation Commission Appeal No. 020273, decided March 29, 2002, a claimant made a number of factual allegations in her appeal regarding good cause for failing to attend the CCH and her attempts to respond to the 10-day letter, and the Appeals Panel stated that it was not in a position to evaluate the credibility of the claimant in regard to those matters and thus, remanded the case to the hearing officer to take evidence concerning the claimant's allegations and to permit the claimant to present evidence on the merits of her claim at the CCH on remand. In Texas Workers' Compensation Commission Appeal No. 041398, decided July 26, 2004, a claimant failed to appear at the CCH, did not respond to a 10-day letter, and asserted on appeal that she did not receive the CCH notice, but did not state whether she received the 10-day letter. In that case, the Appeals Panel noted that the claimant presented no evidence to support her contention that she was not receiving her mail due to mis-delivery and concluded that the claimant was afforded due process and declined to remand the case.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) provides that for purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of evidence indicates otherwise, the Commission shall deem the received date to be 5 days after the date mailed; the first working day after the date the written communication was placed in a carrier's Austin representative box located at the Commission's main office in Austin as indicated by the Commission's date stamp; or the date faxed or electronically transmitted. In Texas Workers' Compensation Commission Appeal No. 041139, decided June 28, 2004, Commission records showed that the hearing officer's decision was mailed to a claimant on a certain date and the claimant contended that her appeal of the hearing officer's decision was timely filed within the 15-day appeal period after receipt based on her assertion, supported by her affidavit, that she received the hearing officer's decision one day after the 5-day deemed receipt provision. In that case, the Appeals Panel determined that the claimant's appeal was not timely filed with the Commission and stated, "We are not persuaded that the claimant's affidavit that she did not receive the hearing officer's decision and order until April 26, 2004, constitutes the great weight of the evidence necessary to overcome the deemed date of receipt."

In the instant case, the copy of the 10-day letter in evidence does contain the carrier's Austin representative's Commission box number, but it does not contain a Commission date stamp indicating when, or if, it was placed in the carrier's Austin representative box nor is there a signed acknowledgment of receipt by the carrier's Austin representative. In addition, while the hearing officer notes in his decision that the 10-day letter was "sent" to the carrier, the decision does not state whether the 10-day letter was mailed to the carrier or to the carrier's attorney, was placed in the carrier's Austin representative's box, or both. In Appeal No. 041139, *supra*, the appeals decision noted that Commission records indicated that the hearing officer's decision was "mailed"

and thus the 5-day deemed receipt provision was applied. We believe that the affidavits attached to the carrier's appeal constitute newly discovered evidence pertaining to the receipt or nonreceipt of the 10-day letter and thus may be considered. While the affidavit of DG is confusing in that it does not state the carrier's name or a claim number in the record of this case, in the appeal attorney 2 identifies DG as the custodian of records for the carrier and DG does state the absence of a 10-day letter for the CCH of September 15, 2004. The affidavits of attorney 1 and attorney 2 deny receipt of the 10-day letter.

In Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995, the hearing officer found that the claimant did not have good cause for failing to appear at the first scheduled CCH, but allowed the claimant to present evidence at a second CCH and the carrier appealed the hearing officer's decision in favor of the claimant, contending that because the claimant failed to show good cause for his nonappearance at the first CCH, the only evidence that could be considered was the evidence the carrier presented at the first CCH. The Appeals Panel determined that the hearing officer did not abuse her discretion in considering the claimant's evidence admitted at the second CCH stating "Neither the 1989 Act nor the Commission's rules require the ultimate sanction of barring a party's evidence at a subsequent hearing for failure to appear at a prior hearing, whether or not good cause was shown." However, no abuse of discretion was found when a hearing officer issued a decision against a claimant after the claimant failed to appear at the first scheduled CCH, the hearing officer sent the claimant a letter stating a second CCH would be held on a specific date for the claimant to show cause why he did not appear at the first CCH and to present evidence, the claimant responded that he would appear at the second CCH, the claimant failed to appear at the second CCH, and the hearing officer found that the claimant did not have good cause for failing to appear at the two CCHs. Texas Workers' Compensation Commission Appeal No. 971333, decided September 2, 1997.

Under the circumstances presented, and in light of our recent decision in Appeal No. 042634, *supra*, wherein the Appeals Panel noted that the purpose of the 10-day letter process is to give the nonappearing party the opportunity to meaningfully participate in the dispute resolution process, we believe that the hearing officer's decision should be reversed and the case remanded to the hearing officer for the hearing officer to determine whether the carrier had good cause for failing to appear at the September 15, 2004, CCH, and to afford both parties the opportunity to present evidence on the disputed issues. Accordingly, we reverse the hearing officer's decision and remand the case to the hearing officer for further consideration and development of the evidence consistent with this decision.

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 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.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge