

APPEAL NO. 071706
FILED NOVEMBER 16, 2007

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 July 25, 2007, with the record closing on August 6, 2007. The appellant (claimant) did not appear at the CCH. The claimant's attorney and respondent (carrier) appeared at the CCH. The hearing officer sent the claimant a 10-day letter via United States Postal Service on July 25, 2007. The hearing officer found that "[n]o evidence was received that showed that the claimant had good cause for his failure to appear at the [CCH]".

The hearing officer resolved the disputed issues by deciding that: (1) the carrier did not waive the right to contest compensability of the post-traumatic stress disorder (PTSD), depression, and anxiety; (2) the compensable injury of _____, does not extend to include PTSD, depression, and anxiety; (3) the average weekly wage (AWW) of the claimant is indeterminable at this time; (4) the claimant reached maximum medical improvement (MMI) on November 17, 2005, as certified by the designated doctor, Dr. M; and (5) the claimant's impairment rating (IR) is 7% as certified by the designated doctor, Dr. M. The claimant's attorney appealed the hearing officer's finding of no good cause for failure to appear at the CCH, and the hearing officer's determinations on the disputed issues of extent of injury, carrier waiver, AWW, MMI and IR. The carrier responded, urging affirmance.

DECISION

Reversed and remanded.

On appeal, the claimant's attorney argues she timely responded to the hearing officer's 10-day letter on August 6, 2007, and that there was good cause for the claimant not attending the CCH on July 25, 2007. The hearing officer's 10-day letter indicates that any action in connection with the CCH would be postponed until 10 days from the date of the letter, July 25, 2007. The claimant's attorney contends that "the 10th day to respond fell on Sunday, August 5, 2007, as the letter was dated July 25, 2007, and mailed on July 26, 2007" and that the next working day, after the 10th day, is Monday, August 6, 2007. See 28 TEX. ADMIN. CODE § 102.3(b) (Rule 102.3(b)). The claimant's attorney argues that she timely responded to the 10-day letter on August 6, 2007. The hearing officer issued the decision and order on August 6, 2007.

In Appeals Panel Decision (APD) 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. The claimant attached to his appeal the following documents: (1) a copy of the 10-day letter dated July 25, 2007; (2) a copy of the envelope addressed to the claimant's attorney, address was handwritten, with a postmark date of July 26, 2007; (3)

the claimant's attorney's response to the 10-day letter dated August 6, 2007; and (4) a facsimile transmission (fax) confirmation sheet dated August 6, 2007. The fax confirmation sheet shows that the response was sent by fax to the hearing officer on August 6, 2007, at 4:37 p.m. The appeal file contains a copy of the claimant's attorney's response dated August 6, 2007, which contains the following: (1) a date/time header at the top of the page indicating it was sent "08/06/2007 16:37 [4:37 p.m.];" (2) a Texas Department of Insurance, Division of Workers' Compensation (Division) date-stamp that states "RECEIVED, (City 1) Field Office, AUG 8 2007, [Division];" and (3) a handwritten note which states "too late [initials] 8-08-07 [initials]" referencing the Division date-stamp. Rule 102.5(f) provides, in part, that written communications received by the Division shall be deemed to have been sent on the date received if sent by fax. While we do not know why the claimant's attorney's response to the 10-day letter is date-stamped August 8, 2007, the information in the appeal file reflects it was faxed to the hearing officer on August 6, 2007, during business hours. The evidence indicates that the claimant timely responded to the 10-day letter on August 6, 2007.

Additionally, we note that the 10-day letter to the claimant was mailed to an address different from the claimant's address of record. The appeal file contains the original 10-day letter and envelope that was sent to the claimant via United States Postal Service regular mail. The claimant's address is handwritten on the envelope. We note that the address listed on the 10-day letter is different from the address handwritten on the envelope to the claimant. Also, the envelope contains a postal service sticker that states "RETURN TO SENDER, ATTEMPTED—NOT KNOWN, UNABLE TO FORWARD." The Division records (specifically, Texas Compass Claim/Claimant Summary) indicate that the claimant's address of record is the same as the address listed on the 10-day letter (and the decision and order), and that the address handwritten on the envelope addressed to the claimant contains an address different than the one listed in the Division records. The evidence indicates that the 10-day letter was sent to an address different than the claimant's address of record.

Also, the response dated August 6, 2007, explains that the claimant's good cause for not appearing at the CCH is that he is deceased. The response states:

We have been contacted by a relative who stated that [the claimant] committed suicide due to his depression because of pain from his multiple injuries and problems with the Carrier. The majority of his family is in Mexico. We ask that the hearing be postponed and reset upon request following our determination concerning the proper beneficiaries under the Act as to the past monies and additional benefits owed, wrongful death, etcetera.

As explained above, the claimant's attorney timely filed a response on behalf of the claimant to the 10-day letter on August 6, 2007, and it was error for the hearing officer to issue a decision before the claimant had exhausted his time to respond. In addition, the claimant did not have the opportunity to show good cause for why he failed

to attend the CCH on July 25, 2007, because the 10-day letter was sent to an address different from the claimant's address of record and was returned to the Division.

In APD 950310, decided April 11, 1995, the claimant died from causes unrelated to his compensable injury before the CCH on a disputed IR issue, and the hearing officer decided that he did not have jurisdiction to resolve the issue in dispute because of the claimant's death. The Appeals Panel held that the hearing officer retained jurisdiction to determine whether any unpaid, accrued benefits existed and the extent of any such benefits. The Appeals Panel noted that "[a]lthough entitlement to future benefits ended on the date of claimant's death, entitlement to unpaid, accrued benefits, if any, was not extinguished" and that the claimant's estate could pursue a claim for whatever portion of benefits were accrued and unpaid as of the date of the claimant's death. In that case, the Appeals Panel referenced Section 408.081(c), (now Section 408.081(d)), which provides that an employee's entitlement to income benefits under this chapter terminates on the death of the employee, and that an interest in future income benefits does not survive after the employee's death. While Section 408.002 provides that a right of action survives in a case based on a compensable injury that results in the employee's death, no issue regarding entitlement to death benefits is before us. See *also* APD 071277-s, decided October 18, 2007 (distinguishes a cause of action for death benefits from a cause of action for compensation belonging to the injured employee).

We reverse the hearing officer's finding that no evidence was received that showed that the claimant had good cause for his failure to appear for the CCH, and we remand the case to the hearing officer to determine whether the claimant had good cause for his failure to appear at the CCH on July 25, 2007.

We reverse the hearing officer's determinations that: (1) the carrier did not waive the right to contest compensability of the PTSD, depression, and anxiety; (2) the compensable injury of _____, does not extend to include PTSD, depression, and anxiety; (3) the AWW of the claimant is indeterminable at this time; (4) the claimant reached MMI on November 17, 2005, as certified by the designated doctor, Dr. M; and (5) the claimant's IR is 7% as certified by the designated doctor, Dr. M. We remand the case back to the hearing officer to allow the claimant, if alive, or the claimant's estate, an opportunity to participate in the dispute resolution process, and present evidence on the disputed issues.

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 Division, 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 APD 92642, decided January 20, 1993

The true corporate name of the insurance carrier is **DALLAS NATIONAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSTIN POLK
14160 DALLAS PARKWAY, SUITE 500
DALLAS, TEXAS 75254.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge