APPEAL NO. 950308

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was convened in (city), Texas, on December 7, 1994, with (hearing officer) presiding as the hearing officer, to consider the sole disputed issue, namely, what was the appellant's (claimant) impairment rating (IR). Claimant did not appear. The Texas Workers' Compensation Commission (Commission) ombudsman present to assist claimant stated that the Commission had not heard from claimant since the benefit review conference (BRC) held on October 10, 1994, and that the Commission had no telephone number for claimant. The hearing officer introduced the Commission's letter to claimant dated October 14, 1994, advising of the time, date, and place for the December 7th CCH. The letter was mailed to claimant at the address the ombudsman said claimant provided at the BRC, to wit: "General Delivery" in (city), Texas. The ombudsman introduced a letter dated November 18, 1994, which she sent to claimant at that same address advising him of time, date, and place for the December 7th CCH and further advising him of the ombudsman's availability to assist him. The sole exhibit introduced by the self-insured was an affidavit from its adjuster dated December 5, 1994, stating that the last address of claimant known to the self-insured was "(address), (city), (state) (zip code)."

By letter of December 7, 1994, another hearing officer, (hearing officer), wrote claimant at the (city) and (city) addresses advising that he had continued the hearing to January 26, 1995, to afford claimant an opportunity to show good cause for his failure to appear and that "the only purpose of the hearing on January 26, 1995 will be to show good cause." Claimant testified by telephone at the January 26th CCH about his failure to appear on December 7th after which the hearing officer advised the parties that he did not find good cause and that he would issue a decision explaining his reasons. The hearing officer then asked claimant if he had anything further to present and claimant requested a continuance of the hearing indicating, in effect, that he was not in possession of his medical records, was not prepared to go forward on the merits of the IR issue, and needed time to acquire his evidence. Stating that he found no good cause for a continuance the hearing officer closed the hearing and subsequently issued a decision containing findings not only on the failure to appear issue but also on the IR issue. Finding that the report of the designated doctor selected by the Commission was not overcome by the great weight of contrary medical evidence, the hearing officer concluded that claimant reached maximum medical improvement [MMI] on April 10, 1993, with an IR of 12%. The hearing officer also concluded that claimant did not establish good cause for his failure to appear at the earlier hearing.

Claimant's appeal challenges certain of the factual findings as well as the two conclusions dispositive of the IR issue and the good cause issue. Respecting the IR issue, claimant maintains that the January 26th hearing was supposed to have been limited to a consideration of the existence of good cause for his failure to appear at the earlier hearing but instead "was used to railroad a decision and order for an [IR]." He asserts that no evidence was presented on the IR issue at the January 26th hearing and he seeks another

hearing to afford him the opportunity to present medical evidence of his impairment. Respecting good cause for not appearing on December 7th, claimant states that shortly after the BRC he filed with the Commission a request to change treating doctors, that this request showed his (city) address and should have been treated by the Commission as a change of address, and that prior to the December 7th hearing he talked to a Commission official about his change of treating doctor and that official never mentioned that the December 7th hearing was scheduled.

Responding to the IR issue, the self-insured states that the Commission's "official records" show the appointment of the designated doctor and his assignment of the 12% IR and, thus, that the evidence supports the challenged findings and conclusion on this issue. As for the good cause issue, the self-insured urges the sufficiency of the evidence to support the pertinent challenged findings and conclusion. The self-insured first points to evidence it states it presented at the December 7th hearing, namely, a self-insured letter of November 18, 1994, to claimant as well as the adjuster's affidavit, to show that the self-insured sent notice of the December 7th hearing to claimant at the (city) address. The self-insured also refers to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.4 (Rule 102.4) providing that all notices to a claimant "shall be mailed to the last address supplied" which, carrier asserts, was the (city) address. The self-insured further asserts, apparently in the alternative, that claimant's lack of notice of the December 7th hearing was due to his failure to provide the Commission with his current address.

DECISION

Reversed and remanded.

At the outset of the January 26th CCH the hearing officer advised claimant he would give him an opportunity to show good cause for his failure to appear on December 7th and asked claimant if he understood that to be the issue before the hearing officer. Claimant responded in the affirmative. Claimant testified that he attended the BRC, held on October 10, 1994, and that he did not thereafter request a CCH but rather advised that he would contact the Commission if he desired a hearing. The BRC report recites that at the conclusion of the BRC it appeared that a CCH would not be necessary but that "after the BRC was concluded, the claimant returned to the field office and requested that his case be set for the [CCH]" and that a copy of the CCH rules was mailed to him that day. The Commission's letter of October 14, 1994, sending claimant a copy of the BRC report and advising him of the December 7th setting was mailed to claimant at "General Delivery, (city), (state) (zip code)." At the December 7th hearing the ombudsman represented that at the BRC claimant had instructed that the general delivery address in (city) be used.

Claimant testified that he left (city) shortly after the BRC, that he went to (city) where he remained at the (city) address for a few weeks, and that he then went to (state) where he was currently located. When the hearing officer asked him for a current address claimant stated that the only address he could provide was "general delivery" in (city),

(state), because he was a "homeless" person. He further stated that after the BRC he filed a request to change treating doctors with the Commission and that the form stated his (city) address. The BRC report states that one of the disputed issues at the BRC was whether claimant could change treating doctors and that the matter was resolved by his being provided during the BRC with an Employee's Request to Change Treating Doctors form (TWCC-53) together with appropriate instructions. According to the BRC report, the benefit review officer encouraged claimant to select a new treating doctor. Claimant introduced the TWCC-53 which requested a change in treating doctor to (Dr. C) in (city), (state). The form was signed by claimant on "10/12/94," approved by a Commission official on "10-13-94," and stated the following address for claimant: "(address), (city), (state). (zip code)." Claimant maintained that the Commission thus had his change of address on this form and should have used it to provide him with notice of the December 7th CCH. He further testified to speaking to a Commission employee in (city) at sometime before the December 7th CCH about the status of his request to change treating doctors and said the employee never mentioned that a CCH was scheduled. He insisted he never received notice of that hearing and there was no evidence that he had. The self-insured in its response on appeal alludes to a notice of the December 7th CCH letter it sent the claimant on November 18, 1994, as being in evidence. However, the only exhibit offered by the self-insured was the adjuster's affidavit. It was the ombudsman who introduced her letter of November 18, 1994, addressed to claimant at "General Delivery" in (city) advising him of the December 7th hearing.

The hearing officer asked claimant if he had contacted the Commission about a CCH after the BRC and before leaving (city) and he replied that he had contacted the Commission about changing treating doctors but not about a CCH. He also responded to the hearing officer that he had not contacted the Commission after he left (city) for (state). Before ruling on the good cause issue, the hearing officer explained the disputed issue in the BRC report and asked claimant if he wanted a hearing on that issue. Claimant responded that he did want to proceed with a hearing but did not then have a set date as to when he could proceed with that issue. The hearing officer then stated that he found no good cause for the failure to appear and that he would issue a decision explaining his rationale. The hearing officer then asked claimant if he had anything else to present. Claimant said he had nothing more to present at that time and that since it was determined that he did not have good cause he was not prepared to go forward on the IR issue. He asked the hearing officer to postpone the hearing to give him an opportunity to obtain more evidence. The hearing officer summarily stated he found no good cause for a continuance and that the motion was denied. No position on the request for continuance was sought from nor stated by the self-insured.

Claimant challenges the below listed findings and conclusions.

FINDINGS OF FACT

6.The [Commission] appointed [Dr. FS] as the designated doctor.

7.[Dr. FS] certified claimant as having a 12% whole body impairment.

10.Claimant has failed or refused to provide the [Commission] with an address at which he can receive notice since October 1994.

11.Claimant is able to communicate with employees of the [Commission] when he chooses to do so.

14.A person of ordinary prudence in Claimant's circumstances would provide the [Commission] with an address at which notice could be received.

15.Claimant has not furnished a substantial reason equivalent to a legal excuse which would excuse his non-appearance at the [CCH] on December 7, 1994.

CONCLUSIONS OF LAW

2.Claimant reached [MMI] on April 10, 1993 with a 12% whole body [IR].

3.Claimant has not established good cause for his non-appearance at the contested case hearing on December 7, 1994.

Section 410.025(b) provides that at the time a BRC is scheduled the Commission will schedule a CCH to be held not later than the 60th day after the date of the BRC if the disputed issues are not resolved at the BRC. Section 410.151(a) provides that if arbitration is not elected a party to a claim for which a BRC is held "is entitled to a [CCH]." Rule 141.7(d) provides in part that no later than the eighth day after receiving the BRC report the director of hearings shall furnish to the claimant by first class mail or personal delivery a copy of the report and notice of the date, time, estimated duration and location of the CCH. Section 410.156 and Rule 142.11 provide that failure to attend a CCH without good cause, as determined by the hearing officer, is a Class C administrative violation subject to a penalty. Claimant's evidence was unrefuted that he never received notice of the December 7th CCH.

The hearing officer grounds his finding of no good cause, in essence, on claimant's failure to provide the Commission with an address at which he could have received notice of the December 7th CCH. Rule 102.4(a) provides that all notices to a claimant "shall be mailed to the last address supplied, either on the employer's first notice of injury, any claim form filed by the claimant, or by a claimant's letter [emphasis supplied];" Rule 102.4(b) provides that notices setting hearings shall be sent to the claimant by the Commission; and Rule 102.5(a) provides that all notices and written communications to the claimant will be mailed to the last address supplied by the claimant. In our view, the last address supplied to the Commission by claimant before the December 7th CCH was the (city) address on the TWCC-53 which he signed on October 12, 1994, before leaving (city) for (city) where he

testified he resided for several weeks. The Commission signed its approval on the TWCC-53 on October 13th and thus had knowledge of the claimant's change of address on that date but apparently failed to update its records with the (city) address. The Commission's October 14th letter containing notice of the December 7th CCH was sent only to the (city) address.

The existence of good cause is ordinarily a factual question for the hearing officer to resolve and the test for its existence "`is that of ordinary prudence; that is, the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.' [Citations omitted.]" Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995. We find the hearing officer's determination that claimant did not have good cause for failing to appear at the December 7th CCH to be an abuse of discretion under the circumstances of this case. Claimant's evidence that he provided the Commission with a Commission form which showed his change of address prior to the Commission's mailing the notice of the CCH and that he received no notice of the CCH being set was unrefuted. *Compare* Texas Workers' Compensation Commission Appeal No. 91052, decided November 27, 1991, and Texas Workers' Compensation Commission Appeal No. 92055, decided March 30, 1992; and Texas Workers' Compensation Commission Appeal No. Appeal No. 941679, decided February 2, 1995.

We further find that the hearing officer abused his discretion in failing to grant to claimant the continuance of the January 26th hearing which he requested after the hearing officer announced his no good cause ruling. The hearing officer's letter of December 7, 1994, to claimant stated that "[t]he only purpose of the hearing on January 26, 1995, will be to show good cause." Claimant testified that he was made aware of the content of this letter by his mother around Christmas time. As already noted, the hearing officer also iterated this limited purpose for the hearing at its outset. With the hearing officer so plainly stating the limited purpose of the hearing, the claimant could hardly have been expected to come prepared to meet his burden of proof on the substantive issue. We have observed with approval the practice of other hearing officers in advising non-appearing parties that at the second hearing evidence will be taken on both the matter of good cause for failure to attend the first CCH and on the merits of the disputed issues and in later reaching a decision on both matters. *See, e.g.*, Appeal No. 941679, *supra*.

In Appeal No. 950044, *supra*, the hearing officer determined that the carrier in that case did not show good cause for failing to appear at the first hearing and then closed the record without receiving the carrier's evidence on the merits of the disputed issues and issued a decision based on claimant's evidence adduced at the first hearing. While not disturbing the good cause determination the Appeals Panel reversed the decision and remanded the case relying on Appeal No. 941679, *supra*. That case involved an employee who did not show good cause for failing to appear at the first CCH but who was allowed to present evidence at a rescheduled hearing. In affirming, the Appeals Panel noted that 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. Section 410.156(b) provides that the failure of a party to attend a [hearing] will constitute a Class C administrative violation, the penalty for which is found in Section 415.022(3)." The hearing officer's failure to grant claimant a continuance under the circumstances of this case was the equivalent of applying the ultimate sanction of barring his evidence on the merits of the disputed issue.

Finally, we agree with the claimant's assertion of error concerning the findings and conclusion relating to the IR issue for the obvious reason that no evidence was offered to support them. The self-insured told the first hearing officer that it had nothing to present on the IR issue since claimant had the burden of proof. The only document in evidence which mentions the IR issue is the BRC report. This report states that (Dr. S) was the treating doctor, that he assigned IRs of both 13% and 16%, that Dr. FS was the "TWCC Des. Dr." and that he assigned 12%. No records from these two doctors, nor from any of the 18 other doctors mentioned in the report, were in evidence. The record does not indicate that any of these medical records were in the Commission's file much less that official notice was taken of any by the hearing officer.

For the above reasons, we reverse the decision and order of the hearing officer and remand the case for further development of the evidence and reconsideration of the disputed issue on the basis of all of the evidence, including that of the claimant.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge