

APPEAL NO. 94997

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE, Chapter 100 *et seq.* (Texas Workers' Compensation Commission Rules), a contested case hearing (CCH) on attorney fees was held in (city), Texas, on June 9 and 20, 1994, (hearing officer) presiding as hearing officer. She determined that the attorney fee in question was reasonable and affirmed the same and held that the attorney in question did not show good cause for failing to appear at the CCH set for June 9, 1994. Attorney (atty) has appealed the determination that she did not have good cause for failure to appear at the June 9, 1994, hearing. A brief from the carrier's representative was filed which points out that the attorney is taking a position somewhat inconsistent with a position she took in an earlier case where a carrier representative failed to appear at an attorney fee hearing.

DECISION

We affirm.

The claimant in this case filed a dispute of an award of attorney fees to her attorney, the appellant. A hearing was scheduled on this issue for June 9, 1994, and a notice dated May 10, 1994, was sent to the attorney, claimant, carrier, and the carrier's representative. This notice clearly advised that a dispute of attorney fees was raised and that the attorney of record was required to appear at the hearing at 9:00 a.m. on June 9, 1994. Only the representative for the carrier appeared on June 9, 1994. The hearing officer indicated that she called the attorney's office and was told by a secretary that the attorney was in route. After waiting an hour, a second call was placed to the attorney's office and assurances were given that the attorney had the matter on her calendar and would be there. The attorney never appeared. Subsequently, the hearing officer sent both the claimant and the attorney a letter dated June 9, 1994, advising them they had 10 days to contact the hearing officer to show good cause for the failure to appear.

On June 20, 1994, a hearing on good cause for failing to appear at the June 9, 1994, hearing was held at the request of the attorney. The thrust of the presentation of good cause was that another field office of the Texas Workers' Compensation Commission (Commission) had a form letter on attorney fee disputes that did not require the attorney's appearance, that the attorney lived in the vicinity of the particular office and had most of her practice there, that she was no longer representing the claimant, (although the fee involved was for a time when she was representing the claimant) and that the attorney had a conflict on June 9, 1994, involving another hearing. The attorney introduced no evidence other than a letter advising of the withdrawal of representation dated May 4, 1994. The attorney acknowledged that she received the notice of the June 9th hearing and stated that she had not requested any continuance of the hearing.

The hearing officer determined that the attorney did not establish good cause for failing to appear at the June 9, 1994, hearing. This is ordinarily a question of fact and a determination of good cause is within the sound discretion of the hearing officer, as the presiding officer in a CCH. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). A

determination of good cause or the lack thereof will be set aside only if that discretion is abused. Morrow, supra. In determining good cause, the conduct of the person must be examined in its totality and an ordinarily prudent person test is applied. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). The question we face on appeal is whether the hearing officer acted arbitrarily or abused her discretion in determining good cause did not exist, that is, without reference to any guiding rules and principles. We find no solid basis to conclude that the hearing officer acted arbitrarily, abused her discretion or that there was no reference to any guiding rules or principles. The 1989 Act, Section 408.221, specifically requires that the Commission approve attorney fees for claimant's attorney and sets forth specific guidelines that must be followed. Further, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 152.1 *et seq.* (Texas Workers' Compensation Commission Rules) implements the requirement of the Act and details the oversight by the Commission in approving any attorney fees. In discharging those duties, particularly where disputes are involved, hearings may well be necessary and in such instances, the procedure could be materially hampered and the intent of the Act and Rules thwarted if the persons necessary to the resolution of the issue(s) ignored a requirement to appear. We see no abuse of discretion in a hearing officer determining good cause is not shown where an attorney fails to appear after there is a properly requested and timely set hearing, proper notification is sent to affected parties, there are disputes over which the Commission has jurisdiction, and where statutory and regulatory requirements are being considered. The lack of any request for a continuance or other communication with the Commission based upon a stated conflict in scheduling does not enhance the appellant's position.

Although we do not find merit in this appeal and uphold the determination of a lack of good cause for failing to appear, this is not to be taken to mean that other remedies may not be available to a hearing officer where a necessary party to a proceeding fails without good cause to appear. For example, in appropriate circumstances, such party might be held to waive its position, rights, claim or defense.

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge