APPEAL NO. 010187

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 scheduled for November 21, 2000. No CCH was held. At the scheduled time and place, the hearing officer converses with the appellant (claimant), who is present, as is the attorney representing the respondent (self-insured), and questions why the claimant's attorney is not present. The hearing officer, on the record, called the claimant's attorney asking why he was not present, refusing the attorney's explanation; stated that she is continuing the case and will expect the attorney to be present at the next setting or withdraw from the case; and told the attorney that she is recommending the attorney "receive an administrative violation of $1,000.00" for his failure to appear at the scheduled November 21, 2000, hearing. The hearing officer announced that she will send out an "order" that day; that the claimant's attorney will receive it the following Monday; that it will have the date and time of the next hearing; and that the hearing officer expects the claimant's attorney to be there or withdraw. The hearing officer then confers with the self-insured's attorney, presumably with the claimant present, and selects a time and date of the rescheduled hearing agreeable with the self-insured's attorney. The case was rescheduled for December 15, 2000, at 9:00 a.m. The order for continuance, setting out the facts, was signed on November 21, 2000.

In evidence, as hearing officer's "Exhibit 5," is a letter dated November 27, 2000, giving the carrier's attorney's version of the events that led to the claimant's attorney's failure to appear on November 21, 2000. The claimant's attorney, by facsimile transmission dated December 6, 2000, advised the hearing officer that he had a conflicting court case scheduled for December 15, 2000, and could not attend the CCH. The hearing officer, by an order of continuance dated December 12, 2000, continued the case to January 4, 2001. In a Benefit Dispute Agreement (TWCC-24) dated December 21, 2000, the parties resolved the disputed issues of entitlement to supplemental income benefits (SIBs) for the first quarter and an extent-of-injury issue. The agreement was signed by the claimant's attorney, the self-insured's attorney, and the benefit review officer. In a pleading entitled "Claimant's Motion to Drop Setting," the claimant requested that the case be dropped from the current docket setting (January 4, 2001), because the claimant was abandoning her pursuit of SIBs for the first quarter and the extent-of-injury issue. By order canceling the CCH dated January 3, 2001, the hearing officer canceled the January 4, 2001, CCH.

Subsequently, in a decision and order dated January 4, 2001, the hearing officer resolved the disputed issues of SIBs and extent-of-injury in accordance with the benefit review conference agreement and resolved an issue of whether the claimant's attorney had good cause for failing to appear at the November 21, 2000, scheduled proceeding by finding that he did not. The claimant's attorney appealed the determinations on his failure to show good cause for failing to appear by outlining the events from his perspective, by objecting that the hearing officer "was fining [claimant's attorney] $1,000.00 for . . . failure to appear," and requesting that we reverse the hearing officer's decision on the appealed issue.

DECISION

Affirmed.

Section 410.156(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.11 (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. Section 415.022 and Rule 142.11 provide that the penalty shall not exceed $1,000.00. Our review of the record indicates that the hearing officer did not say she was fining the claimant's attorney $1,000.00 but rather she was referring the matter to the Compliance and Practices Division with a recommendation of a $1,000.00 fine. Whether the hearing officer in fact did so is not evident in the record before us. Section 415.021 provides the various elements to be considered in assessing an administrative penalty and that a penalty may be assessed only after the person charged with an administrative violation has been given an opportunity for a hearing. Investigation and notice provisions are covered in Section 415.032 and charges the Division of Compliance and Practices with processing the administrative violation.

At issue before us is whether the hearing officer abused her discretion in determining that the claimant's attorney failed to show good cause for failing to appear at the November 21, 2000, scheduled CCH. Although we have addressed a hearing officer's finding of good cause or no good cause for failing to attend a CCH, these cases usually revolve around whether a party should be allowed to present evidence where good cause for a failure to appear has not been shown. In Texas Workers' Compensation Commission Appeal No. 001315, decided July 24, 2000, we held that such lack of good cause would not prevent a party from presenting evidence, a situation not present in this case. To the extent that the claimant's attorney is challenging the hearing officer's determination that the claimant's attorney did not have good cause for this failure to attend the November 21, 2000, hearing, our review does not demonstrate that the hearing officer erred in making that determination. The existence of good cause is generally a factual determination. Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995. A hearing officer's good cause determination is reviewed on appeal under an abuse of discretion standard. *Id.* To determine if an abuse of discretion occurred, we must look to see if the hearing officer "acted without reference to any guiding rules and principles." Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In this case, the claimant's attorney certainly had notice of the CCH and when the hearing officer called him on November 21, the claimant's attorney had an opportunity to give his reason for failing to attend and did so by saying that he had sent a fax, or talked, to someone in proceedings regarding cancellation of the CCH. The hearing officer made it very clear that no one in proceedings, or any secretary, nor an agreement with the adjustor, had the authority to cancel or continue a CCH, and that must be done by order of the hearing officer. The hearing officer, in this case, unlike many of the other cases reviewed, then ordered a continuance which would have permitted the claimant to present evidence on the merits even if the claimant's attorney had failed to show good cause for this failure to attend the CCH. Accordingly, we cannot agree that the hearing officer abused her discretion in determining

that the claimant's attorney did not have good cause for failing to appear at the scheduled hearing. As previously indicated, our affirmance of the hearing officer's decision on this issue has no relation to any action the Compliance and Practices Division may or may not take regarding any administrative violation.

We reject the dissenting opinion on the basis that the claimant's attorney arguably was given due process at the November 21, 2000, hearing; had an opportunity to be heard at subsequent rehearings; and provided a written response listed as an exhibit in the hearing officer's decision.

The procedure by which the hearing officer made the finding of no good cause was akin to a finding of direct contempt by a judge. Direct contempt is that which occurs within the presence of the judge; the due process accorded the contemnor consists merely of asking an explanation, and, where no good one is received, the inquiry ends. Ex parte Friedman, 808 S.W.2d 166 (Tex. App.-El Paso 1991).

Here, the hearing officer was required by the rules to make a fact finding, even though there was in the end no party in interest to be affected by the finding. Whether counsel will be investigated and given notice and an opportunity to be heard by Compliance and Practices we cannot say. In any case, if a referral and investigation is made, counsel in the instant case may then present his side of the story regarding any "alleged" violation.

Further, the attorney was not deprived of any property in that before any fine can be imposed because of the "alleged" violation, the Compliance and Practices Division is required to give a due process hearing pursuant to Section 415.032, as noted previously.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I dissent from the majority opinion. In my view, the claimant's attorney has been deprived by the Texas Workers' Compensation Commission (Commission) of procedural due process under the 14th Amendment to the Constitution of the United States which provides, in part, that no state may deprive any person of life, liberty, or property without due process of law, and under the Texas Constitution, Article 1, § 19, which has similar provisions. The due course of law provision of the Texas Constitution exists to prevent government from depriving persons of property without notice and hearing. Federal Sign v. Texas Southern University, 951 S.W.2d 401 (Tex. 1997). At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. University of Texas Medical School v. Than, 901 S.W.2d 926 (Tex. 1995). Constitutional due process of law requires an administrative agency to afford a full and fair hearing on all disputed fact issues critical to the rights of the parties on a question before it. Grace v. Structural Pest Control Board of Texas, 620 S.W.2d 157 (Tex. Civ. App.-Waco 1981, writ ref'd n.r.e.).

The hearing officer's Decision and Order, signed on January 4, 2001, states the finding of fact that the claimant's attorney had no good cause for his failure to appear for the proceedings of November 21, 2000, and the conclusion of law that the attorney did not have good cause for his failure to appear for the proceedings of November 21, 2000. This finding and conclusion were rendered without having afforded the attorney notice that the hearing officer had decided to add the issue of good cause for the attorney's nonappearance on November 21, 2000, to the two disputed issues which the parties resolved by agreement before January 4, 2001, and without having afforded the attorney an opportunity to appear before the hearing officer and litigate the issue. Indeed, the hearing officer held no hearing at all on January 4, 2001, and apparently issued her Decision and Order simply to "clear the books" of the Commission's Hearings Division. The hearing officer's having called the attorney on November 21, 2000, to ascertain why he was not then present at the hearing she had just convened can hardly be said to constitute such notice and opportunity to be heard and present evidence as meets minimum due process requirements. In fact, during the telephone conversation, the hearing officer stated that she intended to recommend that the attorney be fined $1,000.00 by the Commission's Compliance and Practices Division.

In my view, the attorney has been deprived of due process. If, indeed, the hearing officer, rather than the Commission's Compliance and Practices Division, is the appropriate Commission official to be *sua sponte* raising and adjudicating this issue, then I would reverse and remand for the hearing officer to provide the attorney with a constitutionally adequate notice and hearing.

Philip F. O'Neill
Appeals Judge