

APPEAL NO. 020507
FILED APRIL 29, 2002

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 originally scheduled for November 29, 2001; however, neither party nor their counsel appeared, and the hearing officer issued a "ten-day, show cause" letter to the counsel of both parties, demanding that good cause be shown for their failure to appear. Both parties' counsel responded to the hearing officer's letter. The CCH was held on February 5, 2002, in (City 1). The hearing officer resolved the disputed issues by deciding (1) that the appellant/cross-respondent (claimant) did not sustain a compensable injury in the form of an occupational disease; (2) that the claimant's date of alleged injury, pursuant to Section 408.007, i.e., the date the claimant knew or should have known the alleged disease may be related to the employment, was _____; (3) that the respondent/cross-appellant (carrier) is relieved from liability because of the claimant's failure to timely notify her employer pursuant to Section 409.001; and (4) that the carrier has not waived the right to contest compensability of the claimed injury because it did timely contest the injury in accordance with Section 409.021. The claimant did not file an appeal to challenge the substantive determinations of the hearing officer, and the carrier asked that the hearing officer be affirmed (in its counsel's appeal regarding the show cause issue). Therefore, the decision and order of the hearing officer, regarding the aforementioned determinations, have become final pursuant to Section 410.169.

At the February 5, 2002, CCH, the hearing officer ruled at the beginning of the hearing that there was no good cause for each counsel's failure to appear at the November 29, 2001, CCH, without taking a proffer of evidence from either counsel. Thus, on appeal are each counsel's complaints regarding the hearing officer's failure to allow them to show good cause for their failure to previously appear. Counsel for both the claimant and the carrier argue that they should have had an opportunity to proffer their evidence of good cause with argument at the February CCH, and that the hearing officer's failure to allow them to do so prior to his ruling was an abuse of discretion, and left them subject to administrative penalty.

DECISION

Reversed and rendered.

The hearing officer abused his discretion in failing to hold a show cause hearing on the issue of the attorneys' failure to appear at the November 29, 2001, CCH. The record reflects that on November 28, 2001, the carrier's counsel filed an unopposed motion for continuance for the CCH scheduled the next day because of winter weather warnings and travel advisories and the necessity of her traveling through it, by plane, from (City 2) to (City 3) to City 1. The hearing officer summarily denied the motion, via facsimile. Later on that date, both counsel for the carrier and counsel for the claimant filed an agreed motion for continuance on the same basis. The hearing officer denied this motion as well, and

sent his denial via facsimile to both counsels' offices, along with a warning of penalty should they fail to appear in City 1 the next day at 8:30 A.M. On November 29, 2001, neither party nor their counsel appeared at the CCH, and the hearing officer so noted on the record, as well as noting that he would be sending a "ten-day, show cause" letter to counsel, and he did. Both parties' counsel responded to the letter with explanations and documentary evidence supporting the argument that it was too dangerous for the carrier's counsel to have traveled on the day before the CCH, as was necessary. The carrier's counsel introduced documentary evidence that included public records of the winter weather warnings and travel advisories urging no travel, except for emergency situations. Further, the post-September 11 security measures at the airports necessitated the need for a passenger's arrival two hours prior to flight, and the carrier's counsel's remark for the need of expedience in scheduling and reservations per the practice of her law firm. The claimant's counsel argued that he could see no alternative to agreeing that the carrier's counsel should not travel under such adverse conditions, and that he did not accept the hearing officer's statements about schoolchildren and weather as probative evidence, as the hearing officer was not sworn, and did not take judicial notice of the weather reports, the flight schedules, or any matter relevant to the counsels' failure to appear. The hearing officer stated in his Statement of the Evidence that both parties' counsel had no good cause for their failure to appear without hearing argument, or a proffer of evidence from either party. The hearing officer did allow exhibits into evidence that the parties now argue showed their good cause, so they are part of the record we review.

An abuse of discretion occurs where the decision maker acts without reference to any guiding rules and principals (*Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986)). In this case, while the hearing officer did act with reference to guiding rules and principles, i.e., the City 1 schools remaining open, he did indeed abuse his discretion in determining that the attorneys did not have good cause for their failure to appear at the November 29, 2001, CCH because he failed to follow standard procedures. In the November 29, 2001, "ten-day, show cause" letter, the hearing officer wrote:

"You may contact this [Texas Workers' Compensation] Commission office within ten days of the date of this letter to request that the [CCH] be reconvened. If you contact the Commission within ten days, ***you will be allowed to present evidence on the issue, and to show good cause why you failed to attend the November 29, 2001, [CCH].***" (Emphasis added).

Both counsel timely responded to the hearing officer's letter. Yet, upon their arrival at the February 5, 2002, CCH, neither counsel was allowed anything akin to a show cause hearing before the hearing officer ruled that they did not have good cause for their previous failure to appear. Therefore, the hearing officer failed to do what even he agreed to do in his November 29, 2001, letter. At the February 5, 2002, CCH, both counsel objected to the hearing officer's denying them the opportunity to show good cause.

Providently, both counsels' responses to the "ten-day, show cause" letter were admitted into evidence, as well as attached supporting documentation, and are, as such,

part of the record. We note that the counsels' agreement to continue the CCH (agreement to not appear) because of inclement weather, while laudable¹, does not unilaterally cause the CCH to be continued, or excuse them the necessity of showing good cause for their failure to appear. However, in our review of the record, we determine that both counsel had good cause for not appearing at the November 29, 2001, CCH, for the reasons above-referenced, and that the hearing officer abused his discretion in determining that they did not have good cause. The hearing officer abused his discretion, and went against his own statements, in failing to allow counsel a show cause hearing.

We therefore reverse the hearing officer's determination that the claimant's and the carrier's counsel did not have good cause for their failure to appear at the November 29, 2001, CCH, and render the opinion that both counsel showed good cause for their failure to appear, and should not be subject to any administrative penalty.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Terri Kay Oliver
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge

¹We here note that both counsel acted with the professional courtesy one would hope for all lawyers. In addition, in III of "The Texas Lawyer's Creed--A Mandate for Professionalism," there are extensive guidelines set out to be each attorney's goal in his or her treatment of colleagues, and these counsel certainly surpassed those goals.