

APPEAL NO. 980202
FILED MARCH 11, 1998

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 January 5, 1998. He (hearing officer) denied the appellant's (claimant) motion for a continuance and found that the claimant failed to establish that he sustained a compensable injury on or about _____, or that he had disability. The claimant appeals that part of the decision which denied the continuance but not the substantive findings of no compensable injury and no disability. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The factual background leading up to the setting of the date for the CCH and the request for a continuance is largely undisputed. At the benefit review conference, held on November 13, 1997, the claimant was unrepresented but assisted by an ombudsman. On that date he signed a Notification of Scheduling Benefit Contested Case Hearing, otherwise known as an HR-10, which reflected that the CCH was set for January 5, 1998, at 8:30 a.m.

This form advised the parties that a request for a continuance would only be granted upon a showing of good cause. On November 18, 1997, the claimant signed an agreement for representation by his attorney. The attorney communicated this fact to the Texas Workers' Compensation Commission (Commission). Apparently, the next communication between the attorney and the Commission was a request for a continuance faxed to the Commission on December 31, 1997. The stated reason for the request was a conflict with a civil jury trial "priority setting" scheduled to begin January 5, 1998. An information copy of the request was indicated for the carrier in care of a law office that apparently was not the carrier's representative in this case. There is no indication that a copy was faxed to the carrier at the same time the request was faxed to the Commission.

The hearing officer, on January 2, 1998, made inquiries of the district court and was advised that the priority setting for the civil case was requested by the claimant's attorney "a couple months ago." The hearing officer then telephonically denied the request and advised the attorney that he could again present his motion at the CCH scheduled for January 5, 1998. At the CCH, the attorney for the claimant explained that on September 29, 1997, he agreed to a setting of the civil trial for January 5, 1998. This was done before he agreed to represent the claimant and he admitted that he agreed to the representation without checking his calendar for scheduling conflicts. The carrier's attorney stated at the CCH that he had no knowledge that the claimant was represented by counsel and first heard about the request for a continuance when he arrived for the CCH with several witnesses. He also stated that no exchange of documents had been made by the claimant.

Section 410.155 provides that a request for a continuance of a CCH may be granted by the Commission only upon a determination of good cause. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(c) (Rule 142.10(c)) further provides that a request for a continuance from a party represented by an attorney shall be made in writing five days before the hearing, shall state the reason, and shall be delivered to all the parties. See *also* Rule 142.4. In his discussion of this motion in his decision and order, the hearing officer commented that the motion lacked "important information" such as the county or district where the civil trial was scheduled and a statement of service on the opposing counsel.

We review a ruling on a request for a continuance under an abuse of discretion standard, that is, whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951252, decided September 13, 1995. The guiding principle or test for the existence of good cause to grant a continuance is that of ordinary prudence, that is, whether the movant exercised the degree of diligence in prosecuting the case as an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 970135, decided March 12, 1997. The hearing officer, in a series of findings, determined that the claimant's attorney did not exercise ordinary prudence in waiting to request a continuance until December 31, 1997. Specifically, he found that the claimant's attorney was aware of the scheduling conflict at least as early as November 18, 1997, when he agreed to represent the claimant, but did nothing to move for a continuance until December 31, 1997. He also determined that the request did not comply with Rule 142.10(c) in that it failed to provide notice to the opposing party.

In his appeal of this ruling, the claimant's attorney conceded that the hearing officer was "correct" when he stated that the attorney failed to deliver a copy of the motion for a continuance to all parties. He then argues that a "close reading [sic] of the Hearing Officer's decision seems to indicate that the failure to comply with Rule 142.10 and 142.4 was the **only reason** for his decision." (Emphasis in original.) We disagree that the hearing officer simply undertook a mechanical application of the appropriate rules in deciding not to grant the continuance. He also expressly considered whether the claimant's attorney acted with due diligence. In any case, we are unwilling to conclude that a straightforward application of the rules would have been an abuse of discretion. Finally, the claimant's attorney argues that the carrier did not assert prejudice in opposing the motion. Prejudice could clearly be inferred from the opposition to the motion and the presence of the employer's representative and several witnesses at the scheduled CCH. The basis for the motion was the conflict in the civil trial setting. The attorney knew, or could be charged with the knowledge, that the civil trial and the CCH were scheduled for the same date for approximately six weeks before he moved on December 31, 1997, to continue the CCH without informing all the parties. While the timing of the motion was five days before the CCH, which is the minimum required by the rule, the hearing officer still concluded that the claimant's attorney failed to show good cause for the continuance. We find no abuse of discretion in this refusal and decline to reverse it on appeal.

When the hearing officer announced at the CCH that he again refused to grant the request for a continuance, the attorney and the claimant, upon advice of his attorney,

departed the CCH without introducing any evidence. The claimant had the burden of proof on both issues. Johnson v. Employers Reinsurance Corporation , 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The carrier declined to present evidence. Under these circumstances, the hearing officer determined that the claimant failed to meet his burden of proof and correctly concluded that the claimant did not sustain a compensable injury or have disability as claimed.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Christopher L. Rhodes
Appeals Judge