

APPEAL NO. 92214

A hearing concerning appropriate and authorized attorney fees was conducted by (hearing officer), a Texas Workers' Compensation Commission Hearing Officer, at (city), Texas on April 10, 1992. She entered an order signed April 21, 1992, awarding specific attorney fees which changed a previous Commission Order determined to be incorrect. Appellant seeks review of the order signed April 21, 1992 and received by him, according to his statement in his appeal, on May 9, 1992. He is seeking an increase in the fee awarded. No response to the request for review has been filed.

DECISION

Determining this appeal has not been timely filed, it cannot be considered. The order of the hearing officer is final.

As indicated, the order of the hearing officer was entered on April 21, 1992. It was sent to the appellant in a cover letter from the Commission dated May 6, 1992, and was received by the appellant on May 9, 1992. This appeal was mailed by certified mail on May 21, 1992 and was received by the Commission on May 26, 1992. Tex. W.C. Comm'n, 28 TEX ADMIN CODE § 152.3(f) (Rule 152.3(f) was in effect during the dates involved in this case and is controlling in this matter. That rule provides in pertinent part:

(f)An attorney, claimant, or carrier who contests the fee fixed and approved by the commission shall request a contested case hearing (or, if the order was made by a hearings officer, review by the appeals panel) by certified mail, return receipt requested, no later than seven days after the date of the commission's order.

Under the circumstances, this appeal has not been timely filed and cannot be considered. Accordingly, the hearing officer's order on attorney fees is final.

The dissenting opinion points out that this case is styled in such a fashion as to refer to the attorney in this case as "appellant." Such term in the style of this case, used basically to indicate the individual seeking to invoke review by this body, is not intended in any way to confer "party" status on such individual.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR

I agree with Chief Judge Sanders that the appeal made to the appeals panel should

not be considered. If valid, it was not timely. I question whether the appellant in this attorney's fee case has standing to appeal to the appeals panel. Attorneys fees are addressed under Article 8308-4.09 and 4.091 of the 1989 Act. While "the commission or court" is to act on fees, as referenced, no right to a hearing on attorneys fees appears in the 1989 Act. Article 8308-6.02(a) does not in my opinion extend the statutory obligation of the Division of Hearings, in regard to benefit review conferences, contested case hearings, arbitration, and appeals, to attorneys fees as "related to workers' compensation claims."

By Tex. W. C. Comm'n, 28 Tex Admin Code 152.3 (f), dated February 22, 1991, [rule 152.3 (f)] the commission chose to use a contested case hearing in certain instances as a review mechanism of an order addressing attorneys fees. In this case the order in question was issued by a Benefit Review Officer. (Note that the Benefit Review Officer's power to issue an order as to an attorney's fee is in contrast to the authority granted that officer under Article 8308-6.11 through 6.15 of the 1989 Act which provides for no determinations, except interlocutory ones, at that level; also, under Article 8308-6.31 through 6.34 of the 1989 Act, a contested case hearing is not an appeal or review of a benefit review conference.) Having chosen to allow for review by use of a contested case hearing and by specifying as an alternative measure review by the appeals panel only when the hearings officer has entered the original order, I am not willing to concede that this appellant, under the rule as it then existed, is entitled to appeal again, in this instance to the appeals panel.

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Joe Sebesta  
Appeals Judge

#### DISSENT

I respectfully dissent since I am of the opinion that appellant's request for review was timely pursuant to the provisions of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308.6.41(a) (Vernon Supp. 1992) (1989 Act) which provides that "[a] party that desires to appeal the decision of the hearing officer shall file a written appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings . . . ." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §152.3(f) (TWCC Rule) provides that "an attorney, claimant, or carrier who contests the fee fixed and approved by the commission shall request a benefit contested case hearing . . . no later than seven days after the date of the commission's order. . . ." TWCC Rule 152.3(g) provides that an attorney, claimant, or carrier contesting the fee ordered by a hearing officer after a contested case hearing shall request review by the appeals panel pursuant to the provisions of TWCC Rule 143.3. TWCC Rule 143.3(a)(3) provides that a party to a benefit contested case hearing dissatisfied with the hearing officer's decision may request an appeals panel review "not later than the 15th day after receipt of the hearing officer's decision."

Since the claimant (employee) requested a benefit contested case hearing on the matter of the attorney's fees ordered to be paid from his benefits, as he was authorized by TWCC Rule 152.3(f) to do, and since such a hearing was held on that issue with appellant appearing and presenting evidence on the issue, appellant became a party to that hearing and was entitled to the same status and appellate rights provided for in the 1989 Act as any other party to such a hearing. The hearing officer's "Decision and Order On Attorney's Fees" was transmitted to appellant by the standard letter from the Hearings and Review division of the Texas Workers' Compensation Commission (Commission) dated May 6, 1992. That letter also advised appellant that attached was the Commission's fact sheet explaining the procedure if an appeal is desired. The letter appears to be the standard letter sent to all parties after contested case hearings. I further note that the Decision in this matter designates appellant as "appellant" and that TWCC Rule 143.1 defines "appellant" as "[a] party to a benefit contested case hearing who is dissatisfied with the decision of the hearing officer, and files a request for review of that decision by the appeals panel."

Concluding that by the plain language of the foregoing provisions of the 1989 Act and TWCC Rules appellant was indeed a "party" to the contested case hearing and is indeed an "appellant" before this panel, I consider his request for review timely because, pursuant to those foregoing provisions, appellant had fifteen days, not seven, to file his request for review. While the Appeals Panel has previously refused to consider the review of attorneys fees issues on the grounds that such review requests were untimely under TWCC Rule 152.3(f), those requests for review did not follow contested case hearings. To the extent that TWCC Rule 152.3 could be viewed as in conflict with Article 8308-6.41(a), such conflict must be resolved to follow the statute. Generally, the rules of administrative agencies are invalid to the extent they conflict with governing statutes. "Another very solid proposition, at least under Texas law, is that rules and regulations adopted by administrative agencies may not impose additional burdens, conditions or restrictions in excess of or inconsistent with statutory provisions. (Citations omitted)." Bexar County Bail Bond Board v. Deckerd, 604 S.W.2d 214, 216, (Tex. Civ. App. -San Antonio 1980, no writ).

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Philip F. O'Neill  
Appeals Judge