

APPEAL NO. 92226A

On April 27, 1992, a contested case hearing was held in (city), Texas, in regard to attorney's fees as provided for in Tex. W. C. Comm'n, 28 Tex. Admin. Code § 152.3(f) (effective date: February 22, 1991) and authorized by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-2.09(a) and 4.09. The hearing officer, (hearing officer), amended the order previously issued on attorney's fees by reducing the amount from \$2,100.00 to \$225.00. Appellant asserts that the hearing was void in that it was not requested appropriately and that the preponderance of the evidence supported the amount of the award originally ordered.

DECISION

Finding that the appeal, if valid, was not timely filed, the order of the hearing officer is final.

This appeal is not being considered for two reasons:

- (1) If appellant has standing to appeal, then the appeal was not made within seven (7) days as is required by Rule 152.3(f). Appellant's appeal recites that he received the decision of the hearing officer on May 15, 1992. Since the envelope in which his appeal was sent to the commission is postmarked May 26, 1992, the appeal was not timely. See Texas Workers' Compensation Commission Appeal No. 92214 (Docket No. redacted) dated July 8, 1992. Even if appellant, prior to the date of Appeal No. 92214, was advised that the length of time to appeal an issue of attorney's fees was longer, the appeals panel is not compelled to adopt a time period different from that stated in Rule 152.3 (f). See In Re Water Rights of Cibolo Creek Watershed, 568 S.W.2d 155 (Tex. Civ. App.-San Antonio 1978, no writ) and Leach v. Fischer, 669 S.W.2d 844 (Tex. App.-Fort Worth 1984, no writ).
- (2) The appellant does not have standing to appeal in this particular case. An appeal of the commission order on attorney's fees was authorized under Rule 152.3(f) which allowed any party to request a contested case hearing when the order was issued below the level of a contested case hearing officer. (Had the order been issued by a "hearings officer," then the appeal would have been to the appeals panel.) Rule 152.3(f) was written to allow one appeal of attorney's fees, not successive ones up to the level of the appeals panel, and does not provide that Article 8308-6.01 through 6.64 apply. In addition, the 1989 Act does not provide that Articles 8308-6.31 through 6.42, including Article 8308-6.41 which sets forth the right to appeal to the appeals panel, shall apply to attorney fees. Article 8308-6.01(b) states the purpose of contested case hearings and other levels of dispute resolution within

Article 6 by providing:

Each proceeding before the commission to determine the liability of an insurance carrier for compensation for an injury or death under this Act is governed by this article.

Article 8308-6.34 (g) shows that the provisions of Articles 8308- 6.31 through 6.42 were not meant to apply to matters of attorney's fees when it specifically referred to such fees only as adjunct to a contested case hearing, by stating:

The hearing officer shall issue a written decision that includes: (1) findings of fact and conclusions of law; (2) a determination of whether benefits are due; and (3) an award of benefits due. On a form to be prescribed and promulgated by the commission, the hearing officer shall issue a separate written decision with respect to attorney's fees and any matter relating to such fees, and no part of this decision with respect to attorney's fees or the form shall be made known to a jury in any judicial review of an award, including an appeal.

While this appeal will not be considered on its merits, appellant's assertion that the contested case hearing was void because improperly requested could not have prevailed. Appellant did not introduce into evidence any document, any written statement, or any testimony that would show how the hearing was requested. Hearing officer exhibits did not include that request or documents related to it nor were they required to be included therein. Without evidence in the record as to the issue raised on appeal, the appeals panel cannot judge whether the request for a hearing was timely or not under Rule 152.3(f), which is stated by appellant to control this issue. The appeals panel will only consider the record and the appeal and response. Article 8308-6.42(a) of the 1989 Act.

This appeal cannot be considered. The decision of the hearing officer on attorney's fees is final.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

DISSENT:

I respectfully dissent for the reasons stated in my dissent in Texas Workers' Compensation Commission Appeal No. 92214 (Docket No. redacted) decided July 8, 1992.

Philip F. O'Neill
Appeals Judge