

APPEAL NO. 92307

A contested case hearing was held in (city), Texas, on May 27, 1992, (hearing officer) presiding, to determine whether an April 15, 1992 order of the Texas Workers' Compensation Commission (Commission) ordering payment of attorney's fees to appellant in the amount of \$900.00 was correct. The Commission had previously approved \$450.00 in attorney's fees for appellant. After denying appellant's motions to quash the hearing for lack of jurisdiction and to recuse herself for bias and prejudice, the hearing officer determined that the Commission's order was incorrect and reduced the fees to \$195.00. Appellant asserts on appeal that the hearing officer erred in conducting the hearing for lack of jurisdiction, erred in failing to recuse herself, and erred in making her order and certain findings of fact and conclusions of law, in that there was insufficient evidence to support them. Appellant requests an order awarding 7.05 hours of legal services at the rate of \$150.00 per hour for a total of \$1,057.50. No response was filed by respondent/claimant (respondent).

DECISION

Determining that respondent failed to request the contested case hearing within the time required by Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE, §152.3(f) (TWCC Rule), the decision and order of the hearing officer are reversed and rendered.

According to the evidence, which consisted of the testimony of appellant, respondent, and various documents, appellant undertook the representation of respondent on July 29, 1991 in the matter of her workers' compensation claim. Appellant's representation involved only informal resolution of the claim without Commission intervention and did not include a benefit review conference or subsequent administrative proceedings. See Rule 152.4, Guidelines for Maximum Hours for Specific Services Performed by a Claimant's Attorney. Appellant signed a Claimant's Attorney's Affidavit for Fees (Disputed Claim) on September 30, 1991 for 13 hours of attorney time at the rate of \$150.00 per hour (\$1,950.00) and submitted it to the Commission. By order of October 23, 1991, a disability determination officer (DDO) of the Commission approved attorney's fees in the amount of \$450.00 to be paid from respondent's benefits. No contest of that order was taken by any party. Appellant notified respondent by letter that he ceased his representation of respondent as of February 6, 1992 and submitted to the Commission a verified Application and Order for Attorney's Fees signed on March 18, 1992 in the amount of \$1,770.00 for 11.8 hours of attorney's time. A Commission order, signed by a DDO on April 15, 1992, approved and ordered the payment from respondent's benefits of attorney's fees in the amount of \$900.00. The Commission mailed a copy of the order to respondent on April 16th but it was returned to the Commission on April 24th with the envelope stamped "addressee unknown." Attached to the order was a notice advising that anyone dissatisfied and contesting the fee approval and order "shall request a contested case hearing by certified mail return receipt requested no later than 7 days after the date of this order. Rule 152.3(F)."

Respondent testified she had moved her residence on January 20, 1992 and was

unaware of the Commission's April 15th order approving additional fees for appellant until she made inquiry upon receipt of a benefits check for a lesser amount. The record did not indicate the date she inquired about the amount of her check. However, she called the Commission on May 6, 1992 to indicate that she was very upset to learn that additional fees were approved since appellant had withdrawn from her case and she felt he should not have been awarded additional fees. She further advised the Commission she had not received her copy of the April 15th order, along with the accompanying information stating she had only seven days to contest the order, because she had moved. Her telephone call to the Commission led to the scheduling of the contested case hearing at her request. She testified at the hearing that she had not met appellant before the hearing; that she had not had more than five telephone conversations with appellant's office (not the approximately 13 calls listed on appellant's affidavit); and, that such calls were always to or from appellant's secretary.

Appellant was asked by the hearing officer about a number of dates and attorney services appearing on his second affidavit which appeared on his initial affidavit, and about his not having personally conferred or conversed by telephone with respondent. Appellant responded, in essence, that his second affidavit spoke for itself; that all the services detailed on that affidavit involved attorney time; that he had not requested compensation for staff; that he regarded the Commission's first order for \$450.00 attorney's fees as payment for his first three hours of services at the rate of \$150.00 per hour; and that he submitted the second affidavit because persons at the Commission had told him to submit an itemized statement of his services.

Prior to taking evidence from appellant and respondent on the correctness of the Commission's April 15th order, the hearing officer considered and denied appellant's motions to quash the hearing for lack of jurisdiction and to recuse herself for bias and prejudice. Respecting the motion to quash, appellant contended that the requirements of Rule 152.3(f) were mandatory, had previously been strictly applied to him, and had not been met by respondent. He pointed out that under the Rule the seven day period to request a hearing begins to run from the date of the order, not from the date the order is received by a contesting party. Rule 152.3(f), since amended effective June 1, 1992, then provided as follows:

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. The contesting party shall send a copy of the request, by certified mail, return receipt requested, to the carrier and, by regular mail to the other parties, including the claimant. Notice of a contest shall relieve the carrier of the obligation to pay, according to the commission's order, until such time that the commission enters a subsequent order.

Respondent testified she never received a copy of the order. She said she did notify

the postal service of her change of address but her testimony in that regard was vague. Appellant argues on appeal that since respondent moved on January 20, 1992, several months before the April 15th order, she had a duty to notify the Commission of her change of address or file a notice with the postal service so that her mail could be forwarded to the new address. There was no evidence that respondent ever notified the Commission of her change of address. She did testify she received mail at a post office box number both before and after her change of residence. However, the Commission's order was mailed to her former street address. TWCC Rule 102.5(a) provides that all notices and written communications to the claimant will be mailed to the last address supplied by claimant.

The hearing officer opined that insofar as the requirement for the hearing request being by certified mail was concerned, TWCC Rule 142.5(c)(2), which provides that "[a]n unrepresented claimant may request a hearing by contacting the commission in any manner," could be applied to relieve respondent of that requirement. As for the requirement that the request be made no later than seven days after the date of the order, the hearing officer stated that she regarded the rule to contemplate receipt of the order by the contesting party; that the evidence showed respondent's copy of the order was returned to the Commission undelivered; and that respondent didn't become aware of the existence of the order until the insurance carrier began to withhold attorney's fees from her benefits checks. The hearing officer also denied appellant's motion that she recuse herself for bias and prejudice against him.

Article 8308-4.09(a) provides that an attorney's fee for representing a claimant before the Commission must be approved by the Commission. Article 8308-2.09(a) empowers the Commission to adopt rules as necessary to implement the 1989 Act. The Commission has promulgated TWCC Rules 152.1 through 152.5 which address attorney's fees. With regard to the seven day period commencing with the date of the Commission's order, we observe that prior to the June 1, 1991 amendment, Rule 152.3(f) provided that the seven day period commenced with the date of the Commission's order notwithstanding whether such order was being contested before a contested case hearing officer, or was the order of a contested case hearing officer being reviewed by the Appeals Panel. However, the June 1st amendment added subparagraph (g) to the Rule which provided that an attorney, claimant or carrier contesting fees ordered by a contested case hearing officer, as distinguished from fees ordered prior to a contested case hearing, shall request review by the Appeals Panel pursuant to the provisions of TWCC Rule 143.3. That Rule commences the time period in which to request the review upon the date of receipt of the hearing officer's decision, not the date of the order itself. Notwithstanding this anomaly, however, we are aware of no authority for the Appeals Panel to ignore the plain language time requirements of Rule 152.3(f) in the face of an appealed issue on the point and we will not do so in this case. While administrative agencies may not generally impose additional burdens, conditions, or restrictions in excess of or inconsistent with statutory provisions (Bexar County Bail Bond Board v. Deckerd, 604 S.W.2d 214, 216 (Tex. Civ. App. - San Antonio 1980, no writ)), agencies are bound by their own rules (Gulf Land Co. v. Atlantic Refining Co., 131 S.W.2d 73 (Tex. 1939)). Further, we do not feel free to reopen an order approving attorney's fees when such order was not timely appealed under the express rule involved

here. See generally Sexton v. Mount Olivet Cemetery Association, 720 S.W.2d 129 (Tex. App.-Austin 1986, writ ref'd n.r.e.). And see Galacia v. Texas Employer's Insurance Association, 348 S.W.2d 417 (Tex. Civ. App.-Waco 1961, writ ref'd, n.r.e.) where the court dismissed a workers' compensation case for lack of jurisdiction for claimant's failure to file his notice that he would not abide by the final ruling and decision of the Industrial Accident Board within 20 days of its rendition. The Board's award had been sent to plaintiff at an erroneous address provided by claimant. The court noted that the Board complied with its rules, which it said have the force and effect of law; was not negligent; and was under no legal duty to review its files to determine an alternate address for claimant.

Under the circumstances of this case, respondent's request for the contested case hearing was not timely made. Accordingly, the Decision and Order of the hearing officer were a nullity and the Commission's order of April 15, 1992 became final. In view of our disposition of this case, it is unnecessary for us to address the merits of appellant's motion to recuse and the hearing officer's findings regarding the attorney's fees allowed and disallowed.

Reversed and rendered.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the result since there is no evidence that respondent had notified the Commission of her change of address. Once the copy of the order had been sent to the last address supplied by the claimant (see Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 102.4 [rule 102.4]), then rule 102.5(a) and (h) were applicable and claimant's date of receipt was deemed to be five days after the order was mailed by the Commission. Five days after April 16th, the date of mailing the order, was April 21st and claimant did not request a hearing within seven days of that date.

I point out that the rationale in this concurring opinion gives the aggrieved party seven days from the date the order is received, as interpreted by applicable rules, rather than seven days from the date of the order. This method of determining the seven day time of appeal for an attorney's fee has been applied previously by the Appeals Panel in Texas

Workers' Compensation Commission Appeal No. 92226A (Docket No. redacted) decided July 15, 1992, which was a previous appeal by this same appellant. We wrote:

"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." (Emphasis added.)

In my opinion it makes no difference whether the seven day period refers to a time to request a hearing, as in this case, or refers to a time for appeal to the Appeals Panel, as in Appeal No. 92226A, *supra*. Both, in these instances, were covered by the same rule.

In addition, while Section 16 of the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art 6353-13a (Vernon Supp. 1991) is not followed by the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992) as to notice requirements, I believe that cases decided prior to that Act address the requirement for notice. Under Highway Trans. Co. et al. v. Southwestern Greyhound Lines, 124 S.W.2d 433 (Tex. Civ. App.-Austin 1939, writ ref'd), respondent's seven day period to request a hearing should begin at the time respondent receives, or should have received, notice of the attorney fee order. Under rule 152.3(f) as interpreted in this decision on appeal, respondent's seven day period began from the date of the Commission's order.

Joe Sebesta
Appeals Judge