

APPEAL NO. 92327

A contested case hearing was held on June 10, 1992 in (city), Texas, with (hearing officer) presiding. The hearing was held at the request of claimant (respondent/claimant herein) to contest the amount of attorney's fees fixed by order of the Texas Workers' Compensation Commission (Commission) signed April 28, 1992. That order awarded attorney's fees in the amount of \$1,402.50 to (appellant), who previously represented respondent/claimant in a workers' compensation case. The hearing officer held that the respondent/claimant properly requested the contested case hearing, that the April 28th order was invalid under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), because it approved payment of attorney's fees for services appellant did not perform, and that no attorney's fees should be awarded based on the affidavit filed by appellant because such was untruthful and therefore defective.

Appellant argues on appeal that the June 10th hearing is void as a matter of law because respondent/claimant did not comply with the appropriate Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.3(f); appellant argues that the finding of fact and conclusions of law indicating the Commission had jurisdiction in the matter were thus in error. Appellant argues in the alternative that the finding of fact and conclusion of law concerning the affidavit attesting to his services were in error, and that the decision and order is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. No response was filed by respondent/claimant. Respondent/carrier did not appear at the hearing.

DECISION

We reverse the decision of the hearing officer and render the Commission's April 28, 1992 order because the hearing was not timely requested.

Appellant, who did not personally appear at the contested case hearing, filed a pleading styled "Appearance, Objection, and Motion to Dismiss Contested Case Hearing." In it, appellant moved for dismissal of the hearing for respondent/claimant's failure to comply with Rule 152.3(f) in that the hearing was not timely requested, nor requested by certified mail, nor sent to the other parties, *i.e.*, appellant. The hearing officer overruled this objection and motion at the outset of the hearing.

At the hearing respondent/claimant, who testified through an interpreter, said he did not recall the date he received the Commission's April 28th order by mail, but that he requested the hearing in person within a week of receiving it. The hearing officer's decision recited that respondent/claimant came to the (city) field office on May 12, 1992 and requested a hearing to contest the fee fixed by the April 28th order; the hearing officer apparently took official notice of this date.

Rule 152.3(f) provides in pertinent part that an attorney, claimant, or carrier who

contests an attorney's fees approved by the Commission shall request a contested case hearing by certified mail no later than seven days after the date of the Commission's order, with a copy of the request sent to the other parties. We have held in Texas Workers' Compensation Commission Appeal No. 92329 (Docket No. redacted) decided August 24, 1992, that the failure of an unrepresented claimant to request an appeal by certified mail, or to send copies of the appeal to the other parties, will not invalidate the appeal. However, we held in that appeal that the seven day time limit for requesting such a hearing runs from the date of the Commission's order, as Rule 152.3(f) states, and not the date the order was received.

Finding of Fact. No. 6 and Conclusion of Law No. 2 misconstrue this rule by implying that respondent/claimant must request a hearing within seven days after receipt of the order. Respondent/claimant testified that he requested the hearing within seven days of an unknown receipt date; the hearing officer stated that the date of request was May 12th, which was more than seven days after April 28th. Therefore, the hearing was not requested within the time frame established by Rule 152.3(f).

Because of our ruling on this issue, we will not address the merits of the decision and order.

The decision and order of the hearing officer is reversed and the April 28, 1992 order reinstated.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Susan M. Kelley
Appeals Judge