

APPEAL NO. 92329

This appeal is conducted in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.41 (1989 Act) and Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3), and §152.3 (as amended, effective June 1, 1992) (Rule 152.3).

A contested case hearing was held at the request of the respondent/claimant, on May 27, 1992, appealing an order approving attorney's fees that had been requested by (Mr. W). That order had been issued April 6, 1992, by a Disability Determination Officer (DDO) for the Texas Workers' Compensation Commission (Commission), approving fees in the amount of \$1,552.50, representing a reduction of the amount originally sought, in conformity with attorney fee guidelines and the apparent lack of a "dispute" indicated on the affidavit that would have entailed applicability of the informal dispute resolution guidelines. The respondent/claimant requested by telephone on April 24, 1992, a contested case hearing to appeal this.¹

Appellant asks that the decision be reversed and the order of the DDO reinstated. He states that the hearing officer had no jurisdiction to hear the appeal because the respondent/claimant did not request an appeal by certified mail within seven days of the issuance of the order, as provided in Rule 152.3(f). The appellant also attacks the substance of the order. No response was filed.

DECISION

The order of the hearing officer is reversed; the Appeals Panel renders the April 6, 1992, order of the Commission because of the failure of the respondent/claimant to request a hearing within the time frame provided in Rule 152.3 and 142.5(c)(2).

Attorney's fees for representing a claimant before the Commission (or a court) must be approved by the Commission (or the court). 1989 Act, Article 8308-4.09 (a). That statute spells out the factors that should be considered by the Commission in approving the amount of the fee, which cannot exceed 25% of the claimant's recovery.² Within the statutory parameters, the amount of fees and method of payment are matters committed to the discretion of the Commission or the court. Smith v. City of Austin, 670 S.W.2d 743 (Tex. App.-Tyler 1984, no writ); Texas Employers' Insurance Ass'n v. Motley, 491 S.W.2d 395 (Tex. 1973). It is the statute that confers "jurisdiction" on the Commission, not the rules themselves.

¹ Official notice was apparently taken by the hearing officer, although not recited on the record, of the date that a request for hearing was made to the Commission.

² "Claimant's recovery" is defined in Rule 152.2(b), and lists amounts that are not included in computing the benefits subject to the 25% ceiling.

The Commission in accordance with delegated rule-making powers set forth in Article 8308-2.09(a), has adopted Rule 152.3 (along with other rules in 28 TEXAS ADMIN. CODE Chapter 152) to enforce and implement Commission approval of such fees. As such approval is most often done without a hearing, the Commission has provided for a review process that will allow the agency to review an approval of attorney's fees, and modify such approval. In the version of Rule 152.3 in effect on April 6, 1992, subsection (f) stated that such appeals were to be made "no later than seven days after the date of the Commission's order." Unlike other portions of the statute or rules that trigger action based upon receipt of an order, the Commission has determined, through promulgation of the rule, that the time frame for requesting review of an attorney's fees award runs from the date of the order. It is not our function to second-guess the wisdom of administrative rules, which are solely within the purview of the courts to invalidate. See Article 6252-13a, § 12. (Texas Administrative Procedure and Texas Register Act). An administrative agency is bound by its own rules. Gulf Land Co. v. Atlantic Refining Co., 131 S.W.2d 73 (Tex. 1939).

As to appellant's point that the request was not made by certified mail, Rule 142.5(c)(2) indicates that an unrepresented claimant may request a contested case hearing "in any manner" and must be read together with Rule 152.3(f). The only "manner" for requesting a contested case hearing to review an attorney's fee order that appears in Rule 152.3 is the requirement that the request be made by certified mail. Rule 142.5(c)(2) indicates an intent on the part of the Commission that the dispute resolution process be made accessible to those who are functioning without an attorney. We would therefore agree that, interpreting these two rules harmoniously, the failure of an unrepresented claimant to request an appeal of attorney's fees by *certified mail*, or send copies of that appeal to other parties, will not in and of itself invalidate the appeal. However, the seven day time limit for requesting such a hearing does not, in our opinion, constitute a "manner" as that term is used in Rule 142(c)(2).

Although establishment of a review process may be viewed as an implied power of the right of approval of fees granted under Article 8308-4.09 and 8308-4.091, we are not at liberty to engraft upon the Commission's express rule an inherent power to reopen, at any time, orders for approval of attorney's fees that are not appealed in the time frame prescribed by the Commission. See Sexton v. Mount Olivet Cemetery Association, 720 S.W.2d 129 (Tex. App.-Austin 1986, writ ref'd n.r.e.)

The hearing officer's decision indicates that the hearing was requested more than seven days after April 6, 1992, the date of the order. Consequently, because the hearing was not requested within the time frame established in Rule 152.3(f), the order of the hearing officer is reversed and the order, dated April 6, 1992, is rendered and reinstated. Because of our holding on this matter, we do not reach the substance of the order itself.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge