

APPEAL NO. 92377

A contested case hearing was held in (city), Texas, on April 2, 1992, (hearing officer) presiding, to consider the dispute of respondent (claimant) over additional attorney's fees in the amount of \$1,012.50 approved for his former attorney, (attorney) (appellant), by a March 10, 1992 order of the Texas Workers' Compensation Commission (Commission). Respondent said he requested the contested case hearing, although no evidence was adduced as to the date and manner of his request. He testified to the extent of his telephone calls and visits to appellant's office during the September 1991 to February 1992 period of appellant's representation. Respondent contended that appellant had previously been paid \$150.00 following a prior Commission order, that he had never met or spoken to appellant as far as he knew, and that he could not understand why appellant was charging so much for doing so little. Appellant cross-examined respondent, the sole witness, about his telephone calls and office visits. The hearing officer adduced the only exhibits which included appellant's two attorney's fees affidavits and the Commission's respective orders thereupon. In his Decision of June 24, 1992, the hearing officer set aside the Commission's March 10, 1992 order because appellant's attorney's fees affidavit, which resulted in that order, failed to delineate the services performed by time billers other than appellant himself, as contemplated by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 152.1 - 152.5 (TWCC Rules). The hearing officer decided that appellant's affidavit was not in substantial conformity with the TWCC Rules, and that the Commission was unable to determine appropriate fees therefrom. The hearing officer ordered the workers' compensation insurance carrier to hold in escrow the approved \$1,012.50 in attorney's fees, as deducted from respondent's weekly income benefits, and stated that the order was without prejudice to appellant's resubmission of his affidavit to identify the other time billers' services, hours, and rates. In appellant's request for review, after asserting his standing to appeal from the hearing below, appellant contends first that the Commission was without jurisdiction to hold the hearing and that the hearing was void for the reason that no evidence showed that respondent requested the hearing not later than seven days from the Commission's March 10th order, as required by TWCC Rule 152.3(f). In the alternative, appellant asserts that the hearing officer's Decision and Order are against the great weight and preponderance of the evidence for the reasons that the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-4.09 (Vernon Supp. 1992) (1989 Act) provides for only attorney's fees and not for paralegal and law clerk fees, and that the preponderance of the evidence established that appellant himself performed the services enumerated on his affidavit, either personally or by way of the supervision and review of others. Appellant asks us to reverse the Decision and Order and enter an order for 6.75 hours of legal services at \$150.00 per hour for a total amount of \$1,012.50 to be paid from respondent's weekly income benefits. No response was filed by respondent.

DECISION

The decision of the hearing officer is affirmed.

Respondent testified that appellant undertook his representation in September 1991

and terminated that representation on or about February 15, 1992. He said that appellant was first paid \$150.00 in attorney's fees. Appellant's first affidavit, signed on December 16, 1991, reflected that his representation commenced on September 27, 1991, and it apparently sought payment for 18 hours of attorney services at the rate of \$150.00 per hour totalling \$2,250.00 for the period September - December 1991. The Commission's order of January 8, 1992 approved only \$150.00. Respondent said he received a Commission order which approved an additional \$1,012.50 in attorney's fees for appellant and called the Commission wanting to know why appellant was charging so much when he just left the case up in the air and never explained things. He contended that after his initial visit in September 1991, he returned to appellant's office three or four times but that appellant was never in for him. He said he had never met and didn't know appellant, and that his telephone calls were always with a secretary. On cross-examination by appellant, respondent conceded he had seen appellant with a translator on several office visits but maintained he never spoke directly to appellant and didn't know who he was. Appellant did not speak Spanish and respondent did not speak English. Respondent said he signed a lot of papers but didn't know what he was signing.

We first address appellant's appealed issue that the hearing below was void for want of jurisdiction in that there was no evidence that respondent timely requested the hearing to contest the Commission's order approving the additional attorney's fees. The version of TWCC Rule 152.3(f) then in effect required respondent to request the hearing by certified mail "no later than seven days after the date of the commission's order." Appellant did not raise an issue at the hearing below as to the timeliness of respondent's request for the hearing. In Texas Workers' Compensation Commission Appeal No. 92307 (Docket No. redacted) decided August 24, 1992, we reversed and rendered for the appellant and found the hearing officer's Decision and Order a nullity because, under the circumstances of that case, the respondent's request for the hearing was not timely made. While not casting the rule's time requirement as jurisdictional, we did state we could not there ignore the seven day requirement since the appellant in that case, who is also the appellant *instanter*, had raised the issue at the hearing below and requested our review. Because appellant here did not raise the timeliness issue below, we are not now required to decide it. Concerning issues not raised at the hearing, we have previously observed that "[s]ince the issue was never brought before the contested case hearing, there is no decision of the hearing officer on which to base a proper predicate for review of this matter by the Appeals Panel. (Articles 8308-6.41(b), 8308-6.42(a))." Texas Workers' Compensation Commission Appeal No. 91057 (Docket No. redacted) decided December 2, 1991. *And see* Texas Workers' Compensation Commission Appeal No. 91100 (Docket No. redacted) decided January 22, 1992. Further, we do not find that the hearing officer lacked jurisdiction for the hearing or that it was void.

As for appellant's alternative appealed issue to the effect that the hearing officer's Decision and Order are against the great weight and preponderance of the evidence, we find it without merit for the obvious reason that the hearing officer made no determinations

respecting the merits of appellant's attorney's fees affidavit and the services and hours reflected therein. The hearing officer stated the following in his Decision:

In view of the foregoing [appellant's] 14 February 1992 affidavit is not in substantial conformity with the Rules and the commission is unable to determine an appropriate fee on the current record. This order is without prejudice for [appellant] to resubmit his 14 February 1992 application for fees in its entirety identifying who performed the services and stating the hourly rate for each such time biller for the hours approved by the commission in its 10 March 1992 order.

The hearing officer's decision is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge