APPEAL NO. 92497

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.3 (Rule 152.3). On August 19 and 20, 1992, a contested case hearing was held in (city), Texas, upon the request of the respondent who disputed an attorney fee award made to his attorney. (hearing officer) presided. She reduced the amount of attorneys' fees awarded in June 1992 by the Commission to (M B) for representing respondent in regard to a 1991 injury. Appellant (attorney herein) appealed without specifically attacking any part of the hearing officer's decision. Respondent (claimant herein) did not respond.

DECISION

We affirm this decision on attorney's fees.

The appeal in this case was filed timely, but did not recite service upon the claimant. Upon notification of this, attorney attempted to serve claimant by mail. Attorney has provided a copy of a notice sent to claimant's last supplied address, but this communication was returned as undeliverable. We do not need to address the effect of this attempt to serve a copy of the appeal on claimant because on December 22, 1992, attorney states that personal service took place at the (city) office of the Texas Workers' Compensation Commission. At that time attorney handed claimant a copy of the appeal which he refused to sign for. His refusal to sign does not negate that service took place. By the terms of Rule 143.4, claimant had 15 days from date of receipt of the appeal to file a response. The response should have been filed no later than January 6, 1992. No response has been received.

Claimant retained attorney in June 1991. All agree that at that time attorney was retained to represent claimant in two injury cases, one arising in 1985 and one in 1991. Contracts were signed between both parties in regard to both injuries and called for contingent fees of 25% of the recovery in each. Claimant and his wife both stated that the attorney told them she would take a fee from the 1985 injury case but not from the 1991 case. The Commission approved two awards of attorney's fees related to the 1991 injury. The claimant only appealed the second, June 1992 award. The hearing officer, in approving part of the June 1992 Commission award to the attorney, gave more weight to the testimony of the attorney and the contract between the parties regarding the 1991 injury than she did to assertions by the claimant that attorney said she would charge no fee.

In addition, the claimant testified that he did not contest the first award for attorney's fees made in January 1992 in regard to the 1991 injury because he was about to receive a settlement check from the 1985 injury and was afraid that the attorney would keep that check if he contested attorney's fees for the 1991 injury. The attorney denied that any indication was given to claimant that she would keep the 1985 settlement check. Claimant's failure to contest the first attorney's fee award, the attorney's testimony, and the contract signed by

claimant provide sufficient evidence to support a decision to uphold some amount of attorney's fee.

The hearing officer exhaustingly considered each item on the attorney's fee request with the claimant and asked for his opinion as to the efficacy and amount of each. Attorney in June 1992 had requested 6.9 hours at $150.00 per hour for $1,035.00. The Commission at that time awarded 5.9 hours for $885.00. Claimant's opinion of the 17 items enumerated on the fee request was that 2.65 hours would have been sufficient. (The hearing officer noted that the attorney did not charge a fee for her time at two benefit review conferences attended for claimant.) There was no contested case hearing.

The hearing officer notes in approving 3.2 hours of the 5.9 previously approved by the Commission that the attorney did not show a basis for many phone calls listed in her request for fees. The general basis for the hearing officer's decision, without specificity as to particular entries, makes it hard to consider just what entries were partially reduced or totally reduced. While this manner of reaching a decision is open to critical review, the general nature of the appeal, which does not take issue with this manner of approach, and the thorough consideration of the facts, evident by the record and the hearing officer's otherwise exhaustive and specific opinion, provide a sufficient basis for affirmance of the decision. The record does not indicate that the findings and conclusion that set forth 3.2 hours in attorney's fees are against the great weight and preponderance of the evidence. As a result of this decision, the attorney in regard to this 1991 injury will receive attorney's fees of $1,065.00, awarded in January 1992 (and not appealed), and $480.00 approved through affirmance of the hearing officer's decision, for a total of $1,545.00. As stated, claimant did not appeal this decision. However, we would note that the total amount ultimately paid cannot exceed 25% of the recovery. Article 8308-4.09(b).

While the arithmetic in the decision and order of the hearing officer is not absolutely clear, the decision and order are affirmed to the extent that they approve only so much of an attorney's fee, based on the June 30, 1992 award in question, that does not exceed $480.00.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge