

APPEAL NO. 93624

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.001 *et seq.*, a contested case hearing was held in (city), Texas, on June 1, 1993, at the request of the appellant, claimant herein, (hearing officer) presiding as hearing officer. The sole issue was whether any portion of attorney's fees awarded by the Disability Determination Officer in the amount of \$627.50 was excessive. The claimant failed to attend this hearing.

The hearing officer found that the number of hours of attorney (2.5 hours), paralegal (4.25 hours) and law clerk (2.25 hours) time originally approved were "reasonable, necessary, and performed," but the attorney fee award was excessive. Specifically, he found that a reasonable attorney's fee rate was \$125.00 per hour instead of the originally claimed and approved \$150.00, a reasonable paralegal fee was \$25.00 per hour and that a reasonable fee for the law clerk was \$55.00 per hour instead of the originally claimed and approved \$65.00 per hour, thus reducing the originally approved fee from \$627.50 to \$542.50.

The claimant appeals this decision and order of the hearing officer. The request for review has not been served on the respondent, attorney herein, as required by Tex. W. C. Comm'n, 28 TEX. ADMIN § 143.3 (Rule 143.3) nor has the attorney independently appealed the reduction in his requested fees.

DECISION

Finding that the request for review was not timely filed and the jurisdiction of the Appeals Panel has not been properly invoked, the decision of the hearing officer has

become final pursuant to the provision of Sections 410.169 and 410.202, and Rule 143.3(a)(3).

Section 410.202 provides that a party desiring to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel and serve a copy on the other party not later than the 15th day after the date the hearing officer's decision is received from the Texas Workers' Compensation Commission's (Commission) hearings division. Rule 143.3(a) provides that a request for review be filed with the Commission's central office in Austin not later than the 15th day after receipt of the hearing officer's decision. Rule 143.3(c) provides that a request shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and is received by the Commission not later than the 20th day after such date. Failure to serve the opposing party does not render an otherwise timely appeal untimely. Texas Workers' Compensation Commission Appeal No. 92397, decided June 3, 1993.

The hearing officer's decision in this case, signed on June 3, 1993, was distributed by the Commission's hearing's division on June 14, 1993. The claimant does not indicate the date she received the decision and thus we apply Rule 102.5(h) which provides that "the commission shall deem the received date to be five days after the date mailed." Accordingly, claimant is deemed to have received the decision on June 19, 1993, and her appeal was required to be filed with the Appeals Panel not later than 15 days later. Since the 15th day fell on July 4, 1993, a Sunday, the final day to file an appeal was extended in accordance with Rules 102.3(a)(3) and 102.7, to the next business day, or July 5, 1993.

The claimant's handwritten request for review, dated July 20, 1993, was postmarked July 23, 1993, and received by the Commission on July 26, 1993. It is thus untimely and consequently the jurisdiction of the Appeals Panel was not properly invoked.

Although not necessary to our decision, we have nonetheless examined the record in this case to determine whether there was sufficient evidence to support the hearing officer's determinations on the matters submitted for appeal. See Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1992. In her appeal letter, claimant maintains that she was not present at the contested case hearing because she was never told of the date of the hearing even though her attorney, the respondent, was supposed to have told her. As to fees, she believes they are too much and that she was never told what they would be. The hearing office found on the record that the claimant without good cause was not present at the contested case hearing. The evidence showed detailed efforts to reach the claimant and notify her of the hearing. Notices were sent as required by Commission rules by mail to her existing address. Phone calls were attempted unsuccessfully, and the hearing began only after a search of the premises failed to disclose her presence. Absent some evidence of official fault or irregularity in the provision of notice to the claimant of the contested case hearing date and place, we are unwilling to conclude that the claimant did not receive notice. See Texas Workers' Compensation Commission

Appeal No. 93347, decided June 14, 1993. We would find the hearing officer did not abuse his discretion in conducting the hearing and issuing a decision. Texas Workers' Compensation Commission Appeal No. 92055, decided March 30, 1993.

Despite the claimant's unexcused failure to attend the requested contested case hearing, the hearing officer received evidence from the attorney, determined the attorney's fees previously awarded were excessive and reduced them accordingly. This was within the sound discretion of the hearing officer and the attorney did not appeal this decision. Lacking a timely request for review by either party, the jurisdiction of the Appeals Panel has not been properly invoked. See Texas Workers' Compensation Commission Appeal No. 92099, decided May 21, 1992.

Although pursuant to Sections 410.169 and 410.202, the decision of the hearing officer has become final, one matter deserves brief comment. In Conclusion of Law No. 2, the hearing officer states that attorney's fees in the amount of \$627.50 are reasonable and necessary, although the carrier is ordered to pay fees in the amount of \$542.50. The calculations of the proper fee amount contained in the findings of fact clearly show that the correct award intended by the hearing officer was the smaller figure. We believe that this error is clerical in nature and can be corrected by the executive director, pursuant to Sec. 410.206 as implemented by Rule 140.5.

Finally, the decision and order of the hearing officer caps attorney's fees at 25% of income benefit payments even though the initial award capped fees at 15% of income benefit payment. The difference is nowhere discussed in the decision of the hearing officer. Were there jurisdiction in the Appeals Panel to review this case, we would find that the hearing officer overruled the initial determination of the benefits review officer on the question of percentage maximum of benefits to be withheld for attorney's fees.

In summary, for the reasons stated above, this appeal was not timely filed and the decision of the hearing officer is the final administrative decision in this case.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge