

## APPEAL NO. 93660

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE § 401.001 *et seq.* (1989 Act). On June 21, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that Mr. M, the appellant (claimant), owed his attorney a reasonable fee for necessary work the attorney had performed. The hearing officer ordered that respondent (attorney), is entitled to a limit of \$1,193.75 in attorney's fees, but the hearing officer found excessive the Commission's previous award for the attorney's charges for sending a collection letter to the claimant. The claimant filed an appeal contesting the hearing officer's decision. The attorney did not file a response.

## DECISION

Finding that the appellant did not timely file a request for review of the hearing officer's decision, we find that the hearing officer's decision has become final pursuant to Section 410.169.

The hearing officer closed the contested case hearing on June 23, 1993. The hearing officer signed the decision and order on July 1, 1993. At the close of the hearing, the hearing officer reminded both parties that if they are dissatisfied with the decision from the hearing, either party must file an appeal no later than 15 days after his decision is received to challenge the hearing officer's decision. The claimant indicated that he understood this appeal deadline. As indicated, Texas Workers' Compensation Commission (Commission) sent out the decision and order on July 8, 1993, with a cover letter dated July 7, 1993. This letter with the hearing officer's decision also contained a fact sheet pamphlet which explained the appeal procedures. The Commission also sent this same information to the claimant's attorney. Without assistance of counsel, the claimant filed a request for review in an appeal without a date. The request for review had a postmark of July 29, 1993. The Commission received and file stamped the request on August 2, 1993.

Section 410.202(a) requires "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." See *also* Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE § 143.3(A)(3) (Rule 143.3 (A)(3)). "For purposes of determining the date of receipt of these notices and other written communications which require action by a specific date after receipt, the Commission shall deem the received date to be five days after the date mailed." Rule 102.5(h). The Commission distributed the decision of the hearing officer on Thursday, July 8, 1993. The Commission rules deem that the claimant received the hearing officer's decision on Tuesday, July 13, 1993, which is five days after the mailing date of the decision. The claimant does not state in his appeal when he received the decision. The claimant had until 15 days from the deemed receipt, five days after distribution, of the decision. The 15 day

date would have ended on Wednesday, July 28, 1993. Rule 102.3(3). The claimant's request for appeal was postmarked Thursday, July 29, 1993, which made his appeal one day late. We conclude that the claimant failed to file a timely request for review in accordance with Section 410.202(a) and Rule 143.3. In the absence of a timely request for review by the Appeals Panel, the decision of the hearing officer became final by operation of law. Section 410.169; Rule 142.16(f); Texas Workers' Compensation Commission Appeal No. 92265, decided August 5, 1992.

Even though the appeal was untimely filed, we have reviewed the evidence to determine its sufficiency to support the challenged findings and conclusions of the hearing officer. The hearing officer decided that the attorney's fee awarded on April 7, 1993, was excessive only to the extent that the attorney attempted to include in his fee an amount charged for attempting to collect his fee from the claimant.

The claimant argued that the attorney did not do anything. The attorney testified that he performed all the services for which he billed the claimant. The claimant testified that he did hire the attorney, but the claimant also said that he fired the attorney. The attorney had already done work for the claimant before the firing date. The attorney testified that he contacted the carrier for more money for the claimant and that he talked with the claimant's doctors regarding the claimant's compliance with doctor's orders. The attorney and the claimant disputed each other's accounts of the exact amount of work performed by the attorney.

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing, and the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign their testimony, and then resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeals No. 93155, decided April 14, 1993. As the fact finder, the hearing officer has the responsibility and the authority to resolve conflicts and inconsistencies in the evidence, to assess the testimony of the witnesses, and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; *citing* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports a fact finder's conclusions and his findings are not against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); *citing* Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951). The hearing officer found that the attorney did work necessary hours for the claimant and that this amount of time was necessary to protect the claimant's interests, but the attorney's fee was excessive in asking

for charges on his time spent attempting to collect the fee. Sufficient evidence existed to support the hearing officer's decision with regard to the attorney's fee.

Thus, even if the claimant had timely appealed, the record indicates that the Appeals Panel would have found that sufficient evidence supported the hearing officer's decision. Because the appeal was not timely filed, the decision of the hearing officer is final. Section 410.169.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge