

APPEAL NO. 011053  
FILED JUNE 20, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 2, 2001. The hearing officer determined that: (1) no attorney fees, paralegal fees, or expenses should be approved for any services rendered or alleged to have been rendered on and after January 3, 2001; and (2) the appellant did not have good cause for failing to appear at the CCH scheduled on April 4, 2001. The appellant appealed the hearing officer's good cause determination on sufficiency grounds and requested the Appeals Panel take official notice of facts not presented at the CCH. The appellant later filed a supplemental appeal, requesting that we clarify the hearing officer's decision to state that the claimant continues to be required to pay all attorney's fees and expenses incurred prior to January 3, 2001. Appellant, then, filed a second supplemental appeal, requesting that the Appeals Panel take official notice of the fact that the computers were down in the (field) office on or about June 6-7, 2001, and "consider whether the same problem may have happened in the [claimant's] case." Because the second supplemental appeal was not filed within 15 days of the appellant's receipt of the hearing officer's decision and order, pursuant to Section 410.202, it will not be considered. The hearing officer's determination with regard attorney's fees was not appealed by either party and is, therefore, final.

DECISION

Affirmed.

Request for Official Notice

We first address the appellant's request that the Appeals Panel take official notice of facts not presented at the CCH. We note that we generally will not consider evidence that was not submitted into the record, and which is raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The appellant, in his initial appeal, requests we take official notice of the number of adverse rulings he has received from this hearing officer, presumably to support his assertion that the hearing officer abused his discretion in determining that the appellant did not have good cause for failing to appear at the CCH scheduled on April 4, 2001. We conclude that the evidence offered by the appellant does not meet the requirements of newly discovered evidence necessary to warrant a remand. Additionally, we believe that

the facts of which the appellant requests official notice are not the sort which are judicially cognizable or generally recognizable within the Texas Workers' Compensation Commission's (Commission) specialized knowledge. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.2(11) (Rule 142.2(11)).

#### Good Cause Determination

The hearing officer did not err in determining that the appellant did not have good cause for failing to appear at the CCH scheduled on April 4, 2001. Whether good cause exists is a matter left up to the discretion of the hearing officer, and the determination will not be set aside unless the hearing officer abused his discretion, that is, acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 991332, decided August 5, 1999, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for the existence of good cause is that of ordinary prudence; that is, the degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 941680, decided January 31, 1995.

The appellant testified that he did not receive notice of the CCH scheduled for April 4, 2001, but he did receive notice of the show cause hearing scheduled for May 2, 2001. The documentary evidence shows that both notices were mailed to the appellant at the same address. Rule 102.5(d) provides, in pertinent part, that for written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, the Commission shall deem the received date to be five days after the date mailed, unless the great weight of the evidence indicates otherwise. In view of the evidence presented, we cannot conclude that the hearing officer abused his discretion in determining that the appellant did not have good cause for failing to appear at the CCH scheduled on April 4, 2001.

#### Request for Clarification

As stated above, the appellant, in his first supplemental appeal, requests that the Appeals Panel clarify the hearing officer's decision to state that the claimant continues to be required to pay all attorney's fees and expenses incurred prior to January 3, 2001. The hearing officer's decision provides, in relevant part, that the "[appellant] is not entitled to any attorney's fees on or after January 3, 2001." We believe the hearing officer's decision is sufficiently clear with regard to which attorney's fees remain payable and which do not.

The decision and order of the hearing officer are affirmed.

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Michael B. McShane  
Appeals Judge

CONCUR:

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Judy L.S. Barnes  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge