

APPEAL NO. 020544
FILED APRIL 22, 2002

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) on attorney's fees was requested by the respondent (claimant), and was convened on October 31, 2000, but the appellant (attorney) did not appear. A "show cause" letter was issued to the attorney; he responded to the "show cause" letter, and the hearing was rescheduled for, and held on, December 5, 2000. The attorney again failed to appear, and did not contact the Texas Workers' Compensation Commission (Commission) regarding his failure to attend the CCH. A Decision and Order was issued on March 26, 2001, in which the hearing officer determined that attorney's fees in the amount of \$337.50 were not reasonable and necessary.

The attorney appealed on sufficiency of the evidence grounds. By our opinion in Texas Workers' Compensation Commission Appeal No. 010754, decided May 29, 2001, we reversed and remanded the case for reconstruction of the record because there was no audiotape of the hearing included with the record on appeal. The remand CCH was scheduled for August 2, 2001, but reset for, and convened on, October 22, 2001. The attorney had submitted an untimely request for a continuance on October 18, 2001, which was denied. The attorney did not appear at the October 22, 2001, hearing, but the hearing officer conducted the hearing in his absence. She admitted three exhibits for the claimant and ten exhibits for the hearing officer, and heard testimony from the claimant. After that hearing, the hearing officer issued another "show cause" letter and reset the hearing for January 10, 2002. The attorney failed to appear for that hearing, he was not represented at the hearing, and he did not contact the Commission concerning the hearing. The hearing officer issued her Decision and Order on Remand on February 15, 2002, once again determining that attorney's fees in the amount of \$337.50 are not reasonable and necessary.

The attorney has appealed again, asserting that the "decision of the hearing officer is so contrary to the great weight of the evidence as to be clearly wrong and manifestly unjust and/or that the findings and conclusions by the hearing officer are not supported by the credible evidence." The attorney includes five attachments with his appeal, three of which are the same documents as are already in evidence as the claimant's or hearing officer's exhibits. One of the attached documents is similar to Claimant's Exhibit No. 3, except that the attorney's version has a corrected year of injury (changed from 2000 to 1998) and the fee percentage is written in as 25% (the claimant's copy is blank in this area). The other attachment is a letter purportedly written to the Commission on May 11, 2000, entering the attorney's appearance on behalf of the claimant, with a copy sent to the adjuster. The attorney also asserts that he never received notice of the January 10, 2002, hearing. The claimant did not submit any response to the attorney's appeal.

DECISION

Affirmed.

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To the extent that the attorney's appeal asserts new matters or attaches documentary evidence not presented at the CCH, such information cannot be used to decide this appeal. All of the attached documentation was in existence prior to the last two scheduled hearing dates, and would not qualify as "newly discovered evidence." Given the history of this case as outlined above, the attorney had ample opportunity to show up at scheduled hearings to present evidence or testimony. He only bothered to submit a request for continuance (untimely) on one occasion, and he has failed on several occasions to contact the Commission to advise someone that he would not be able to attend a hearing. We decline to consider any extra-record matters submitted by the attorney.

As to the merits of the appeal, Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We do not find it so in this case.

We affirm the decision of the hearing officer that the attorney's fees in the amount of \$337.50 are not reasonable and necessary, and we affirm the order of the hearing officer that the attorney reimburse the claimant for those fees.

Michael B. McShane
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge