

APPEAL NO. 032849  
FILED DECEMBER 22, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 031139, decided June 26, 2003. We had remanded the case to reconstruct the record, as there was no tape recording or transcript of the original contested case hearing (CCH). A CCH was held on September 22, 2003. The hearing officer issued a decision after the CCH on remand in which he set aside two prior orders on attorney's fees, one that had been entered on January 7, 2003, (order 1 herein), and the other that had been entered on January 22, 2003, (order 2 herein). In his decision, the hearing officer stated that these attorney's fees were excessive and awarded attorney's fees in the amount of \$0.00 in regard to the attorney's fees in dispute. The appellant (attorney herein) files a request for review, challenging the decision of the hearing officer. There is no response to the attorney's request for review from the respondent (claimant herein) in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Order 1, which is labeled as Texas Workers' Compensation Commission (Commission) Docket No. 1 sequence 10, granted the attorney \$1,020.00 in attorney's fees for dates of service from October 29 through November 25, 2002. Order 2, which is labeled as Commission Docket No. 1 sequence 12, granted the attorney \$675.00 in attorney's fees for dates of service from December 17, 2002, through January 7, 2003.

The attorney contends that the hearing officer exhibited hostility to him during the CCH and that the hearing officer's adverse decision against him was the result of bias. Our review of the tape recording of the CCH indicates that at points the proceedings became somewhat heated, but we find nothing in the record that establishes bias on the part of the hearing officer.

The hearing officer found as a matter of fact that 0 hours of attorney time were reasonable and necessary for the time periods in dispute. In his decision the hearing officer explains that the \$2,985.00 in fees that had been approved prior to January 7, 2003, and which were not in dispute, more than adequately compensated the attorney for the work performed and results accomplished. The hearing officer found that under the totality of the circumstances that the fees in dispute were not reasonable and necessary.

We first note that the attorney stated at the hearing that he had waived and continued to waive any entitlement to the attorney's fees granted in Order 2. Thus, any error in regard to the hearing officer's denying these fees would be likewise waived.

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 of the weight and credibility that is to be given to 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, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we do not find legal error in the hearing officer's factual finding that the attorney's fees which had been ordered in Order 1 were not reasonable and necessary.

The attorney argues on appeal that the hearing officer erred as matter of law in disallowing the fees under Order 1 because the claimant failed to timely dispute these fees. There was conflicting evidence as to when the claimant received Order 1. The claimant testified at some points that he did not recall when he received Order 1 and at another point that he received Order 1 on January 19, 2003. The claimant consistently testified that he disputed the attorney's fees on January 29, 2003. Given the conflicting evidence in the case, the hearing officer could determine as the fact finder that the claimant timely disputed the attorney's fees which had been granted under Order 1.

Finally, the attorney asks that we set aside the determination by the hearing officer that the attorney failed to show good cause for failing to appear at the CCH which was held on April 2, 2003. The attorney argues that the hearing officer's finding in this regard was surplusage because he contends that the matter was not addressed at the CCH on remand. At the CCH on remand the attorney testified that he was notified of the CCH set on April 2, 2003, but did not attend because he believed the setting would be cancelled when he waived the fees approved in Order 2, which he believed at the time to be the only attorney's fees in dispute. Here again, it was the function of the hearing officer to weigh this evidence and we perceive no error as a matter of law in his finding that the attorney did not have good cause for not attending the April 2, 2003, CCH.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge