

## APPEAL NO. 950324

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was convened in (city), Texas, on January 5, 1995, with (hearing officer), the second hearing officer, presiding as hearing officer. The record was held open until January 18, 1995. The hearing officer determined that the appellant (attorney) did not have good cause for not appearing at the CCH and was not entitled to attorney's fees in the amount \$637.50. The attorney has appealed from both determinations. No response was filed by the respondent (claimant).

### DECISION

Affirmed in part and reversed and rendered in part.

The only facts stated at the hearing about the injury of (claimant), claimant, are that it was a lower back injury, that the date of the injury was (date of injury), and that the claimant's employer was (employer).

Claimant executed a contract of employment with the attorney on July 7, 1992, employing the attorney to represent claimant in the prosecution of his claim for workers' compensation. The attorney wrote to claimant on September 6, 1994, confirming claimant's conversation with (Ms. J) of the attorney's office that since no more checks were forthcoming on claimant's case, the attorney was closing claimant's file and could do nothing further on his case. The conversation was stated to have taken place one or one-and-one-half months previously. The attorney requested approval of fees in the amount of \$637.50 for representing claimant. The Texas Workers' Compensation Commission (Commission) entered an order on October 28, 1994, approving attorney's fees for \$637.50 for services from June 21, 1993, through September 13, 1994, consisting of 4.25 hours of attorney time and no expenses. Claimant timely contested the attorney's fee order, contacting the Commission by telephone on November 2, 1994, and requesting a CCH as allowed by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.3(d) (Rule 152.3(d)), which states in part: "[a] claimant may request a hearing by contacting the Commission in any manner no later than the 15th day after receipt of the Commission's order." The first hearing officer in this matter, (hearing officer), notified the attorney of the time, date and place of the CCH by letter dated November 23, 1994. The attorney replied to that hearing officer by letter dated December 16, 1994, and received December 20, 1994, stating that he had a trial set on the scheduled hearing date, asking that his testimony be heard over the telephone on that date, and stating that he was sending documents for verification of his fees. Notations on the face of the attorney's letter to that hearing officer, ostensibly initiated by that hearing officer, indicate that on December 27, 1994, a message was left on the attorney's recorder that his letter was not in compliance with Rule 142.4 and that the attorney needs to be present for the CCH. A "later" notation on the letter indicates that "(T) called" and was told why the attorney needs to be there. The attorney was not present at the hearing.

Claimant testified at the hearing that most of the telephone conferences with him shown on the itemized listing of attorney's fees, specifically the calls of June 28, July 21, August 29, and September 6, 1994, represented his unsuccessful attempts to speak to the attorney, who did not return his calls. Claimant stated that he received no benefits or information of value during those calls but indicated that during one of them, on July 21, 1994, the attorney's secretary did explain the impairment rating to him. Claimant stated that the attorney returned only one of his telephone calls, calling him on September 15, 1994, returning a call of September 13, 1994. He also stated that he had no knowledge of the telephone conferences shown on the listing with an adjuster or with an ombudsman on January 19, June 14, June 24 and June 28, 1994.

Claimant also testified that 16 payments of \$40.00 each for attorney's fees had been deducted for the period July 1, 1993, through October 30, 1993, which he believed covered the office conference of June 21, 1993, for which fees were approved in the Commission's October 28, 1994, order.

The hearing officer stated at the hearing that the following issue was before him: "Is (attorney), attorney, entitled to the attorney's fees requested and approved for dates of service from June 21, 1993, through September 13, 1994, in the total sum of \$637.50." The hearing officer also stated that the burden of proof was on the claimant in disputing the fees.

The hearing officer advised the attorney by a letter dated January 10, 1995, that he was leaving the record open until January 18, 1995, to give the attorney an opportunity to provide a written explanation of his failure to appear on January 5th and also an opportunity to respond to claimant's evidence on the attorney's fees.

The hearing officer stated in his Decision and Order, issued February 6, 1995, that the record was held open until January 18, 1995, but that attorney did not respond.

The hearing officer found, as fact, that the attorney did not "exercise that degree of diligence as an ordinary prudent attorney would have exercised under the same or similar circumstances when he failed to appear for the [CCH] on January 5, 1995." The hearing officer then reached a conclusion of law that "[the attorney] did not have good cause for failing to appear at the scheduled [CCH] on January 5, 1995."

Regarding the attorney's fees, the hearing officer made findings of fact that \$150.00 is a reasonable hourly rate for attorney's fees and that "4.25 hours of attorney time was neither reasonable, nor necessary, nor performed." He reached a conclusion of law that attorney's fees in the amount of \$637.50 were neither reasonable, nor necessary nor performed; rendered a decision that Mr. H was not entitled to those fees, superseding the previous order approving them; ordered the carrier to stop deducting the attorney's fees from claimant's income benefit payments; and ordered the attorney to reimburse claimant for any of those fees already paid to him.

The attorney has appealed, contending that he had shown that he had good cause for his failure to appear at the CCH, that he had forwarded documents supporting his fees, and that the hearing officer's alleged abuse of discretion had caused him additional time and expense for which he should be awarded an additional 1.25 hours. Attached to the appeal are copies of documents and records, including time slips, telephone slips, and a letter dated December 19, 1994, from the attorney to the first hearing officer. There is no indication in the record or in the attorney's December 19th letter that copies of these documents were sent to the claimant or that they were even received by the hearing officer. Except for the copies of the application for and approval of attorney's fees which were admitted as part of Hearing Officer's Exhibit No. 1, they are not part of the record and will not be considered. Section 410.203(a).

The first issue before us is whether the hearing office abused his discretion in finding that Mr. H did not show good cause for his failure to appear at the January 5th CCH. As we stated in Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995, the existence of good cause is ordinarily a factual question for the hearing officer to resolve, and that the test for its existence "is that of ordinary prudence; that is, the degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances." The fact that in the case under review the attorney had notified the hearing officer that he had a court appearance already set for the date of the CCH is not in dispute. However, it is apparent from the notes on the hearing officer's copy of the attorney's letter of December 16th, 1994, that the attorney was advised of and given an explanation as to why the hearing officer required his appearance at the CCH. There is no indication in the record that the attorney thereafter sought a continuance to avoid his schedule conflict nor was there evidence in the record of any other effort to contact the hearing officer about resetting the CCH. We find no abuse of discretion under the circumstances of this case.

Regarding the disputed attorney's fees, the only evidence regarding whether the telephone conferences of January 19, 1994, June 14, 1994, June 24, 1994, and June 28, 1994, with an adjuster and an ombudsman to dispute them was claimant's testimony that he had no knowledge of them. There was thus no evidence in the record to meet claimant's burden of proof in challenging those previously approved charges and thus no evidence to sustain the hearing officer's finding of fact or conclusion of law regarding the one hour of attorney's time represented by those four telephone conferences. As to that hour of time, the Finding of Fact No. 5 and Conclusion of Law No. 3 are 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).

We therefore affirm so much of the hearing officer's Decision and Order as determines that the attorney did not have good cause for failing to appear at the hearing and that he is not entitled to attorney's fees for 3.25 hours. We reverse and render a new Decision and Order that the attorney is entitled to attorney's fees for one hour so as to approve a total of \$150.00, and we revise Finding of Fact No. 5, Conclusion of Law No. 3,

the second paragraph of the Decision, and the second and third paragraph of the Order accordingly.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Robert W. Potts  
Appeals Judge