APPEAL NO. 950418

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Appellant (attorney herein) represented the respondent (claimant herein) in connection with certain workers' compensation matters. By order of December 5, 1994, the Texas Workers' Compensation Commission (Commission) approved fees for the attorney in the amount of $575.00 which represented the entire amount requested for four hours of professional services. The claimant appealed this order and a contested case hearing was held on February 13, 1995, with (hearing officer) presiding, to address the sole issue of the propriety of these fees under the 1989 Act and implementing rules. The hearing officer determined that the original order awarding attorney's fees was improper because there was insufficient evidence to show that the attorney "secured any benefits for the claimant or resolved any disputes in connection with the claimant obtaining benefits" and ordered the attorney to be paid no fees and to return to the claimant fees paid by virtue of the original Commission order. The attorney appeals arguing that the decision and order of the hearing officer should be reversed because she was hired in connection with securing benefits and resolving a certain dispute, but was dismissed by the claimant before these efforts could come to fruition; because she was never advised by the hearing officer that she had the burden of proof to establish her entitlement to fees; because she was not given adequate notice about which attorney fee application would be in issue; and because the hearing officer showed bias and prejudice against the attorney in her conduct of the contested case hearing. The attorney also seeks to present "newly discovered evidence of claimant's perjurious testimony."[1] In response, claimant asserts essentially that the hearing officer's decision and order were correct and should be affirmed.[2]

DECISION

We reverse and remand.

The claimant testified that she hired the attorney to represent her on September 27, 1994, and terminated the attorney-client relationship on November 22, 1994. The nature of the claimant's compensable injury was not made clear at the hearing, but it occurred on (date of injury), and the claimant said the carrier began paying medical and temporary income benefits (TIBS) "immediately."

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[1] The attorney attached to her appeal a motion for injunctive relief in the nature of an order that the attorney be allowed to keep the fees she has already received pending the outcome of this appeal. The Appeals Panel does not have authority to issue injunctive relief. *See* Section 410.203. *See also* Rule 152.3(f) and (h) regarding final orders of the Commission.

[2] The attorney has apparently been paid other legal fees in connection with this claim that are not further specified and have not been disputed.

According to the claimant, she wanted to hire the attorney to answer questions she had about workers' compensation benefits and about other employment issues not related to these benefits. She said she was willing to pay the attorney separately for this advice, but the attorney told her she could not accept payment directly from the claimant and convinced the claimant that she needed the attorney to assist her in dealing with workers' compensation matters. The particular matter pending of most importance to the claimant at that time was approval for spinal surgery. The claimant said she was concerned about being examined by a carrier-requested doctor and wanted to know what her rights were in that regard. She underwent one examination under what she considered were disagreeable circumstances and encountered difficulties in connection with scheduling and undergoing a second examination by this doctor. According to both the claimant and the attorney, the attorney provided professional services to the claimant in connection with pursuing the medical examinations required for the approval of the spinal surgery.

Section 408.221 provides that the Commission must approve attorney's fees for representing a claimant "before the commission. . . ." In approving a fee, the Commission "shall consider . . . (6) the benefits to the claimant that the attorney is responsible for securing. . . ." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1(b) (Rule 152.2(b)) further states that an attorney "shall receive a fee for representation of any party before the commission only after the commission approves the amount of the fee." Fee guidelines contained in Rule 152.4 authorize payment of fees for services rendered in informal dispute resolution and prior to any appearance before the Commission. However, any approved fee is payable only out of certain benefits (including TIBS) actually paid to the claimant. *See* Rule 152.1(c). Texas Workers' Compensation Commission Appeal No. 93743, decided November 3, 1993, confirmed that if the claimant recovered no income benefits, no fees could be paid to the claimant's attorney even though the attorney expended professional efforts on behalf of the client. In that case, the Appeals Panel quoted approvingly National Farmers Union Property and Casualty Company v. Degollado, 844 S.W.2d 892 (Tex. App.-Austin 1992, writ denied) for the proposition that attorney's fees for representing a claimant in a workers' compensation case "shall not be awarded unless the trial court finds that benefits have accrued to the claimant by virtue of the legal representation. . . ." (Emphasis added.)

The hearing officer in the case now appealed found that, although the attorney performed some of the services which were originally approved for payment, there was no evidence to show that she secured any benefits for the claimant or resolved any disputes. Clearly, according to the claimant's own testimony as well as that of the attorney, the claimant hired the attorney for the purpose of assisting her in obtaining spinal surgery, a medical benefit under the statute. One primary reason why this benefit was not achieved or any dispute about it resolved while the attorney was still acting on behalf of the claimant, was that the claimant, as was her right, discharged the attorney. Although medical benefits do not generate money from which to pay fees (*see* Rule 152.2), we believe the securing of medical benefits by virtue of the legal representation satisfies the statutory provision quoted

above for awarding fees and that fees can be awarded for securing medical benefits if there are other income benefits being paid from which the attorney's fees could be collected.

We also do not believe that a client's discharge of an attorney before the benefits (that are the subject of the representation) can be adjudicated in itself precludes the approval of fees earned for time already expended on the claimant's behalf. Rule 152.1(e) states that a "client who discharges an attorney does not, by this action, defeat the attorney's right to claim a fee." *See also* Texas Disciplinary Rules of Professional Conduct (1994), Rule 1.15, Comment 4:

> A client has the power to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. . . . (Emphasis added.)

Based on these considerations, we find that the hearing officer erred in disapproving all attorney's fees solely because the attorney failed to secure a benefit for the claimant when the great weight and preponderance of the evidence established that this failure was caused by the discharge of the attorney before the entitlement to the benefit could be established. Consistent with Rule 152.1(e), we reverse the decision and order of the hearing officer and remand the case to the hearing officer to identify the services performed by the attorney in connection with the attorney's attempt to secure spinal surgery for the claimant and to approve fees for those services which are reasonable in light of the factors contained in Section 408.221.

Our remand of this case obviates the need to address at length the other issues raised by the attorney on appeal. We need only note that we find no merit in the attorney's claim that she was not fairly advised about "which attorney fee application would be in issue." The set notice for the hearing identified both the attorney and the claimant. Only two fee applications were made with regard to this claim. Most importantly, the attorney failed to raise this objection at the hearing and will not be allowed to present it for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, January 22, 1992. The attorney also objected about not being told by the hearing officer that the burden of proof shifted to her. Again, this objection was not raised at the hearing. We would, nonetheless, question whether the burden improperly shifted. The hearing officer stated at the start of the hearing that the burden of proof was on the claimant. No other mention of burden of proof was made, but the attorney was directed to present her closing argument first and the claimant was allowed to make only a final closing argument. While in some circumstances it may be error to force the party who does not have the burden of proof to argue first, thus only being able to speculate on the points raised by the party with the burden of proof, we would hardly find error in this case. The only witnesses at the contested case hearing were the parties who combined testimony, argument and position statements throughout their presentations. Each side knew exactly what the other was contending. Thus the order of final argument did not, in our opinion, present reversible error.

Finally, as to possible bias on the part of the hearing officer as alleged, we have reviewed the record and find none. We do not believe that the hearing officer overstepped the bounds of impartiality in her questioning of either party. Statements by the hearing officer that the hearing "was going to end at five" and that the parties "only got about 30 minutes" are ill-advised, do not enhance perceptions of fair treatment and should be avoided.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's division of hearings pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge