

APPEAL NO. 980082

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 5, 1996, appellant (claimant) sought the legal services of (attorney 1). Apparently, the file was later turned over to the respondent, (attorney 2), who apparently represented claimant at a benefit review conference (BRC) on June 5, 1996. On August 21, 1997, claimant requested a copy of her file from attorney 2, and on September 8, 1997, attorney 2 wrote the Texas Workers' Compensation Commission (Commission) advising that her office no longer represented the claimant in her case.

On September 17, 1997, an official actions officer, issued a Commission Order for Attorney's Fees (order 1) approving .50 hours out of one hour requested for attorney 2 to "Setup File" on June 1, 1997, for an approved fee of \$75.00 out of \$150.00 requested.

Claimant disputed the order, requesting a contested case hearing (CCH) on attorney's fees. On November 18, 1997, a CCH was held, with hearing officer. The hearing officer determined that the .50 hours of attorney time approved in order 1 was reasonable, necessary, and performed, and he ordered the carrier to pay attorney 2 \$75.00 in attorney fees from claimant's benefits.

Claimant appeals, arguing primarily that her file had already been set up by attorney 1 and that she had already paid for that service. She also raises other objections which will be dealt with in our opinion. The file contains no response from attorney 2 or the carrier.

DECISION

Reversed and rendered.

Claimant objects to the carrier's being listed as a party in the case. While the basic dispute is between claimant and attorney 2, the carrier is normally listed as a party in attorney fees cases. In addition, in this case, the carrier is being ordered to pay the attorney fees from claimant's benefits. It is therefore proper for the carrier to be treated as a party in this case.

Claimant refers to Exhibit 3 as showing she has already paid for setting up her file. Exhibit 3 is claimant's letter of August 21, 1997, requesting a copy of her file. Claimant also refers to Exhibit 5, Exhibit 6, and Exhibit 7. There are no such exhibits in the file and the Decision and Order of the hearing officer does not list any such exhibits as having been offered or admitted in this CCH. If these were exhibits at a prior CCH, they were not offered or admitted at this CCH and will not be considered for the first time on appeal. Texas Workers' Compensation Appeal No. 91132, decided February 14, 1992. Claimant

also argues facts and evidence not presented at the CCH, which we likewise will not consider for the first time on appeal.

Claimant argues that she already had a contract with attorney 1 and had already paid once for setting up her file. The Attorney Fee Processing System (AFPS) shows an earlier Commission Order for Attorney's Fees (order 2), dated June 20, 1996, approving one hour for attorney 1 to "Setup File" on April 5, 1996, for a fee for that activity of \$150.00. While it might be argued in a case where a claimant had dismissed one attorney and hired another, that the second attorney would have to set up a new file and be entitled to a fee for doing so, the evidence in this case shows that a file was originally set up by attorney 1, who ceased handling workers' compensation cases and transferred the file to attorney 2, who had worked in his office, without notifying claimant. While we will not act on evidence presented by a party for the first time on appeal (with certain narrow exceptions not applicable here) we will review the records of the Commission to determine what fees have been previously paid in a particular case. Given the facts of this case, where attorney 1 set up a file (collecting a fee for doing so) and transferred it to attorney 2, without the prior or contemporaneous approval of claimant, the hearing officer abused his discretion in approving a fee for attorney 2 to set up the file.

Claimant also argues that the carrier's service has already paid attorney 2 out of her benefits pursuant to order 1. If so, attorney 2 must reimburse claimant for that \$75.00 payment. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.3(g) and (h) (Rule 152.3(g) and (h)).

The decision and order of the hearing officer is reversed and a new decision is rendered denying any fee to attorney 2 for setting up a file and ordering that attorney 2 reimburse claimant for any fee collected by her for doing so.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge