

APPEAL NO. 91010
FILED SEPTEMBER 4, 1991

This appeal arises under the Texas Workers' Compensation Act of 1989. On June 27, 1991, a contested case hearing was held at _____, Texas. (Hearing officer) presided as hearing officer. The hearing officer denied the claimant's request for increased temporary income benefits (TIBS) and entered decisions on attorney's fees. Appellant was the carrier's attorney. He requests that we reverse and render the decision on the carrier's attorney's fees, or in the alternative, remand the attorney's fees issue to the hearing officer with instructions. Carrier's attorney asserts that the hearing officer erroneously applied 28 TEX. ADMIN. CODE § 152.4 (Texas Workers' Compensation Commission Rule 152.4), failed to base the approved fee upon the attorney's time actually expended and reasonably expected to be expended in the handling of the hearing, and failed to consider the nature of the professional relationship between the carrier's attorney and the carrier in determining the reasonable and necessary attorney's fee to be approved.

DECISION

Finding no abuse of discretion by the hearing officer, we affirm the hearing officer's decision on the carrier's attorney's fees. We note that the Texas Workers' Compensation Act of 1989 does not provide a standard of review for the appeals panel to apply to a hearing officer's determination of attorney's fees. Under prior workers' compensation law, the trial court's determination of the amount of and payment schedule for attorney's fees was subject to the "abuse of discretion" standard of judicial review. See Royal Insurance Company of America v. Goad, 677 S.W.2d 795, 802 (Tex. App.-Fort Worth 1984, writ ref'd n.r.e.); Smith v. City of Austin, 670 S.W.2d 743, 744-745 (Tex. App.-Tyler 1984, no writ). We find that standard appropriate in this case.

The decision of the hearing officer reflects that he agreed with the carrier's position on the disputed issue at the hearing by concluding that the claimant's average weekly wage (AWW) for the purpose of determining TIBS must be based on the wages he received from employer and not his total wages from all sources. That decision was not appealed to us and we make no determination on it. Carrier's attorney submitted an Attorney's Affidavit for Fees on a Texas Workers' Compensation Commission proposed draft/interim form for the hearing officer's consideration. Carrier's attorney requested a rate of \$80.00 per hour and requested a total of 21.2 hours for work done from June 19, 1991 through June 28, 1991, for a total of \$1,675.00. A portion of his fee request was for time expended by his co-counsel at a rate of \$70.00 per hour. The hearing officer approved a total of nine hours at \$80.00 per hour plus expenses of \$30.09 for a total of \$750.09.

In his decision on the carrier's attorney's fees, the hearing officer stated that under Rule 152.4, the maximum number of hours that may be awarded for a case through the contested case hearing stage is seven. He then approved one hour for file set up, two

hours for client conferences, one and one-half hours for the contested case hearing, two and one-half hours for research and preparation, and two hours travel time at the attorney's hourly rate for a total of nine hours. Carrier's attorney asserts that Rule 152.4 does not set maximum hours for which a carrier's attorney may recover a fee and that a fee may be approved for all time reasonably expended in the representation of an insurance carrier.

Pursuant to TEX. REV. CIV. STAT. ANN., art. 8308-2.09(a) and art. 8308-4.09(e) the Texas Workers' Compensation Commission adopted Rule 152.4 relating to Guidelines for Maximum Hours for Specific Services Performed by a Claimant's Attorney.

Rule 152.4(d) provides that, except when approved by the commission under subsection (c), an attorney's claim for a service shall not exceed the time limits contained in the table in subsection (d). The table sets out the type of service and the maximum hours for that service. For a case concerning compensability or amount of payment, from initial interview through the contested case hearing, a total of five hours is provided for, plus two hours for client conferences per month. To avoid an arbitrary application of these generalized guidelines, Rule 152.4(c) provides that an attorney may request approval for a number of hours greater than those allowed by the guidelines but must demonstrate to the satisfaction of the commission that the higher fee was justified by the effort necessary to preserve the client's interest, or the complexity of the legal and factual issues involved. The degree or quantum of this demonstration will vary from case to case and is a decision best left to the hearing officer. Rule 152.3(b) provides in pertinent part that, in considering whether a defense counsel's fee is reasonable and necessary, the commission shall also consider the guidelines set out in Rule 152.4 (relating to Guidelines for Maximum Hours for Specific Services Performed by a Claimant's Attorney).

We hold that the time guidelines set forth in Rule 152.4(d) apply to a defense counsel's claim for services through the provision in Rule 152.3(b) which directs the commission to consider the guidelines in Rule 152.4 in considering whether a defense counsel's fee is reasonable and necessary, and that the time limits set forth in Rule 152.4(d) are the maximum time limits for a defense counsel's claim for the services specified therein, unless the defense counsel requests approval for a number of hours greater than those allowed by Rule 152.4(d) and demonstrates to the satisfaction of the commission that the higher fee was justified by the effort necessary to preserve the client's interest or the complexity of the legal and factual issues involved as provided in Rule 152.4(c). Under our holding, the hearing officer was correct in considering the maximum time limits set forth in the guidelines for services claimed by carrier's attorney, but could approve a number of hours greater than those allowed by the guidelines provided carrier's attorney demonstrated to the hearing officer that the higher fee was justified. It is apparent from the decision that the hearing officer found that a greater number of hours was justified than was provided under the guidelines in that the hearing officer approved a total of nine hours. In doing so, he approved the maximum hours for a contested case hearing under the guidelines (1.5 hours which includes research and

preparation time) and then approved an additional two and one-half hours for research and preparation time. We note that carrier's attorney did not attend the benefit review conference for which the guidelines provide two and one-half hours and that the contested case hearing lasted slightly less than one hour.

Carrier's attorney urges that the legislative intent not to set guidelines for maximum attorney's fees for a carrier's attorney can be seen from the failure of the legislature to incorporate Article 8308-4.09(e) into Article 8308-4.091, as the legislature did with Article 8308-4.09(c). The heading of Article 8308-4.09 is "Attorney's Fees Before the Commission or Court," but from a reading of the entire article, it appears that the article relates to only claimant's attorney's fees. Subsection (e) of that article provides that the commission by rule shall provide for guidelines for maximum attorney's fees for specific services, based on criteria in this section, and in no event may an attorney's fee exceed 25% of the claimant's recovery. Subsection (c) lists the following factors for the commission or court to consider in approving an attorney's fee under Article 8308-4.09.

- (1)the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- (2)the fee customarily charged in the locality for similar legal services;
- (3)the amount involved in the controversy;
- (4)the benefits to the claimant that the attorney is responsible for securing;
and
- (5)the experience and ability of the attorney performing the services.

Article 8308-4.091 relates to Attorney's Fees Paid to Defense Counsel. This article provides for approval of defense counsel's fee by the commission or court, that defense counsel's fees must be approved as being reasonable and necessary, that the commission or court must consider issues analogous to those listed under Section 4.09(c) of the Act in determining whether a fee is reasonable, and that defense counsel must present written evidence relating to the time and expenses incurred in defending the case and must present other evidence as considered necessary by the commission or court in making a determination under this section.

While carrier's attorney is correct in pointing out that Article 8308-4.091, relating to defense counsel's fees, does not incorporate the Article 8308-4.09(e) provision directing the commission by rule to provide for guidelines for maximum attorney's fees for specific services, carrier's attorney fails to consider that portion of Article 8308-4.091(c) which directs defense counsel to present other evidence as considered necessary by the

commission or court in making a determination on defense counsel's fees under Article 8308-4.091. Under Article 8308-2.09(a), the commission is authorized to adopt rules as necessary for the implementation and enforcement of the Workers' Compensation Act of 1989. Pursuant to this grant of authority, the commission adopted Rule 152.3 which, among other things, directs the commission to consider the guidelines set out in Rule 152.4 (relating to Guidelines for Maximum Hours for Specific Services Performed by a Claimant's Attorney) in considering whether a defense counsel's fee is reasonable and necessary. It can reasonably be concluded that in adopting this provision the commission determined that the "other evidence" it considered necessary for defense counsel to present under Article 8308-4.091(c) is evidence sufficient to demonstrate that a higher fee occasioned by defense counsel's request for approval for a number of hours greater than those allowed by the guidelines is justified by the effort necessary to preserve the client's interest, or the complexity of the legal and factual issues involved. To conclude otherwise would result in assigning different meanings to the word "consider" as used in Rule 152.4(a), which provides that "The guidelines outlined in this rule shall be considered by the commission . . .", and as used in 152.3(b), which provides in pertinent part ". . . the commission shall also consider the guidelines set out in § 152.4 of this title . . ." We find no clear intent on the part of the commission to have the word "consider" mean something different in Rule 152.3(b) than it means in Rule 152.4(a).

Carrier's attorney urges us to hold that an attorney's fee can be approved for post-hearing services reasonably related to attendance at a contested case hearing. Carrier's attorney argues that even though counsel for carrier has attended a hearing, it is still necessary for counsel to report the results as well as the significance of a Decision and Order rendered by the hearing officer and that these services are customarily within the billing relationship and expectations of the parties.

In his fee affidavit, carrier's attorney requested approval for two hours for preparing a report to his client and completing and closing his file the day after the hearing. These two hours were not approved by the hearing officer.

We recognize that it is customary and appropriate for an attorney to inform his or her client about the status of a matter the attorney is handling for the client and that under Rule 1.03(a) of the Texas Disciplinary Rules of Professional Conduct, an attorney has a duty to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. We note that the hearing officer did approve two hours for client conferences for the time period shown in the affidavit, which was less than a month. This comports with the guidelines in Rule 152.4(d) which permit two hours for client conferences per month and which guidelines the hearing officer is directed to consider in approving defense counsel's fees under Rule 152.3(b).

The guidelines in Rule 152.4(d) do not specifically address time spent by an attorney for post-hearing services other than allowing one hour for services related to an

appeal to the appeals panel. The guidelines do allow one and one-half hours for services connected with a contested case hearing, which includes research and preparation time. In connection with the hearing itself, the hearing officer approved one and one-half hours for the hearing, an additional two and one-half hours for research and preparation, and two hours travel time for a total of six hours. The transcript of the hearing indicates that the hearing took slightly less than one hour to complete.

We also note that carrier's attorney's affidavit for fees was dated June 27, 1991, the day of the hearing, but that the two hours for post-hearing services were for work to be done on June 28, 1991. Thus, the request for approval of the post-hearing hours was for services to be performed in the future, and not for time that had actually been spent in defending the case when the request was submitted on June 27, 1991. Article 8308-4.091(c) uses the words "time spent" and Rule 152.3(a) uses the words "time expended" in relation to the written evidence and affidavit, respectively, which must be submitted for approval of attorney fees. It appears to us that the above-cited statute and rule do not contemplate approval of hours to be expended in the future, but allow approval only of time that has actually been spent in performing services. However, the statute does not prohibit or preclude incremental filings for attorney's fees as the different phases of a claim processing are completed.

While we do not here hold that fees for post-hearing attorney services, such as reporting the status of the matter to the client and closing the file, are necessarily excluded from being considered as reasonable and necessary attorney fees, provided the time has been expended for such services when the request for approval of the fee is submitted, we do hold that in this case there was no abuse of discretion in failing to approve the two hours for post-hearing services inasmuch as the hearing officer did approve six hours of time spent in connection with the hearing which lasted slightly less than one hour, and the fee for the post-hearing service was for time that had not actually been expended on the date of the request for approval of the fee.

Carrier's attorney urges us to hold that the hearing officer should consider the full nature of the relationship between carrier's attorney and his client, the carrier, in approving the carrier's attorney's fees, and that given the fee arrangement between carrier's attorney and his client, all time expended and anticipated to be expended should be approved.

Rule 152.3(b) provides that the commission shall consider the nature and length of the professional relationship to the client in approving a defense counsel's fee. The only written evidence presented by carrier's attorney to the hearing officer concerning his fee was his Attorney's Affidavit for Fees. This document indicates that carrier's attorney and his co-counsel represented the carrier at hourly rates of \$80.00 and \$70.00, respectively, that professional services were listed from June 19, 1991 through June 28, 1991 (for a total of 21.2 hours), and that carrier's attorney's law firm is located in City A, Texas.

In the Decision on Attorney's Fees, the hearing officer noted the total hours and total fee requested by carrier's attorney, the time period in which the services were performed, and that the hourly rate was well within area limits. The hearing officer stated that he was unable to take official notice of rates charged by City A attorneys but he did take official notice of the fact that the rate charged by attorneys in the City B area for legal work involving workers' compensation is in the \$125 - \$150 range. From our review of the evidence and decision, it is apparent to us that the hearing officer considered all information bearing on the nature and length of the professional relationship between carrier's attorney and the carrier submitted to the hearing officer by the carrier's attorney. This is evident from the factual recitations in the decision and from the fact that the hearing officer approved a total of six hours (1.5 for the CCH, 2.5 for research, and 2 for travel) in connection with the contested case hearing and not just the one and one-half hours (which includes research and preparation) specified in the guidelines for a contested case hearing. Carrier's attorney has not made us aware of any factor bearing on the nature and length of his professional relationship with the carrier that was not before the hearing officer. Since in our view the hearing officer did consider all the evidence that was made available to him on this issue, and since carrier's attorney has not shown that there is any probative evidence bearing on the client relationship issue which was not presented to the hearing officer and which was unavailable to carrier's attorney, there is no reason for a remand for further consideration and development of evidence.

Finding no abuse of discretion on the part of the hearing officer in his approval of carrier's attorney's fees, we affirm the decision of the hearing officer.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge