

APPEAL NO. 92104
FILED APRIL 30, 1992

On February 25, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The claimant did not attend the hearing, and efforts to locate him were unsuccessful. The carrier went forth and presented its defense. The hearing officer determined that the claimant did not sustain a compensable injury in the course and scope of his employment with (employer).

The issue in this appeal involves defense attorneys' fees approved by the hearing officer in an order of February 27, 1992. Carrier claimed services for two attorneys and a paralegal, totaling \$1,950.00. The hearing officer approved a total of \$847.50. No hours claimed by the paralegal for carrier's law firm were approved.

DECISION

We order that additional fees for paralegal services up to and including representation of the insurance carrier at the contested case hearing be approved. The carrier will have to file a new affidavit for approval of fees that it may wish to claim related to this appeal; those fees are not currently before this tribunal.

Because the order complained of was made by a contested case hearing officer, the carrier is properly before this tribunal according to Texas W.C. Comm'n Rules, 28 TEX. ADMIN. CODE Section 152.3(f) (Rule 152.3). Approval of reasonable and necessary attorneys' fees for defense counsel is authorized by the Texas Workers' Compensation Act (the 1989 Act), TEX. REV. CIV. STAT. ANN. Art. 8308-4.091(a). The Commission is directed to consider analogous factors to those listed for approval of fees for claimant's counsel, listed at Art. 8308-4.09(c). The Commission is also directed by the 1989 Act to set actual guidelines for maximum fees for claimant's counsel, according to Art. 8308-4.09(e), and has done so in Rule 152.4. However, these guidelines are also to be considered in approving fees for defense counsel. See Rule 152.3(b); Texas Workers' Compensation Commission Appeal No. 91010, decided September 4, 1991.

Accordingly, applying the guidelines set forth in Rule 152.4, we observe that carrier is in a situation in part of its own making, in that it failed to claim hours for "analogous" services to which it was entitled. Carrier's attorneys expended time in initially setting up the file, and in client conferences, yet no hours are claimed for file setup and only 0.8 hours (approved by the hearing officer) are claimed for client conferences. It is clear from reading the affidavits which accompany the fee application that time was expended by the paralegal in setting up the file and doing initial research. Further, if the adjuster for the carrier was a witness; the paralegal also lists time spent in conference with witnesses, which would, in part, be attributable to a "client conference" with the adjuster.

We note that there is nothing in the affidavits provided by the carrier's attorney or in his testimony at the hearing claiming that this case was any more complicated than other "course & scope" issues that typically come before the Commission, as provided for under

Rule 152.4(c). The carrier's attorney conceded at the hearing that he had probably overestimated his time to attend the contested case hearing (claimed at 3.4 hours) by half an hour; the hearing officer noted that it appeared to him that his time for the contested case hearing would be two hours at the "outside," but he ultimately approved 2.5 hours for this service. To the extent that a general new law "learning curve" was claimed by the attorneys, we would note that the hearing officer apparently gave the carrier's attorney some benefit of the doubt and allowed some attorney time slightly in excess of the hours provided under Rule 152.4(d).

It seems to us that reasonable and necessary fees of a defense law firm do involve paralegal time, and that the failure to allow any time for the paralegal was an abuse of discretion. In approving additional paralegal time, we will look solely to additional time allowed by Rule 152.4(d). That rule provides for one hour of initial setup of the file, and two maximum hours for client conferences per month. The paralegal conducted client conferences. The attorney's office spent time on the case only during one month. As 0.8 hours for client conferences was already allowed to the senior attorney on the case, that leaves 1.2 hours of paralegal time to be allowed using standards similar to those that would be used for claimant's attorneys. Thus, an additional fee of 2.2 hours of paralegal time at \$50 per hour is approved.

In all other respects, we will defer to the judgment of the hearing officer insofar as his assessment of reasonable and necessary fees in the region, and uphold his determination. We would point out that the while the outcome was successful for carrier, the nonappearance of the claimant certainly enhanced its chances of a victory. And, aside from paralegal fees, the fees disallowed by the hearing officer are by and large for secondary review of documents, for attention to a "possible" continuance, and for preparation of the fee affidavit. The hearing officer could well have concluded that such services were not necessary to presentation of the defense's case. We therefore reverse only that portion of the hearing officer's decision to disallow all paralegal time claimed, and render an approval for an additional 2.2 hours of paralegal time, or \$110.00.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge