APPEAL NO. 92247

This appeal is conducted in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-6.41 and Texas W.C. Comm'n., 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3), and §152.3 (as amended, effective June 1, 1992) (Rule 152.3).

A contested case hearing was held at the request of the respondent/claimant, on April 27, 1992, appealing an order for attorney's fees that had been awarded to (Mr. W). That order had been issued March 18, 1992, by a Disability Determination Officer for the Texas Workers' Compensation Commission (Commission), approving fees in the amount of $300.00. Although the appellant had not requested the hearing, he asked for relief at the hearing, to wit, arguing that the March 18, 1992 order should be increased to the full amount he requested of $1570.50.

After the contested case hearing, the hearing officer determined that services claimed for attorney time were actually rendered by paralegal staff, and reduced the allowed amount to $75.00, based upon a finding that the customary billing rate for the time of legal assistants in the Houston area was $50.00 per hour.

The appellant asks that the decision be reviewed and reversed, arguing first that the respondent/claimant did not timely request a contested case hearing to appeal the March 18, 1992 order, and, alternatively, that the decision of the hearing officer was so against the great weight and preponderance of the evidence as to be manifestly unjust. In particular, the appellant complains of Conclusion of Law Nos. 3 and 4, and Findings of Fact Nos. 8 through 12. Appellant asks that fees in the total amount of $1,570.50 be allowed by this panel after reversal of the hearing officer's decision. No response has been filed.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

At the outset, it must be noted that this appeal was filed on June 8, 1992, and received June 11, 1992. Consequently, it has been filed after June 1, 1992, the effective date of amendments to Rule 152.3. By virtue of new subsection (g) of Rule 152.3, a party appealing an order of a contested case hearing officer as to attorney's fees shall request review pursuant to Rule 143.3, which allows fifteen days following receipt of the order in which to file an appeal. The appellant states that he received the order May 29, 1992, and, as he has filed his appeal within fifteen days, we have jurisdiction over the appeal.

In finding that this appeal is thus timely filed, we would note that Rule 152.3 is a procedural rule. Brooks v. Texas Employers' Insurance Ass'n, 358 S.W.2d 412 (Tex. Civ. App.- Houston 1962, writ ref'd n.r.e.). With respect to procedural administrative rules, changes may be made that will affect future steps in pending cases; this rests upon the principle of law that no litigant has a vested right in a procedure. Texas Dept. of Health v. Long, 659 S.W.2d 158 (Tex. App.- Austin 1983, no writ); Brooks, *supra*; Merchants Fast

Motor Line v. Railroad Comm'n, 573 S.W.2d 502 (Tex. 1978). Thus, although the order was issued May 26, 1992, the rule amendment went into effect June 1, 1992 and controls appeals from attorneys fees orders pending on that date.

As to appellant's point that the contested case hearing officer's order is void, we would note that there is nothing in the record of this hearing to contradict the hearing officer's recitation of jurisdiction to hear the matter (Conclusion of Law No. 1). Second, this point was not complained of during the hearing itself. The parties agreed at the beginning of the hearing that the issue to be resolved was whether the March 18, 1992 order of the commission was correct. Indeed, the appellant himself sought relief from the March 18 order, asking that it be increased. Therefore, even if there were evidence to indicate that respondent/claimant's request was not filed in accordance with Rule 152.3, that issue was waived, and each party's dispute with the order was tried, in essence, by agreement of the parties.

Appellant represented the respondent/claimant from April 4, 1991 until February 19, 1992. He filed a verified application for attorney's fees, also signed by the respondent/claimant, on September 26, 1991. This affidavit represented that it covered services rendered for the period from April through September 1991. The services claimed for that time period were one hour of attorney time on April 2, 1991, for initial interview and setting up the file, 12 hours of attorney time for client conferences, and 6 hours for research and preparation for informal dispute resolution by the attorney. The hourly rate claimed was $150.00. An expense item of $33.00 for medical records was also requested. A total of $450.00 was allowed of the total claim of $2,883.00, by commission order dated October 15, 1991. This order was not appealed.

Appellant filed a second verified application for attorney's fees, also signed by the respondent/claimant, on December 13, 1991. This affidavit represented that it covered services rendered in October through December 1991. A total of 6 hours for client conferences are claimed for that period at $150.00 per hour. A total of $150.00 was allowed of the total claim of $900.00, by commission order apparently signed January 3, 1992, but erroneously dated "1991". This order was not appealed.

Appellant filed a third verified application for attorney's fees on the newer Commission form, on February 20, 1992. This application states that it covers "all" time and expenses from April 9, 1991 through February 19, 1992. The application requests time for client conferences (which includes phone calls) from April 9, 1991 through February 18, 1992; for services listed under informal resolution for the period from April 25, 1991 through February 6, 1992; and for expenses for medical records in the amount of $33.00. One service claimed under the client conference heading is a half hour on February 19, 1992, the date after representation terminated, for "prepared and filed non-rep." The total claimed fees and expenses were $1,570.50; the commission approved $300.00, noting that two prior orders covered the period from April through December 1991.

The respondent/claimant disputed generally that "half" the services shown on the third application were accurate. She stated that any telephone calls made were never more than five minutes long, and that most visits to the office were merely to drop off documents. She stated that between October 1991 and February 1992, she visited the office four times and estimated she called less than six times. She stated that there was no reason to call as they were not having problems. The third application documents client contacts that compare to her testimony, with nine conferences and five telephone calls, generally claimed at either 1/10 or 1/4 of an hour.

The hearing officer asked the appellant several times for an explanation of whether the third application overlapped services already awarded on the first two applications. Appellant's response was that his office had been asked by the Commission to itemize services. Appellant further testified that it was his belief that the initial $450.00 had been awarded for opening up the file and the initial interview. Appellant stated that he did not bill time expended by legal assistants and office staff, and items listed as attorney services represented supervision and review of the services of others. The respondent/claimant stated that she never personally met with appellant. Appellant stated that he could not recall whether he met respondent/claimant although he said that telephone calls were handled by others in his office and reviewed by him.

Attorney's fees for representing a claimant before the Commission (or a court) must be approved by the Commission (or the court). Article 8308-4.09 (a), 1989 Act. That statute spells out the factors that should be considered by the Commission in approving the amount of the fee, which cannot exceed 25% of the maximum recovery. Commission rules in Chapter 152 of Title 28 of the Texas Administrative Code implement this statute. Rule 152.4 lists a guideline of maximum hours allowable for certain services. Rule 152.4(e) imposes a limit of three hours when an attorney's only service is completion of paper work on an undisputed claim.

A court is not required to award the maximum allowable fee, even if that is what a contract between a claimant and the attorney states. Brooks, *supra*. Within the statutory parameters, the amount of fees and method of payment are matters committed to the discretion of the Commission or the court. Smith v. City of Austin, 670 S.W.2d 743 (Tex. App.- Tyler 1984, no writ); Texas Employers' Insurance Ass'n v. Motley, 491 S.W.2d 395 (Tex. 1973).

In this case, there had been two prior awards of attorneys fees and expenses based upon applications filed for services performed from initial representation through December 13, 1991, the date the second application was filed. As such, these services could not be claimed and considered again. Although appellant recites in his appeal that the third application does not duplicate services for which he was previously paid, the evidence in the record indicates the contrary, including the duplication of a request for $33.00 expenses,

and appellant's testimony indicating that the third application represents itemization of services in response to Commission requests for more information. Appellant was given several chances in the hearing to clarify whether there was overlap, and he failed to do so. There is no basis on the face of the first order for concluding that $450.00 represents only an award for the initial interview and setting up the file, rather than an award based upon the entire amount requested.

Our review of the record shows no abuse of discretion by the hearing officer in adjusting downward the amount approved in the March 18, 1992 order. *See* Royal Insurance Co. of America v. Goad, 677 S.W.2d 795 (Tex. App.- Fort Worth 1984, writ ref'd n.r.e.). The only services which could be considered from the third application would be those rendered after the second application was filed, through February 18, 1992, the date that representation was terminated. The number of hours shown during this time is slightly less than a hour and a half. Appellant testified that direct services were rendered by legal assistants, corroborating the testimony of the respondent/claimant that she did not talk or meet with the attorney during conferences and telephone calls.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge