APPEAL NO. 92284

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 appellant, on April 22, 1992, regarding a March 31st order for claimant's attorney's fees awarded to (Mr. W). The respondent/attorney assisted the appellant in a workers' compensation claim under the 1989 Act (the record does not indicate the inception or ending dates of such representation). That order had been issued by a Disability Determination Officer for the Texas Workers' Compensation Commission (Commission), approving fees in the amount of $1200.00, for eight hours of attorney time as claimed and set forth in a sworn affidavit. The appellant did not appear at the hearing, and the hearing officer stated that he was unable to locate any document that would state the reason the hearing was requested. Respondent/attorney did appear and a brief hearing was held, in which the hearing officer admitted the affidavit for attorney's fees filed by respondent/attorney, the March 31st order for attorney's fees, and the notice of hearing mailed to the appellant by the Commission on April 9th. The hearing officer approved the March 31st order for attorney's fees, and ordered that this be paid weekly from the appellant's income benefit, not to exceed 25% of the weekly benefit.

Appellant asks that the decision be reversed and the proceeding remanded. He states that he had good cause for failure to appear at the hearing, in that the notice of hearing was in English and he does not speak or read English. He asserts that his friend who customarily translated for him was unavailable, and the document was not translated until two days after the hearing. He further asserts that it was not communicated to him that any attorney's fees would be due. Finally, appellant states that he never met personally with the attorney, and went to his office only six times to drop off hospital bills.

Respondent/attorney replies that no new evidence has been shown that would compel a different result, that the decision is correct based upon the record at the hearing, that appellant has not demonstrated good cause for failure to appear at the hearing, that attorney's fees were fully explained in Spanish to appellant, and that the attorney benefited the appellant and is entitled to compensation for services he performed. There is no response to appellant's assertion that respondent/attorney did not personally meet with appellant.

DECISION

Attorney's fees for representing a claimant before the Commission (or a court) must be approved by the Commission (or the court). 1989 Act, Article 8308-4.09 (a). 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 claimant's recovery.[1] Commission

[1] "Claimant's recovery" is defined in Rule 152.2(b), which lists amounts that are not included in computing

rules in Chapter 152 of Title 28 of the Texas Administrative Code implement this statute. 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 v. Texas Employers' Insurance Ass'n, 358 S.W.2d 412 (Tex. Civ. App. Houston 1962, writ ref'd n.r.e.). 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).

The Appeals Panel does not gather evidence, and must review only the record developed at a contested case hearing, and consider the written appeal and response. 1989 Act, Article 8308-6.42(a). The standard of review adopted by the Appeals Panel for consideration of orders approving attorney's fees is whether there has been an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 91010 (Docket No. redacted) decided September 4, 1991. In applying this standard, we do not overrule the hearing officer because we may have exercised our discretion differently; rather, the order is reviewed to determine if the hearing officer made his decision arbitrarily or capriciously, without resort to guiding rules or principles. Downer v. Aquamarine Operators Inc., 701 S.W.2d 238 (Tex. 1985).

In this hearing, the respondent/attorney testified that he was an attorney licensed in Texas. Respondent/attorney entered no other evidence to supplement or qualify any items on his affidavit. The hearing officer noted on the record that there was an earlier order dated March 8th for $150.00. However, he stated that he would not admit it because it was not in issue.[2] The services listed in the affidavit involve not only services described as client conferences, but include review of documents and contact with the respondent/carrier's adjuster, and the doctor. All services claimed are attributed directly to the attorney; no claim has been made for services attributed to paralegals or law clerks. The affidavit describes this as the second application for fees, and affirms that every statement contained therein is true and correct. Although the order attached thereto indicates approval for the full amount sought, the disability determination officer failed to make the required order directing the method by which payment should be made.

We cannot agree that appellant has recited good cause for failure to attend the contested case hearing he requested. Appellant does not contend that he failed to receive the notice of hearing. There is no requirement in the statute or rules that directs communications from the Commission to be made in Spanish. With the greatest respect to the appellant, there are various means by which appellant could have obtained a timely translation of the notice of hearing. The notice itself includes a telephone number and

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the benefits subject to the 25% ceiling.

[2] A hearing officer should, however, be alert to the relevance of earlier orders, whether in dispute or not, as evidence of the progression of a claim, in order to assess the factors in Article 4.09(c) and Rule 152.3(b) as well as the guidelines set out in Rule 152.4.

name of a person to contact with questions. Appellant himself states that the request for the hearing was initially made with the assistance of a Spanish-speaking employee of the Commission. Finally, the Commission ombudsman could have assisted with translation of the notice.

An attorney who represents a party before the Commission is not restricted to billing only for contact with the client. Services such as review and preparation of the pertinent documents, contact with other persons and the Commission, and research, are legitimate services for which an attorney may claim a fee. Appellant's assertion that he did not understand that any fees would be due may reflect a breakdown in communication with his attorney; this does not, however, constitute a basis upon which the Commission may withhold consideration of a request for approval of an attorney's fee under Article 8308-4.09 and 4.091.

In this case, the discretion of the hearing officer has foundation in the affidavit. The hours contained therein do not exceed guidelines listed in Rule 152.4. There is no evidence that the Commission failed to appropriately apply the considerations set forth in Article 8308-4.09. As the sworn affidavit is written, the hearing officer could not infer that client conferences were conducted by persons other than the attorney. The hearing officer had no testimony or other documents in this record refuting matters sworn to in the affidavit. Finally, there was no statement of disputes from the appellant which would alert the hearing officer to specific complaints about the March 31st order that might arguably have triggered a duty on the part of the hearing officer to seek additional evidence. Considering all these factors, based upon evidence before the hearing officer at the time, we cannot say that the hearing officer abused his discretion by approving the March 31st order of the Commission.

The assertions in requests for appeal and responses are not evidence. Respondent/attorney is thus correct that no evidence has been presented to indicate a reversal. In any case, evidence presented at an appeal that was not presented at a contested case hearing will generally not be considered. Appeals Panel Decision No. 91132 (Docket No. redacted) decided February 14, 1992. This does not mean, however, that if a party appears at a hearing and offers evidence that an attorney did not in fact perform services that were claimed as direct services by him, affording the attorney the opportunity to present responsive evidence, the trier of fact could not consider and make an adjustment to an order for attorney's fees. *Cf.* Texas Workers' Compensation Commission Appeal No. 92247 (Docket No. redacted) decided July 27, 1992.

There is no evidence in the record for respondent/attorney's assertion that the contested case hearing officer had no jurisdiction to hear the appeal. In any case, respondent/attorney did not raise such objection at the contested case hearing, and it is therefore waived.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge