

APPEAL NO. 92435A

On July 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer issued a Decision and Order regarding the claimant's entitlement to workers' compensation benefits under the Texas Workers' Compensation Act, TEX REV. CIV STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), and issued an Order For Attorney's Fees on appellant's application for attorney's fees. Appellant represented the carrier, Protective Insurance Company, at the hearing.

Appellant contests the amount of attorney's fees approved by the hearing officer. Appellant requested approval of fees and expenses in the amount of \$4,589.05; however, the hearing officer approved fees and expenses of \$3305.55. Appellant contends that there is no evidence to support the hearing officer's order on attorney's fees, that the order is against the great weight and preponderance of the evidence, that the order is arbitrary and capricious and not supported by substantial evidence, and that the approved fee is not in accordance with the 1989 Act. Appellant asks that the Order For Attorney's Fees be reversed and that we award appellant the fees and expenses requested at the hearing. No response was filed.

DECISION

Finding no abuse of discretion on the part of the hearing officer in the approval of attorney's fees, we affirm his Order For Attorney's Fees.

We apply an abuse of discretion standard in reviewing an order for attorney's fees. 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 (Tex. App.-Tyler 1984, no writ); Texas Workers' Compensation Commission Appeal No. 91010 (Docket No. redacted) decided September 4, 1991.

In Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241, (Tex. 1985), the Supreme Court of Texas stated the following concerning abuse of discretion:

The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. Craddock v. Sunshine Bus Lines, 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. Comm. App.-1939, opinion adopted). Another way of stating the test is whether the act was arbitrary or unreasonable. Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1982); Landry v. Travelers Insurance Co., 458 S.W.2d 649, 651 (Tex. 1970). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. Southwestern Bell Telephone Co. v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965); Jones v.

Strayhorn, 321 S.W.2d 290, 295 (Tex. 1959).

The amount of an attorney's fee paid for defending an insurance carrier in a workers' compensation action brought under the 1989 Act must be approved by the Texas Workers' Compensation Commission (Commission) or court. Article 8308-4.091(a). The fees must be reasonable and necessary, and in determining whether the fee is reasonable the Commission considers issues analogues to those listed in Article 8308-4.09(c) relating to attorney's fees before the Commission or court. Article 8308-4.091(b) and (c). The guidelines for maximum hours set forth in Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN CODE. Sec. 152.4 are also considered by the Commission in determining whether a defense counsel's fee is reasonable and necessary. Rule 152.3(b); Appeal No. 91010, *supra*. 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.

In the present case, appellant submitted an application for attorney's fees in which he requested approval of 24.7 hours of attorney time and 27.8 hours of paralegal time. The hours requested far exceeded the maximum hours allowed by the guidelines. Thus, appellant had the burden to demonstrate that the hours in excess of the guidelines were justified. Rule 152.4(c). In approving 18.20 hours of attorney time and 19.5 hours of paralegal time, the hearing officer approved hours in excess of the guidelines, but less than that requested for approval. The hearing officer is in the best position to determine whether the hours in excess of the guidelines were justified by appellant's efforts and the complexity of the legal and factual issues involved. We have carefully reviewed the application and order for attorney's fees, the hearing record (the decision of the hearing officer in regard to respondent's entitlement to benefits has been appealed), and appellant's request for review, and conclude that the hearing officer did not abuse his discretion in approving the hours reflected in his Order For Attorney's Fees.

The hearing officer's Order For Attorney's Fees is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge