

APPEAL NO. 92481

On August 3, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. Respondent is an attorney. She represented appellant in a workers' compensation claim under the provisions of TEX. REV. CIV. STAT. ANN. art. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act) from (date) to August 23, 1991. A disability determination officer (DDO) approved attorney's fees for respondent in the amount of \$610.00. Appellant contested the attorney's fees approved by the DDO and requested a hearing. After the hearing, the hearing officer determined that the approved attorney's fees are fair and reasonable for the services rendered and ordered that the attorney's fees as previously approved be paid to respondent.

Appellant disagrees with the hearing officer's decision contending that respondent did not work on her case for the number of hours approved by the DDO. Respondent asserts that the appeal was not timely filed and that a copy of the appeal was not served on her. Respondent further asserts that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

We modify the decision and order of the hearing officer and, as modified, affirm.

Appellant's request for review does not contain a certificate of service showing that the request was served on respondent as required by Article 8308-6.41(a) and Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 143.3(a) and (b). The appeals panel has viewed an appellant's failure to serve the other party as not affecting the timeliness of the appeal but as extending the time for an opportunity for response until service is made. See Texas Workers' Compensation Commission Appeal No. 91120 (Docket No. redacted) decided March 30, 1992. In this case, appellant's request for review was received by the Texas Workers' Compensation Commission on September 8, 1992, and the clerk for the appeals panel sent a copy of the request for review to respondent on September 9, 1992 by facsimile transmission. The response is dated and postmarked October 2, 1992, and was received by the Commission on October 5, 1992. The response was clearly not filed with the Commission not later than the 15th day after the request for review was received by respondent as required by Article 8308-6.41(a) and Rule 143.4(a). Therefore, the response will not be considered on appeal. However, we have determined that appellant's request for review was timely filed. The decision of the hearing officer was mailed to the parties on August 19, 1992. Appellant's appeal is postmarked September 3, 1992, and was received by the Commission on September 8, 1992. Allowing for mailing time as provided by Rules 102.5(h) and 143.3(c), the appeal was filed not later than the 15th day after the date of receipt of the decision as required by Article 8308-6.41(a) and Rules 152.3(g) and 143.3(a).

In connection with her representation of appellant from (date) through August 23, 1991, respondent requested approval of 2.4 hours for attorney time, 7.4 hours for paralegal

time, and \$5.00 in expenses. This amounted to a total fee of \$691.00. The hours for which approval was requested involved initial services, client conferences, and informal resolution without Commission intervention. The DDO approved 2 hours for attorney time, 7 hours for paralegal time, and \$5.00 in expenses. The total approved fee was \$610.00, which amount was determined to be fair and reasonable by the hearing officer.

Appellant testified that she injured her back and neck at work on (date of injury) and went to see respondent for legal representation on (date). Appellant said she signed an agreement to have respondent represent her in her workers' compensation claim and that she expected respondent to be her lawyer and represent her. However, she denied signing an agreement that she introduced into evidence which provided that respondent would receive as compensation an amount not in excess of the statutory fee of 25 percent. Appellant said that the agreement she signed provided for attorney's fees only in the event her case was settled. The latter agreement was not offered into evidence. Appellant acknowledged that she began receiving workers' compensation benefits after she retained respondent, that she visited respondent's office and filled out workers' compensation forms, and that she talked to respondent several times about her case. Appellant also said that she was continuing to receive income benefits as of the date of the hearing.

The reasons appellant gave for contesting the fee approved by the DDO were that she had a difficult time reaching respondent by telephone; that she had to do most of the work on her case by herself; that she understood that respondent would not be paid unless there was a settlement of her case, apparently referring to a lump sum settlement such as she had received in a workers' compensation claim under the prior law; that respondent did not explain the new workers' compensation law to her; and that respondent had loaned her \$200.00 to pay her rent. Appellant said that respondent did not help her at all "other than get [appellant] on workers' comp."

We note that under the 1989 Act, a claim for workers' compensation benefits is not "settled" for a lump sum as was the practice under the prior workers' compensation law. Article 8308-4.33(a) specifically provides that a settlement may not provide for payment of any benefits in a lump sum except as provided in Article 8308-4.27 pertaining to commutation of impairment income benefits. Other provisions of the 1989 Act provide that an insurance carrier's liability for medical benefits may not be limited or terminated by agreement or settlement and that income benefits are to be paid on a weekly basis as and when they accrue, except that under certain circumstances impairment income benefits may be commuted, and provisions are made for advancement of income benefits and acceleration of impairment income benefits subject to specified requirements and limitations. Articles 8308-4.21; 8308-4.27; 8308-4.32; 8308-4.321; 8308-4.61.

Article 8308-10.03(a) provides that an attorney who represents a claimant before the Commission may not lend money to the claimant during the pendency of the workers' compensation claim. A representative who violates the prohibition against loans may be subject to the penalty and sanctions procedures set forth in Chapter B of Article 10 of the

1989 Act through Article 8308-10.07(12). However, we are not aware of any Commission rule which provides for reduction or denial of attorney's fees for a violation of Article 8308-10.03(a). See Article 8308-10.07(d).

Respondent testified in some detail concerning her work in handling appellant's worker's compensation claim. According to respondent, time spent on the claim by her and her paralegal included conferences and telephone calls with appellant, filing the claim, and correspondence and telephone calls to and from the carrier, Commission, employer, and health care providers. Respondent said that she and members of her office staff repeatedly explained the provisions of the 1989 Act to appellant and that she gave appellant full legal representation in connection with her claim. Respondent acknowledged that she loaned appellant \$200.00. She said that appellant terminated her services when she would not loan her additional funds. The \$200.00 loan is not reflected in the application for attorney's fees. It is addressed in a letter dated August 23, 1991, from respondent to appellant.

Pursuant to Article 8308-4.09, an attorney's fee for representing a claimant before the Commission or court under the provisions of the 1989 Act must be approved by the Commission or court. In approving an attorney's fee, the Commission must consider the criteria set forth in Article 8308-4.09(c) and the provisions of Rule 152.4 which contains guidelines for maximum hours for specific services performed by a claimant's attorney. 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 guidelines allow one hour for the initial interview and setting up the file, two hours for client conferences per month, and, in regard to resolving disputes of compensability or amount of payment, the guidelines allow six hours for informal resolution of all issues without Commission intervention. As part of the application for attorney's fees, an attorney must submit a statement of hours expended on the case by attorneys, paralegals, and law clerks. In this case, a total of two hours of attorney time and seven hours of paralegal time was approved for legal services performed over the course of almost seven months.

The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). 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. Having reviewed the record and the applicable provisions of the 1989 Act and Commission rules, we conclude that the hearing officer did not abuse his discretion in determining that the attorney's fees approved by the DDO are fair and reasonable for the services performed and in ordering that the fees be paid to respondent. However, we modify that part of his order which orders appellant to pay respondent the attorney's fees previously approved and ordered to be paid because the 1989 Act provides that the attorney's fee shall be paid from the claimant's

recovery and that such fee is subject to a maximum of 25 percent of the claimant's recovery. Article 8308-4.09(b). Therefore, we modify the decision and order of the hearing officer to provide that respondent's attorney's fees as approved by the DDO are to be paid from appellant's income benefits in an amount not to exceed 25 percent of each of appellant's income benefit payments, including accrued benefits, if any, until the amount is paid.

As modified, the decision and order of the hearing officer are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge