APPEAL NO. 92659

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).

The attorney appeals the approval of his attorney's fees, in which he claimed a total of $15,162.50 for attorney time, and $478.36 for expenses relating to prosecution of a contested case hearing and appeal. The hearing officer awarded $10,500 for time and $197.03 for expenses. The claim involved a factually and legally complex issue of compensability involving a head injury in a lifetime income benefits case. It was a vigorously disputed case.

DECISION

We approve certain increases in the claim for attorney fees and disallow other requested increases. The application for appeal fees has been referred to Hearings & Review administration for determination on the fee approved for those services. In all other respects the decision of the hearing officer is affirmed.

GENERAL DISCUSSION RELATING TO POWER TO APPROVE ATTORNEY'S FEES

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 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).

We would note that, to the extent that an attorney renders legal services that collaterally relate to the injury, such as guardianship proceedings or pursuit of non-workers compensation benefits, we have no jurisdiction to approve such fees. It appears that costs and attorney's fees incurred on behalf of a ward's estate by a guardian are subject to probate court approval, to be paid from the estate. *See* V.A.T.S. Probate Code, § 242 (Vernon's Supp. 1992). Consequently, those charges do not involve fees "for representing a claimant

[1] "Claimant's recovery" is defined in Rule 152.2(b), which lists amounts that are not included in computing the benefits subject to the 25% ceiling.

before the commission", and will be disallowed for the commission's purposes when claimed as part of fees requested from the insurance carrier. We note that the hearing officer has approved in error some fees for Probate Court related actions.

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, 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).

SPECIFIC DISPUTES TO THE FEE AWARD

1. Client conferences. The hearing officer has applied Rule 152.4(d) in holding the amount of time allowed for conferences to a maximum of 2.0 hours per month. There were some months when the attorney claimed less than 2.0, and sometimes more. Most of the claimed conference hours that were characterized as such were approved.

The conferences in question were held with the guardian for the claimant. While it may well be that the complexity of the case would require more than 2 hours consultation per month, we are given some pause here because the appeal notes that one factor for higher hours was "associative probate matters relating to this action." Because of this, we cannot find that the hearing officer abused his discretion in applying the limits set forth in the rule relating to client conferences.

2. Preparation for contested case hearing. The hearing in question was held August 25, 1992. The attorney argues that a total of 24.8 hours were claimed but only 9.9 hours were allowed. We cannot tell all of the items the appellant attorney considers as preparation, however, our own tabulation of preparation hours, up to and including the contested case hearing, are 34.5 with 19.6 hours approved. The approved amount exceeds the 4.0 maximum allowed in Rule 152.4(d) for a dispute over compensability taken through the contested case hearing level, which guideline is also intended to cover preparation for and attendance at the hearing. It appears that the hearing officer did consider that the hearing was more complex. We would agree that considering the factors set forth in Article 8308-4.09(d), that an excess of the maximum guidelines set forth in rule 152.4(d) is justified.

Focusing on items where smaller portion of claimed hours were allowed, we observe that the hearing officer reduced the amount of time (5.8 hours) claimed for the hearing to 4.5 hours; he allowed another half hour of time out of 1.2 hours requested for contact with witnesses immediately prior to the hearing. The greatest reductions were made in blocks of time taken for preparation in the days leading up to the hearing. For August 13th and August 14th, preparation times of 4.0 and 4.4 hours were reduced to 1.0 each time; on

August 19th and 20th, the week immediately before the hearing, 3.6 hours claimed each day was reduced to 0.6 each day. The hearing officer's notes state that he had already allowed other time (4.0 claimed for August 18th and fully awarded) for preparation of exhibits and evidence, and that the additional times that he reduced were excessive or that the aggregate allowed already was sufficient. We find that he abused his discretion in disallowing this amount of preparation time in the two weeks before the hearing, and agree that the full amounts of 4.0, 4.4, 3.6, and 3.6 hours, claimed for August 13, 14, 19, and 20 should be allowed. This results in an additional allowance for 12.5 hours at $125 per hour, or an additional fee of $1562.50 related to preparation.

3. Discovery. All time claimed for deposition of the claimant's guardian was allowed. Of 7.0 hours claimed for claimant's discovery and witness subpoena, 6.5 hours were allowed. Time claimed for preparing answers to the carrier's interrogatories (which are mostly uniform questions adopted under Rule 142.19) was 10.3 hours; the hearing officer allowed 6.6 hours. The reduction from 2.1 hour to 0.6 hours was done for a service described as proofing the answers and drafting a transmittal letter and requesting a subpoena duces tecum. This seems to combine aspects of claimant's discovery and response to carrier discovery. The hearing officer's comment for reducing these hours is that sufficient time was already allowed for interrogatories. This appears to us to allow time for the subpoena item but not the interrogatories. In view of the time already allowed for answering form interrogatories, we cannot find that the hearing officer abused his discretion.

4. Preparation and filing of Appeal. The hearing officer did not allow 2.8 hours for filing a response to the carrier's appeal of the hearing decision, on the basis that he had no authority to approve same. This did not constitute a determination one way or the other on those fees; it merely reflected the internal procedure of Hearings & Review division that fees for appellate matters are reviewed and approved by the Austin headquarters of the Hearings & Review Division. Accordingly, the application relating to these fees has been forwarded for expeditious determination and additional order as appropriate, which may be appealed in its own right by a dissatisfied party.

5. Expenses. Rule 152.5(c) expressly states that postage and copying expense that are the costs of operating a law office. For the most part, these were the expenses charges not allowed by the hearing officer. On the other hand, some expenses for exhibit preparation were cut down. Although the hearing officer questioned such charges as possibly too high, we feel that they should have been allowed absent a demonstration that they were unreasonable. Therefore, the following additional expense items are allowed: $20.95 for developing photos of the accident site and $70.84 for art supplies (used to make the demonstrative evidence in this case).

6. Lump Sum. The appellant attorney argues that he has asked that the claimant make payment to him of attorney's fees in a lump sum. However, under the 1989 Act, the claimant does not pay attorney's fees. It is the carrier that pays fees. *See* Article 8308-4.09(g). That statute makes no provision for payment of interest on fees paid out over time.

Consequently, the appellant's concern about the constitutionality of this would have to be addressed to the legislature or to the courts. Under Article 8308-4.09(d), the Commission by rule may provide for commutation of such fees to a lump sum. This rule is Rule 152.1(d), and makes clear that the carrier may recoup the fee out of future benefits. As we read the law and rules, a commutation to a lump sum can be requested at any time; it is suggested that the appellant attorney make a request to the field office handling the claim so that for lump sum payment so that the impact on the claimant's benefits can be assessed.

7. Disallowed probate expenses. The following items were approved as part of the workers' compensation fee recovery in error by the hearing officer, because they are described as items relating to the appointment of a guardian and bonding of the guardian, and appointment of the attorney *ad litem*, through the Probate Court: 4/7/92 - 2.2 hours; 4/27/92 - 2.9 hours; 4/28/92 - 1.3 hours; 5/01/92 - 0.7 hours; 6/16/92 - 1.6 hours; 6/18/92 - 1.7 hours. Therefore, a total of 10.4 hours should have not been allowed as part of the fee for representing the claimant before this Commission under Article 8308-4.09(a). The total offset on the allowed claim, at $125 per hour, is $1300.00. (Such amounts would seem to be more properly claimed through the Probate Court, as noted above; our ruling here goes only to whether such amounts may be approved by the Commission and ordered paid directly by the carrier, under Article 8308-4.09).

Summary of Decision. We approve an additional total amount of $354.29, which consists of $91.79 in additional expenses and $262.50 in additional attorney's fees. The additional attorney's fees are derived by allowing an additional $1562.50 for preparation time (12.5 hours x $125/hr) less the original award of $1300.00 (10.4 hours x $125/hr) relating to ancillary probate matters.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge