APPEAL NO. 92669

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992) and Tex. W.C. Comm'n, 28 Tex. ADMIN. CODE § 152.1 through 152.5 (Rules 152.1 through 152.5). On November 24, 1992, a contested case hearing was held in (city), Texas, upon the request of respondent, claimant herein, who disputed an award of attorney's fee made to appellant, attorney herein. (Mr. R) presided, and attorney chose not to attend the hearing. The hearing officer determined that attorney was not entitled to a fee in this case. Attorney asserts on appeal that the Texas Workers' Compensation Commission (Commission) did not call him by telephone promptly and thereby deprived him of due process, that the hearing officer did not provide a complete recital of facts in his "Statement of the Case", that the hearing officer misstated attorney's position, that the hearing officer misstated what the contract of employment states, that the conclusions of law are not thorough, and that the Commission had earlier ordered fees in this case to be paid.

DECISION

We affirm the decision on attorney's fees.

The attorney was hired on June 24, 1992, at which time claimant had been assessed an 8% impairment rating by her treating physician, Dr. J, who found maximum medical improvement (MMI) on May 8, 1992. The carrier did not dispute the 8% impairment and began paying impairment income benefits (IIBs) on June 9, 1992. After claimant disputed the treating doctor's impairment rating, a designated doctor, Dr. O, was selected, and on September 18, 1992, he assessed an impairment rating of 8%, the same as had been made by Dr. J, the treating doctor, in May 1992.

The contract signed on June 24th provided that the claimant pay up to 25% "of any and all recovery obtained on behalf of the client by payment, settlement and/or compromise of said claim." It also provided that the agreement be "construed in accordance with the laws of the State of Texas".

The applicable provisions of the statute appear at Article 8308-4.09 of the 1989 Act and provide that a fee must be approved by the Commission or a court. That provision goes on to limit the fee to no more than 25% of "the claimant's recovery." The applicable rule is Rule 152.2(b). That rule says in part that "claimant's recovery" does not include:

> (2)benefits initiated or offered by an insurance company when the initiation or offer is based upon documentation in a claimant's file, and has not been the subject of a dispute with the carrier; (emphasis added)

In looking first at Rule 152.2(b)(2), there is no question that benefits were initiated on June 9th, prior to the contract with the attorney on June 24th. Next, that subsection sets a condition on the payment of benefits by saying that the initiation must be based on

documentation in the claimant's file (there was an impairment rating of 8% by the treating doctor dated May 8, 1992) and the initiation had not been disputed by the claimant (the designated doctor only looked at the amount of impairment rating; he did not, nor is there any evidence that he had been asked to, consider whether MMI had been reached). If the claimant had disputed MMI, then the initiation of IIBs would be in dispute because IIBs do not begin until MMI is reached. In this case the initiation of IIBs was not in dispute, so the provisions of Rule 152.2(b)(2) apply and the benefits thereunder are not to be considered a part of claimant's recovery for attorney fee purposes.

The attorney objects that his absence from the hearing deprived him of due process. The hearing officer, however, shows that the attorney telephoned the Commission and indicated that he preferred to handle the matter by telephone. The hearing officer then telephoned the attorney after evidence had been taken, and reports that attorney did not disagree with the facts but asserted his entitlement to a fee. There was no question that the attorney received written notice of the date and time of the hearing.

The next assertion is that the facts recited are not complete. There is no requirement that a discussion of the facts be made in a decision, but if it is, it should fairly represent the facts, as the decision appears to do, without necessarily recording all of them. *See* Article 8308-6.34(g) of the 1989 Act.

The attorney states that the hearing officer misrepresented his position by saying he wanted a fee "based on time expended". The point made by the hearing officer in the decision is that he, as hearing officer, cannot consider time spent unless there is a "claimant's recovery" since the fee is based on time spent up to 25% of claimant's recovery.

The question raised of misconstruction of the contract is not controlling since the 1989 Act, and definition given to it by the rule, control the amount of the fee that may be approved by the Commission. The Commission must follow the 1989 Act and its own rules in approving any fee. The hearing officer considered the fee in that regard. The fact that a fee had been approved earlier by the Commission does not estop the hearing officer from applying the statute and rules correctly.

Finally, the attorney says that the conclusions are not thorough. The 1989 Act is not controlled in this area by the provisions of the Administrative Procedure and Texas Register Act. The 1989 Act only requires that conclusions of law be made. *See* Article 8308-6.34(g).

The hearing officer's decision and order do not misapply the statute and applicable rules and are not against the great weight and preponderance of the evidence; they are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge