

APPEAL NO. 931014

On August 24, 1993, a contested case hearing was begun into the question of whether claimant had a compensable mental health injury; the hearing concluded on August 30, 1993, in (city), Texas. Submission of attorney's fees were made to the hearing officer at the conclusion of the hearing, consistent with the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*), and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1 - 152.5 (Rules 152.1 - 152.5). The hearing officer, (hearing officer), decided that the 172 hours requested should be reduced to 88.3 hours. He reduced expenses claimed from \$1343.33 to \$1153.91, but this reduction was not appealed. He did not reduce the rate per hour charge of \$125.00. Appellant (attorney) states that the reduction in hours was made arbitrarily.

DECISION

We affirm.

The appeal of attorney's fees in this case is dated November 4, 1993, and was received by the Commission on November 8, 1993. On November 10, 1993, Appeals Panel No. 50 in Texas Workers' Compensation Commission Appeal No. 93867 affirmed the hearing officer's decision that the claimant, who this attorney represented, did not sustain a compensable mental trauma injury. Section 408.221(b) provides that the attorney's fee shall be paid from claimant's recovery, except for awards under Section 408.147(c), which is not applicable here (supplemental income benefits). In addition Section 408.221(h) provides that the fee shall not exceed 25% of claimant's recovery (again, except for Section 408.147(c) recoveries). Section 408.221(e) instructs the Commission to "provide guidelines for maximum attorney's fees for specific services. . . ." While this opinion will briefly discuss Rule 152.4, Guidelines for Maximum Hours for Specific Services Performed by a Claimant's Attorney, which implements Section 408.221(e), the failure to secure any award not only makes this review moot absent judicial review (See Texas Workers' Compensation Commission Appeal No. 91005(A), decided August 14, 1991), it also affects one of the criteria set forth in Section 408.221(c). The latter section calls for the Commission to consider the benefits secured by the attorney for the claimant when determining the attorney's fee.

Rule 152.3(b) provides that the Commission "shall consider" the guidelines for maximum charges set forth in Rule 152.4 and the factors set forth in Article 8308-4.09(c) (now Section 408.221(c)). Rule 152.4(c) states that an attorney may ask for more hours than set forth in the guidelines (Rule 152.4(d)) but must demonstrate their necessity to preserve the client's interest or the complexity of the issues involved. The maximum hours for the initial entry into the case are set at one hour. The maximum hours for resolving disputes as to compensability is five hours (including the benefit review conference, the hearing, and research time).

The attorney billed for 13 hours attributed to research, 12 hours and 50 minutes for interrogatories (two hours and 45 minutes for answering interrogatories in addition), five

hours for amendment of the claim, and six and one-half hours for preparing copies. The hearing officer allowed seven hours and 50 minutes for research. He allowed five hours and 50 minutes for interrogatories and one hour for answering interrogatories. Texas Workers' Compensation Commission Appeal No. 92191A, decided June 24, 1992, provided that a hearing officer did not have to allow any time for copying or marking exhibits. All times allowed by the hearing officer in the areas described above exceed the maximum allowed in the guidelines provided in Rule 152.4. We note also that the hearing officer allowed six hours to prepare for cross-examination out of eight and one-half requested. Eight hours was allowed for participation in the hearing. Texas Workers' Compensation Commission Appeal No. 92381, decided September 14, 1992, noted that the time taken by the hearing itself would be known to the hearing officer as a participant therein.

An area in which the decision of the hearing officer is open to some question under Rule 152.4(d) is the provision for client conferences which allows a maximum of two hours per month. While we do not indicate that a maximum must always be allowed, we note fairly large disparities between the amount of communication time with the client claimed and that allowed in March, July, and August, with none of these months totalling over two hours allowed. Since this case involved a claim of mental trauma with the claimant hospitalized for a period of time, it might have been warranted to have exceeded the maximum limit. Had there been a recovery in this case, remand for consideration of the communication periods that could possibly comprise client conferences each month would have been considered. Since no recovery of attorney's fees is possible without judicial order, such an exercise will not be undertaken.

In regard to other factors specified by Section 408.221(c), such as the novelty of the questions involved and the skill required to provide the legal services, we do not see evidence that the hearing officer acted arbitrarily. We note that the Appeals Panel has issued over 40 decisions in the area of mental trauma with no great variance in the stances taken under the 1989 Act. In addition, under Section 408.221(c), the hearing officer did not decrease the hourly rate involved, and we have already noted that one factor to be weighed is the benefits secured. None of these factors is provided a particular weight by the 1989 Act in comparison to each other. The hearing officer is to consider them along with the guidelines for maximum hours set forth in Rule 152.4. Except for the one area that raises a question (client conferences) we see no evidence that the hearing officer has failed to consider both the factors in Section 408.221(c) and Rule 152.4(d).

The action of the hearing officer is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge