APPEAL NO. 931077

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). The sole issue in this appeal is whether the hearing officer erred in denying a portion of the attorney's fees claimed by the appellant (attorney), the attorney for the carrier, in her second application for attorney's fees. The hearing officer,(hearing officer), denied 3.4 hours of the 8.4 hours claimed by the attorney in this application, noting on the request that there was no request for additional time. The attorney appeals claiming that the reason for additional time was discussed at the contested case hearing (CCH) which was held on the merits of the underlying claim and justified the fees claimed.

DECISION

Finding no abuse of discretion by the hearing officer, we affirm.

The partial transcript of the CCH the attorney has provided us shows that on November 15, 1993, the hearing officer completed taking testimony in the underlying claim.[1] From the claimant's testimony it is clear she was claiming an injury due to exposure to chemicals while on the job.

The attorney's application for attorney's fees (TWCC-152) is date-stamped as received by the Texas Workers' Compensation Commission (Commission) on November 18, 1993.[2] The cover page of the TWCC-152 is filled out, but the sections for itemization of hours are blank except for the notation under Section E entitled, "Formal Resolution: Contested Case Hearing," where the notation "SEE ATTACHED" appears.

A document attached to the TWCC-152 reads as follows:

10/07/93Receipt and review of Benefit Review Officer's Report. 0.3

10/08/93Interview supervisors at (employer) and investigate allegation of new 1993 injury. 3.O

10/20/93Correspondence to TWCC requesting additional issues. 0.3

10/25/93Receipt and review of correspondence from TWCC granting additional issue and forward to adjuster and employer. 0.3

11/12/93Telephone conference with adjuster and with supervisors concerning

[1]It is unclear from the partial transcript as to when testimony started, although it is clear that the transcript begins with the continuation of the testimony of claimant.

[2]This TWCC-152 states that it is the second application filed in this claim. The first TWCC-152 is not in the appellate record.

upcoming CCH and testimony. 0.5

Prepare for CCH on issues of timely reporting and new injury. 2.0

11/15/93Attend CCH. 1.5

11/17/93Prepare report to company. 0.5

TOTAL HOURS: 8.40

The hearing officer reviewed the TWCC-152 and on November 22, 1993, approved five hours, noting on the form, "5 hr all allowed by rule. No request for additional time."

The attorney includes a 138-page transcript of the November 15 session of the CCH with her appeal. On pages 129-131 the following discussion takes place between the attorney and the hearing officer:

HEARING OFFICER:Okay. Let me ask [carrier's attorney] some questions.

You requested an additional disputed issue which was granted for a finding of good cause by a hearing office, yet you've brought me no evidence today that I've seen that shows that this woman intentionally injured herself. You've said that the reason you requested that is because you think she might have intentionally injured herself if she knew that she had that condition.

Does that mean that [carrier] is now going to have that as a disputed issue on every case just on the outside chance that some claimant may have intentionally injured themselves?

[ATTORNEY]:Not at all. When I went out to [employer] now, and performed my investigation, I was present at the taking of those pictures and spoke with her supervisor, [Mr. R], at that time. And when [claimant] was not under oath and in the BRC, she said that she had injured herself when she was breathing up the fumes from the tank.

And when I spoke with [Mr. R], he was upset, and he goes, That can't be right; she's not supposed to be over there; that's not her job.

That's really not exactly what he testified to today. My thinking at the time when I asked for that question was that she knew about her condition, knew that she wasn't supposed to be breathing chemicals and went over and did somebody else's job when she shouldn't have been doing it.

[Mr. R] testified today that everybody could have access to that if they wanted to. And I'm not so sure--that wasn't my impression of him when I talked to him at the time.

And I understood what you were going at when you started asking him those questions. And frankly, I feel comfortable in dropping that issue now because it looks like she may have had access to those--to that machine. Now, whether or not it was there, I think the testimony conflicts on that. But what I--

HEARING OFFICER:All right. Can you--

[ATTORNEY]:When I did my investigation, it looked like it was an issue, and that's why I asked for it.

HEARING OFFICER:I can see where it might have looked like it, and now that that evidence didn't develop and you say you have no problem withdrawing that as a disputed issue, does the claimant have any problem withdrawing that as a disputed issue?

Section 408.222(a) requires that all attorney's fee requests for defense counsel must be approved by the Commission. Factors to be considered in approving fees are contained in Section 408.222(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 152.3 and 152.4 (Rules 152.3 and 152.4). Fees in excess of the guidelines may be requested but the amounts claimed must be justified. Rule 152.4(c). The burden is on the attorney to justify fees which exceed the guidelines. Texas Workers' Compensation Commission Appeal No. 92435A, decided October 5, 1992. The standard of our review of attorney's fees approval is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92375, decided September 14, 1992.

Rule 152.3(g) provides that where the hearing officer approves fees after a CCH a party who contests the fees ordered by the hearing officer shall request review by the Appeals Panel. The problem which often arises, as it does in the present case, is that since there was no hearing on the issue of attorney's fees, the record concerning attorney's fees is sketchy at best, nonexistent at worst. We believe that the better practice for an attorney who has any doubt that his or her attorney's fees may be reduced is to make a record at the

hearing concerning attorney's fees. Failing to do so may result in our inability to provide meaningful appellate review if an attorney later appeals the decision of the hearing officer and may require reversal and remand for an evidentiary hearing. *See* Texas Workers' Compensation Commission Appeal No. 93790, decided October 19, 1993.

Facing a similar lack of record in Texas Workers' Compensation Commission Appeal No. 93646, decided September 13, 1993, we reversed in part rendering additional fees up to the amount provided in the guidelines, but refusing to award fees in excess of the guidelines. The rationale for such an approach is that if the hearing officer decides to reduce an attorney's fees below the guidelines, which the hearing officer certainly may, it is incumbent on the hearing officer to provide us with a rationale to review for so doing. On the other hand the burden is on the attorney who requests fees above the guidelines to make a record so we may review the justification for such a request. *See* Rule 152.4(c); Appeal No. 93646, *supra*.

In the present case the attorney has requested an amount over the guidelines and the hearing officer has awarded the amount provided by the guidelines. Thus the burden is on the attorney to justify and to make a record so we may review the justification for the request. The attorney contends that such record was made at the CCH on the merits on November 15, 1993, where she explains the reason for her travel to the employer to conduct an investigation and to take pictures.[3] The question then arises as to whether this explanation constituted a justification requiring the hearing officer to award these hours.

One problem with the attorney's reliance on the above cited language from the record concerning her travel to the employer's place of business is that it is presented not as a justification for additional attorney's fees, but as a justification for her request to add the issue of self-inflicted injury. Now, by arguing that this is her justification for time above the guidelines, she is arguing by implication that the hearing officer was required to recall this testimony (even though his review of the TWCC-152 took place several days after the hearing) and relate it to the issue of the attorney's fees. The attorney could have resolved this problem by simply stating her justification in her TWCC-152 and referring to the discussion at the CCH.

Even if the hearing officer considered the attorney's explanation that she travelled to the employer to conduct an investigation and to take pictures, he may not have believed that this constituted a justifiable request for time above the guidelines.[4] Such a decision would

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[3]It certainly aids our review in a case for a party claiming that evidence supporting its position is found in the transcript of a hearing to point out the pages and lines upon which they are relying. While we understand that a lay litigant may not have the expertise to do this, certainly an *attorney* should be able to provide this information to a reviewing body, rather than require the reviewing body to go through an entire transcript of the proceeding, almost all of which is irrelevant to the issue at hand, searching for the small part of the record upon which the party is relying.

[4]In any case, since the attorney is only claiming 3.0 hours for this investigation at the employer, not the entire 3.4 hours above the guidelines, her explanation of the investigation could only justify at most part of the amount

not, under the circumstances of this case, where there is no explanation of the necessity for the attorney to conduct this particular investigation, be an abuse of discretion by the hearing officer. Thus, even if the hearing officer considered the evidence, which attorney alleges that he did not, there would not be a basis to find he abused his discretion. This distinguishes the present case from those in which we have remanded for more evidence on the attorney's fee issue. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 93790, decided October 19, 1993.[5]

Finally, while meeting with witnesses who are employees of the carrier's insured might be considered client conferences under Section B of the TWCC-152, the attorney has chosen to make her claim for hours strictly under Section E of the form.[6]

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claimed for the investigation.

[5] Also, we stated as follows in Texas Workers' Compensation Commission Appeal No. 93790, *supra*: "However, we must caution that it is incumbent upon and the burden of the attorney requesting fees to follow the requirements of the statute and rules and to provide, *sua sponte* and at the appropriate time, the information and evidence necessary for the adjudication of his request. The most efficient and appropriate time is at the end of the hearing. Failure to provide the information required and to comply fully with the statute and rules is done so at the proponent's peril."

[6] Of course it may be that in the earlier claim for fees (since this is labeled a second application we presume there was a first) the attorney may have reached or exceeded the guidelines for client conferences in October 1993 (2.0 hours per month as provided in Rule 152.4(d)).

The attorney has simply failed to meet her burden to justify fees in excess of guidelines or to establish that the hearing officer abused his discretion. The decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge