

APPEAL NO. 931191

This appeal is considered in accordance with Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act).

The appellant is the attorney for the carrier. He contends that the hearing officer has erred by apparently disallowing in total certain hours he claimant for attendance and preparation for the contested case hearing. No response has been filed.

DECISION

We reverse and remand the determination of the hearing officer on attorney's fees.

A hearing was held on October 20, 1993, involving whether the claimant, JT, had disability and whether he was intoxicated at the time of his injury. The carrier prevailed in its case on the intoxication issue and was discharged from liability for the claim as a result. As we have previously noted, a carrier bears the burden of proof on the exceptions to compensability, of which intoxication is one. See Texas Workers' Compensation Commission Appeal No. 91029, decided October 25, 1991.

The attorney's fees affidavit submitted by the carrier claimed a total of 40.50 hours for the time of the principal attorney on the case, and 2.75 hours for the secondary attorney, for the time period from September 7, 1993, through November 24, 1993. Expenses were claimed and fully allowed, including mileage allowance for travel. The hourly rate claimed was \$95.00 for both attorneys. The hearing officer, without explanation or "line item" indications of what was or was not approved, allowed only 30.50 hours of the principal attorney time, and the full 2.75 hours for the secondary attorney. On the itemized schedule supporting the affidavit, the entries of hours for hearing time and preparation are circled, as well as other items, which total 10.50 hours. According to appellant, these entries were circled by the hearing officer.

We realize that the approval of a request for fees does not always take place within a formal hearing. Nevertheless, we do not believe that this obviates the need for a hearing officer to show where less than full amount was approved, and to briefly explain why less than full hours were approved. See Texas Workers' Compensation Commission Appeal No. 93646, decided September 13, 1993.

Some of the hours claimed on the affidavit exceed the guidelines set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.4(d) (Rule 152.4). For example, 2.5 hours is claimed for setting up the file and the initial interview, although Rule 152.4 provides for one hour. This item is not circled, and if appellant is correct in his assessment that only circled items were reduced, then it would follow that the hearing officer approved, for this item, greater amounts than the rule provides for.

In this case, the carrier was defending under a theory, intoxication, on which it had the initial burden of proof. The hearing itself appears to have lasted about three hours, which exceeds the guidelines which includes preparation time and time for the hearing. We

have stated before that an attorney may be awarded fees for actual time spent in a hearing in excess of the guidelines. Texas Workers' Compensation Commission Appeal No. 93877, decided November 10, 1993. The attorney for the carrier had to travel from (city) to (city) for the hearing, the time for which is also allowable. Texas Workers' Compensation Commission Appeal No. 93800, decided October 26, 1993. It appears that the attorney did technical research to assist in his defense and as a result put into evidence technical information in support of the carrier's defense. In addition, both parties propounded, and answered, interrogatories from the other party.

In summary, there is information readily apparent from the hearings filed that would appear to substantiate fees in excess of guidelines, as required under Rule 152.4(c). In the absence of any indication from the hearing officer as to what specific items or hours were reduced or why, an abuse of discretion is indicated.

Because we cannot tell what was reduced, or whether the hearing officer allowed some excess hours in some categories of service but not in others, we reverse the order of the hearing officer and remand the fee affidavit to the hearing officer for reconsideration, where appropriate, and for specific findings on items claimed in the affidavit if the hearing officer determines that less than the amount requested should be approved. Given that the attorney has to travel to personally appear at a hearing, and given further that we have not allowed fees for appearance at such hearings, Texas Workers' Compensation Commission Appeal No. 93889, decided July 1, 1993, we strongly urge the hearing officer, should he require additional information, to provide for same by written submission or telephonic hearing.

For reasons cited above, the case is reversed and remanded.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge