

APPEAL NO. 93232

This is an appeal of attorney's fees awarded to appellant, the attorney for carrier in the above-referenced case (hereinafter "attorney"), pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). Following a December 31, 1992, contested case hearing in (city), Texas, hearing officer (hearing officer) determined that the claimant, Kenny Whittaker, had failed to prove that he was injured in the course and scope of his employment, and that he failed to show good cause for not reporting the alleged injury. Following submission of an application for attorney's fees submitted by the carrier's attorney after the conclusion of the hearing, the hearing officer issued an order on February 22, 1993 which approved total fees for the attorney in the sum of \$2193.95. This amount represented \$157.65 in expenses, versus "\$119.19" (sic--should read \$199.19), requested and \$2036.30 total fee (versus \$4561.69 requested). Pursuant to rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.3(g), attorney seeks this panel's review of the hearing officer's order denying portions of the requested fee.

DECISION

We affirm the hearing officer's order for attorney's fees.

We observe at the outset that Commission Rule 152.4 provides guidelines for maximum hours for specific services performed by a claimant's attorney, and that Rule 152.3(b) specifically extends these guidelines to attorneys for carriers. This rule implements, in part, Article 8308-4.091, which provides that attorney's fees paid for defending a workers' compensation claim must be approved by the Commission as being reasonable and necessary. That provision further says that in determining whether a fee is reasonable under this section, the Commission shall consider issues analogous to those listed in Article 8308-4.09(c), which requires the Commission to consider the following:

- (1)the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- (2)the fee customarily charged in the locality for similar legal services;
- (3)the amount involved in the controversy;
- (4)the benefits to the claimant [or in this case, the carrier] that the attorney is responsible for securing; and
- (5)the experience and ability of the attorney performing the services.

Basically, attorney seeks our review of the hearing officer's denial of 17 of the 50.6 hours requested for services performed in conjunction with the contested case hearing, as requested by Attorney II¹, as follows:

1. Read file, send documents to claimant's attorney - 3.2
2. Answer interrogatories, send to claimant's attorney - 2.5
3. Read hearing officer's denial of subpoena, call to hearing officer, review pertinent rule on subpoenas - 2.4
4. Call hearing officer & court reporter - .6
5. Three telephone calls to claimant's employer; review file and claimant's medical records - 3.6
6. Telephone conversation with adjuster, call court reporter for transcript of deposition, review file and prepare for contested case hearing - 4.0
7. Prepare documents for contested case hearing - .7

The hearing officer denied all of the above; it appears from notations on the application for attorney's fees that the hearing officer found item number 1 to be a part of basic research, items 2, 4, and 5 to be "normal CCH," and item 6 to be part of client conferences.

The guidelines in Rule 152.4 include the following maximum hours for categories of services: initial interview, set up file, basic research in compensation issues, filing initial documents with Commission: 1 hour; client conferences (per month): 2 hours; contested case hearing, if necessary: 1.5 hours. Any amounts in excess of these maximums must be approved by the Commission. The application reflects that the attorney requested 4.9 hours under the client conference category, for which 4.2 hours were approved, and that he requested a total of 28.8 hours under the category of "formal resolution: contested case hearing", for which 13.9 hours were approved.

¹ The appealed hours were those submitted with regard to Attorney II, whose hourly rate was \$75. Although the hearing officer did not approve all requested hours for attorney's co-counsel, Attorney I, whose hourly rate was \$100, his failure to so approve was not appealed.

We have previously held that an award of attorney's fees is a matter within the hearing officer's discretion, subject to an "abuse of discretion" standard of review. Texas Workers' Compensation Commission Appeal No. 91010, decided September 4, 1991; Royal Insurance Company of America v. Goad, 677 S.W.2d 795 (Tex. App.-Fort Worth 1984, writ ref'd n.r.e.). Upon our review of the record in this case, including the attorney's arguments in his request for review, we do not find that the hearing officer abused his discretion in failing to approve the above items. Attorney's affidavit which accompanied his application for attorney's fees states, among other things, that his hourly rate is that for an attorney of his experience in the locality; that the amount of time expended in representing the carrier in this case was reasonable and necessary; that interrogatories were served on carrier; that it was necessary to request and take a deposition on written questions from a previous employer of claimant's; that many long distance telephone calls were necessary to conduct interviews, prepare witnesses, gather information, and assure witness's appearances; and that photocopying was required for the carrier as well as for providing copies to the opposing party. In addition, a January 14, 1993, letter from carrier's claims specialist to the hearing officer states the opinion that the fees as requested by attorney are fair and reasonable. However, there is nothing to indicate that this information was not before the hearing officer, and that he did not consider it in making his decision. As noted earlier, the hearing officer awarded the attorney hours in excess of the maximum contained in the guidelines of Rule 152.4. The hearing officer's failure to approve the additional hours does not appear unreasonable, in light of the degree of complexity of the case (2½ hour long hearing on the issues of injury in course and scope and timely notice).

In addition, the attorney has appealed the denial of certain expenses involved in the contested case hearing, including the following:

1. Two telephone calls to Commission - \$5.64 and \$3.54; use of telecopier machine to have verification of answers to interrogatories timely signed - \$2.43
2. Photocopying of documents - \$22.95

Rule 152.5 provides that the Commission shall allow recovery of those expenses necessary for the preparation and presentation of a case; however, it states that the Commission shall not allow certain expenses which are "not necessary for the preparation and presentation of a . . . defense," including, among other things, "overhead costs of operating a law office including: rent, utilities, copies, fax, telecopier, postage, shipping, local telephone calls, long distance calls to the commission, and salaries for general office staff." Rule 152.5(c)(2). It thus appears that the hearing officer did not abuse his discretion in denying the attorney's request for the above expenses.

The hearing officer's order for attorney's fees is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge