APPEAL NO. 93284

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 1993). On March 10, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined issues of injury and disability and also determined the amount of attorney fees for claimant's attorney. Appellant is the claimant and protests that the hearing officer reduced the fee requested by his attorney. Claimant's attorney has not appealed the action on her application for attorney's fees and has not responded to the claimant's request. Carrier has not responded to the request, although there is no indication on the request that carrier was served a copy thereof.

DECISION

Finding that the claimant has no standing to appeal this action on behalf of his attorney and observing that the time period to appeal the order on attorney's fees in this case has now passed, the order of the hearing officer is final.

Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 152.3(g) (Rule 152.3(g)) provides that "an attorney, claimant, or carrier who contests the fee ordered by a hearing officer after a benefit contested case hearing shall request review by the appeals panel. . . ." While claimant is one of the parties named by the rule who can request review, existing case law addressing necessary parties to an action should be considered.

Kaplan v. Kaplan, 373 S.W.2d 271 (Tex. Civ. App.-Houston 1963, no writ) involved an action for support by a mother on behalf of her daughter against the husband/father. When the action was filed in County, the daughter had reached the age of 21. The court commented that the law presumed that adult persons were of sound mind and capable of maintaining their own affairs. In affirming the trial court's dismissal of the suit, the court also stated, "it is a rule of general application that one person may not bring suit in the right of another." It pointed out that the daughter did not elect to proceed with an action after she reached 21 and there was no showing that she was incompetent.

Subsequently, Lee v. Westchester Fire Ins. Co., 534 S.W.2d 392 (Tex. Civ. App.-Amarillo 1976, no writ) involved an action in negligence for which Lee had previously received workers' compensation benefits. Lee was an employee in a law firm and was injured in a motor vehicle accident. He attempted to receive a fee for his attorney for recovery of the amount recoverable by the workers' compensation carrier in subrogation. Lee appealed the denial of an award for attorney's fee. The court considered whether the carrier's interest had been protected by the counsel for Lee. It also cited Kaplan, *supra*, in regard to the right of one person to bring an action for another. It said that generally the right must be brought by the person in whom it is vested. It pointed out that the attorney did not assert the fee, he did not join in the motion, and "he has not appealed from the denial of Lee's motion. . . ." While the court found that certain pleas by the carrier had not been verified under the Rules of Civil Procedure, those rules do not apply to the 1989 Act. (*See*

Texas Workers' Compensation Commission Appeal No. 91088, dated January 15, 1992.) The court affirmed the trial court's refusal to award a fee.

Claimant asserts that the action of the hearing officer in allowing only 13 of 39 hours requested in attorney's fees will discourage the attorney from taking other cases. This assertion indicates that claimant has some interest in securing a certain fee for his attorney. Nevertheless, the right to the attorney's fee resides in the attorney, not the claimant. In both Kaplan and Lee, some benefit could be observed as inuring to the interest of the party who attempted to recover on behalf of another, but recovery was not allowed. Obviously if claimant were seeking to reduce the award of attorney's fee (secured from his recovery except in some instances of supplemental income benefits--*see* Articles 8308-4.09(b) and 4.28(l)(2) of the 1989 Act), he has the right to contest such an award to protect the amount of his recovery. As stated in the opening paragraph of this appeal, claimant's attorney has not filed an appeal or a request to join in the appeal made by claimant.

Even if an appeal had been perfected in this case, the hearing officer appears to have followed the "Guidelines for Maximum Hours . . ." set forth in Rule 152.4. The hearing officer allowed the maximum of one hour for initial services; he allowed two hours for client conferences in December, January, February, and March (two hours per month is the maximum set forth); and he allowed four hours for the hearing which was the amount requested. (We add that research and preparation time are included within the times set forth previously according to the maximum hour guidelines.) The action of the hearing officer would not appear to be arbitrary if it were being considered in this case.

In determining that claimant in this case does not have standing to request that his attorney's fee be raised, we distinguish this ruling from that in Texas Workers' Compensation Commission Appeal No. 93232, dated May 13, 1993. In that instance an attorney representing the carrier appealed the amount of the fee he was awarded. Considered in that appeal was a letter from the carrier indicating that the amount the attorney requested was fair and reasonable. Had claimant's attorney appealed her award of attorney's fee, any timely comment by claimant as to the efficacy of the award would have been considered just as was the letter from the carrier in Appeal No. 93232.

The decision of the hearing officer as to attorney's fee is final.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge