

APPEAL NO. 93640

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE § 401.001 *et seq.* (1989 Act). Appellant (claimant) contacted the Texas Workers' Compensation Commission (Commission) to contest the amount of fees awarded his attorneys. On March 10 and June 22, 1993, (hearing officer 1), held a contested case hearing on the fees requested by respondents (lead attorney) and (associate), the claimant's two attorneys. Hearing officer 1 found that the original attorneys' fee of \$5,175.00 awarded in an earlier hearing officer's decision was excessive and ordered that the carrier pay the attorneys only \$4,312.50 fees. On July 29, 1993, the attorneys notified the Commission in writing that they were appealing hearing officer 1's decision of July 6, 1993, on attorney's fees. No response was filed by the claimant.

DECISION

Finding that a significant finding of fact necessary to support the hearing officer's decision of July 6, 1993, does not exist in the record, we reverse the decision of the hearing officer and remand the case.

On January 14, 1993, (hearing officer 2), issued a decision and order on attorneys' fee after he had held a contested case hearing. The Commission sent out the order with a cover letter dated January 25, 1993. This order on attorneys' fee was sent to the claimant with the cover letter which specifically explained the applicable procedure to the claimant: "Should you wish to contest the fee ordered, **you must send a written request for review** by the Appeals Panel **no later than the 15th day after you receive this order.**" Without assistance of counsel, the claimant challenged the award of attorneys' fee with the Commission through verbal communications with both the (city) office and the (city) office. Hearing officer 2 in his decision on the attorneys' fee omitted "25" in a fill-in-the-blank form as the maximum percentage the attorney's could receive from the claimant's recovery. On February 25, 1993, the Commission corrected this omission through a "clerical correction" and amended the order to include the 25%, which is the maximum percentage the attorneys could receive under the law. See Section 408.221(h). The claimant, in response to his verbal communications with the Commission, received a hearing on his attorneys' fee. The hearing concluded on June 22, 1993.

At the June 1993 hearing, the lead attorney presented evidence in support of the time she and her associate spent on the claimant's workers' compensation claim. The testimony of the claimant did not contradict the time spent by the attorneys nor did he contradict the reasonableness of their fees. The claimant only disagreed with the fee being more than the 25% of the amount of benefits which were awarded to him. On cross examination, the claimant testified that he received adequate representation, but the claimant also testified that he had a problem with the \$5,175.00 figure. The lead attorney testified that a great deal of time was expended on the claimant's case. She testified that the 25% limit on attorney fees was not exceeded, but she said that the attorney fees were less than 25% of the over \$24,000.00 of the claimant's total recovery.

An attorney's fee, including a contingency fee, incurred in representing a workers' compensation claimant before the Commission or a court must be approved by the Commission or a court. Section 408.221(a). An attorney's fee may not exceed 25% of the "claimant's recovery," except in a Section 408.147(c) contest over supplemental income benefits. Section 408.221(h). Chapter 408 refers to the recovery of workers' compensation benefits under this section. Section 408.001(a). The Commission rules list guidelines for maximum hours allowed for specific services performed by a claimant's attorney. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (Rule 152.4). The claimant did not dispute the hours of work the attorneys documented on his claim. Hearing officer 1 found that the 34.5 hours expended by the two attorneys for the claimant to be reasonable, necessary and performed. Hearing officer 1 determined that \$125 per hour was a reasonable rate for attorney fees. The attorneys had requested and been previously awarded a \$150 per hour rate by hearing officer 2. In his decision of July 6, 1993, hearing officer 1 found that the attorneys' fee, approved by the Commission in the original hearing decision of November 9, 1992, was excessive.

The issue of a reasonable hourly rate was not raised by either party at the hearing, which was held to consider the claimant's objections to the original order on attorneys' fees. Hearing officer 1 should only have addressed issues raised in contesting the fee. As a result, the attorneys are correct in their appeal on this matter. However, the hourly rate does not appear to have any effect on the 25% maximum attorneys' fee allowed in this case.

The attorneys argued that the claimant signed a contract which was consistent with the Commission rules. However, an award of an attorney's fee in an amount requested under a contract permissible under the law need not be given because a court is not required to award the maximum amount permitted by law even if the parties contracted for such an amount. Brooks v. Texas Employers Insurance Association, 358 S.W.2d 412, 416 (Tex. Civ. App.-Houston 1962, writ ref'd n.r.e.). The amount of an attorney's fee is not controlled by the parties' contract, but must be determined by the trial judge in the exercise of his discretion because the fixing of such an attorney's fee constitutes original rather than appellate jurisdiction. *Id.* The hearing officer exercises his discretion to award an attorney's fee not based on private contract but based on the law contained in the statute. The abuse of discretion standard for review applies to a decision by a hearing officer to award an attorney's fee. Royal Insurance Company of America v. Goad, 677 S.W.2d 795, 802 (Tex. Civ. App.-Fort Worth 1984, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91010, decided September 4, 1991.

The attorneys argued that they should be allowed to receive 25% of the claimant's total recovery of all benefits relating to this claim. This argument is without merit. Rule 152.2(b) clearly limits an attorney's fee:

(b)For purposes of computing the maximum amount of a fee that may be fixed and

approved for a claimant's attorney, "claimant's recovery" shall not include:

- (1) the amount of benefits paid to the claimant prior to hiring the attorney;
- (2) benefits initiated or offered by an insurance carrier when the initiation or offer is based upon documentation in a claimant's file, and has not been the subject of a dispute with the carrier;
- (3) any undisputed portion of impairment benefits paid or offered to the claimant based upon an impairment rating that is assessed by the carrier under the Act, Section [408.121]
- (4) the value of medical or hospital benefits provided to the claimant; or
- (5) lifetime income or death benefits when the carrier admits liability on all issues involved, and when the maximum benefit is tendered in writing by a carrier, no later than the date on which the carrier is required to contest the claim.

The "claimant's recovery" expressly excludes these five instances from an inclusion in an award of an attorney's fee from the 25% limit of the claimant's recovery. The attorneys argued that the claimant recovered over \$24,000, but this argument does not assist us in trying to determine the amount of the claimant's recovery subject to an attorney's fee because the attorneys did not assist in the entire recovery. The hearing officer did not ascertain the total dollar value of the "claimant's recovery" subject to the attorneys' fee. The record does not include sufficient evidence to determine this recovery amount. The decision is remanded to determine the one issue of total dollar value of the "claimant's recovery" subject to the attorneys' fee.

We observe in the record that the attorneys raised a jurisdictional question at the hearing over the procedure that the Commission followed, but the attorneys did not appeal on this issue and the evidence does not show that jurisdiction does not lie. The Appeals Panel must issue a decision on each issue on which review was requested. Section 410.204. Since the attorneys did not raise jurisdiction as an issue and the record does not show that the Appeals Panel is without jurisdiction, no specific ruling as to jurisdiction is necessary.

The claimant should have filed a written request for appeal with the Appeals Panel. Instead, a hearing officer issued an order to hold a hearing on June 22, 1993, on the attorneys' fee issue. To challenge an award of an attorney's fee, an attorney, claimant, or carrier must contest the decision on fees fixed and approved by the Commission by requesting a benefit contested case hearing only if a contested case hearing has not yet been held. Rule 152.3(f). Rule 152.3(f) specifically states that subsection (g) is an

exception to subsection (f). Subsection (g) requires 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** pursuant to the provisions of §143.3 of this title (relating to Requesting the Appeals Panel to Review the Decision of the Hearing Officer). Rule 152.3(g) (emphasis added).

This is a mandatory rule requiring a review of an attorney's fee ordered at a contested case hearing to be reviewed by the Appeals Panel. Had the original challenge by the claimant to the attorneys' fee (a request for review) been made to the Appeals Panel and received within the 15 day statutory limit, the appeal would still have been considered timely even if mishandled within the Commission and the Appeals Panel received the appeal beyond the time limit. Texas Workers' Compensation Commission Appeal No. 93702, decided March 12, 1993; Texas Workers' Compensation Commission Appeal No. 92045, decided February 25, 1992.

An issue regarding the order by the hearing officer requiring a second contested case hearing on the attorneys' fee was waived by the attorneys because they did not raise the issue on appeal. The Appeals Panel must issue a decision that determines each issue on which review was requested. Section 410.204. The attorneys even requested the hearing on attorneys' fee be reopened for good cause to consider more evidence. Where it appears no injury results to the complaining party, an appellate court has always declined to disturb a ruling or a judgment of a trial court. Texas Power & Light v. Hering, 148 Tex. 350, 224 S.W.2d 191, 192 (1949); *citing* Golden v. Odiome, 112 Tex. 544, 249 S.W.2d 822, 823 (1923). No party has complained in this appeal about the procedure or the jurisdiction in this matter.

As stated, the record does not contain sufficient evidence to support the hearing officer's decision on the attorneys' fee. In the present matter, hearing officer 1 did not develop sufficient evidence and find the amount of recovery on which the 25% maximum attorneys' fee could be based.

Finding insufficient evidence to support the challenged findings, we reverse hearing officer 1's decision and remand on the sole issue to determine the total amount of the claimant's recovery subject to the fees of the attorneys. Consideration should be given as to what benefits the claimant had already been paid at the time he retained the attorneys. Reconsideration and development of the evidence, together with additional and/or different findings may be appropriate as determined by the hearing officer.

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.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge