

## APPEAL NO. 93645

(attorney) represented the claimant at a contested case hearing (CCH) held in (city) on May 24, 1993, and continued on June 21, 1993, (hearing officer) presiding. This appeal filed by attorney concerns the ruling of the hearing officer on her second and third Application and Order for Attorney Fees (TWCC-152). This Panel recently issued a decision regarding an appeal of the underlying case. See Texas Workers' Compensation Commission Appeal No. 93643, decided September 10, 1993.

In her second TWCC-152 dated May 24, 1993, attorney filed a claim for approval of 23.0 hours at the rate of \$150 per hour and \$90.00 in expenses, for a total claim of \$3540. The hearing officer granted payment for 16.5 hours at the rate of \$100 per hour and the \$90.00 expense claim, approving \$1740 of the claim. Attorney appeals contending that the hearing officer erred by reducing the attorney's hourly fee, by failing to approve hours spent for client conferences which were within the guidelines for maximum hours for client conferences per month, by failing to approve client conferences regarding issues caused by the loss of claimant's income, and by failing to approve time for forms and documents completed and filed at the Texas Workers' Compensation Commission (Commission).

In her third TWCC-152 dated June 21, 1993, attorney requested approval of 9.7 hours at the rate of \$150 per hour, for a total claim of \$1455. The hearing officer granted payment for 7.4 hours at the rate of \$100 per hour, approving \$740 of the claim. Attorney appeals arguing the hearing officer erred by reducing the attorney's hourly fee, by failing to approve the total hours spent for client conferences which were within the guidelines for maximum hours for client conferences per month, by reducing the hours requested for informal resolution and by failing to approve research time in preparation for the hearing.

## DECISION

We reverse the hearing officer and remand for the further consideration and development of the evidence in light of this opinion.

The Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. 401.001 *et seq.* (1989 Act) requires that all attorney fee requests for representation of any party must be approved by the Commission. Factors to be considered in approving fees are contained in Section 408.221(c) 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 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, the record concerning attorney fees is sketchy at best, nonexistent at worse. We believe that the better practice for an attorney who has any doubt that his or her attorney fees may be reduced is to make a record at the hearing concerning attorney 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.

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 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).

What precludes us from reversing and rendering, applying the same approach to the present case as in Appeal No. 93646, *supra*, is our concern over the action taken or the attorney fee hourly rate. In her appeal attorney attaches copies of TWCC-152's where she has been approved for the hourly rate of \$150 in past cases. Of course the first question is whether we should consider these attachments to her request for review at all. We have generally said that the Appeals Panel will not consider new evidence on appeal, but is limited to the record developed in the case below. Section 410.203(a) (1989 Act); Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992. However, we have also held that we will under certain circumstances consider an attachment to a request for review. See Texas Workers' Compensation Appeal No. 93463, decided July 19, 1993. In fact, we have considered additional information in attorney fee cases found in the request for review because the procedure under Rule 152.3(g) precludes consideration of this information by the hearing officer after a determination is made on an attorney's application for attorney fees. See Texas Workers' Compensation Commission Appeal No. 93469, decided July 23, 1993.

Considering that the attorney in the present case has been awarded a higher fee in the past, we are concerned about the rationale of the hearing officer in reducing her attorney fee rate in the present case. This is not to say that the hearing officer cannot do so; he certainly may. Our concern is how we can review his decision to do so without any record as to the rationale for doing so. We remand to allow the development of the record as to that rationale as well as to why some of the claimed fees have been reduced below the guidelines.

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.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Susan M. Kelley  
Appeals Judge