

APPEAL NO. 93790

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq.*). Appellant, attorneys for the carrier, filed a fee application with the Texas Workers' Compensation Commission (Commission) pursuant to Section 408.222 for professional fee for representing the carrier in a claim under the 1989 Act. The contested case hearing on the claim was held on December 29, 1992, a request for attorney's fees was filed with the hearing officer by the appellant on May 12, 1993, a decision on attorney's fees was issued by the hearing officer on May 18, 1993, and the decision was sent out by the Commission with a cover letter dated August 18, 1993. The hearing officer determined that only \$1,216.00 of the \$3,954.36 claimed be allowed. A timely appeal of the decision was filed by the appellant and no response has been received from either the claimant or the carrier.

DECISION

Unable to determine if there is any abuse of discretion in the hearing officer's decision and being unable to determine, because of the lack of any evidentiary hearing or other evidence on the matter, that pertinent and appropriate matters have been given due consideration, we reverse and remand for reconsideration following an evidentiary hearing as deemed necessary and appropriate by the hearing officer.

Section 408.222 requires the Commission to approve the amount of attorney's fees for defending an insurance carrier and sets forth matters that should be considered and submitted in writing by the defense counsel. Commission rules implement these provisions. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 152.1 *et seq.* There was no hearing on attorney's fees following the contested case hearing, which is certainly the better time for an attorney to present any matters out of the ordinary, which required a greater amount of the attorney's time or greater expense, and to ensure that all other appropriate matters are brought to the attention of the hearing officer. We do not find any attachments or other written data with the written application for attorney's fees. There is a cover letter from the appellant at the time it submitted its written request which states that "[s]hould you require any further information, please do not hesitate to contact me." Of course, establishing the basis for the particular fee or expense item is a matter for that attorney to provide and it is not incumbent upon the hearing officer to seek further justification or to otherwise perfect the application. Nonetheless, it appears from the appeal filed with us that pertinent information was not brought forward or considered, very possibly because of confusion over the requirements and procedures which may or may not have altered the award. While we do not hold that this is justification on its own to disturb a discretionary action of the hearing officer, we are concerned that the considerable and pertinent information set forth in the appeal was not available to or considered by the hearing officer and potentially resulted in an unfair adjudication of attorney's fees. Without any testimony or other evidence that was presented to and considered by the fact finder, we have little upon which to base an informed decision. And, our concern is somewhat enhanced by the fact that less than one third of the requested fee was approved with little apparent rationale. In this regard, the appellant in its appeal sets forth matters concerning more demanding

requirements for preparation, interviews, consultations and reports for the carrier they represented in this case, and that more than one attorney was involved in a case it contends presented novel and difficult questions. It also argues that its request for approval of expenses was improperly denied. On the other hand, it appears that the hearing officer may have inappropriately authorized some fees for judicial appeal matters. We find this case to bear some similarity to a previous decision remanding a case on attorney's fees. See Texas Workers' Compensation Commission Appeal No. 93469, decided July 23, 1993. However, we must caution that it is incumbent upon and the burden of the attorney requesting fees to follow the requirements of the statute and rules and to provide, *sua sponte* and at the appropriate time, the information and evidence necessary for the adjudication of his request. The most efficient and appropriate time is at the end of the hearing. Failure to provide the information required and to comply fully with the statute and rules is done so at the proponent's peril. This case, as indicated above, represents an unusual exception under the particular circumstances.

For the reasons set forth, the decision is reversed and the case remanded for an appropriate evidentiary hearing on the matter of attorney's fees. 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.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result of the majority's opinion, under the particular facts of this case. I wish to stress, however, that following receipt of all appropriate evidence, the hearing officer may appropriately consider the fees as submitted and determine whether such fees were justified under the statutory and regulatory standards. As we stated in Appeal No. 93469, *supra*, we do not mean by this decision to imply that all matters set forth in the appellant's brief are necessarily meritorious; indeed, we are remanding to allow the hearing officer to make this determination, based on a fuller record.

Lynda H. Nesenholtz
Appeals Judge