

## APPEAL NO. 93800

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE § 401.001 *et seq.* (1989 Act) (formerly, TEX. REV. CIV. STAT. ANN. Article 8308-1.01 *et seq.*). (attorney) filed a fee application with the Texas Workers' Compensation Commission to get approval of the amount of fees he requested be awarded to him for representing Amerisure Insurance Company (carrier). On August 19, 1993, (hearing officer) issued a decision on the fees requested by the attorney. The hearing officer denied the full attorney's fees of \$2,084 requested by the attorney, and the hearing officer ordered that the carrier pay its attorney only \$1,484 in fees. The hearing officer did approve the full \$409 requested by the attorney for travel expenses. The attorney appeals the hearing officer's decision of August 19, 1993, regarding attorney's fees. The carrier did not file a response to the attorney's appeal.

### DECISION

Finding an abuse of discretion by the hearing officer in his decision of August 19, 1993, we reverse the decision of the hearing officer in part and render a new decision which allows fees in addition to those approved by the hearing officer.

The amount of the attorney's fees for defending the insurance carrier in a workers' compensation claim must be approved by the Commission. Section 408.222 (a). The attorney filed an Application and Order for Attorney's Fees (TWCC-152) on July 16, 1993. This fee application stated that "IF THE TIME REQUESTED EXCEEDS THE GUIDELINES IN RULE 152.4 BELOW, ATTACH WRITTEN JUSTIFICATION." The attorney noted on the fee application written justification for some of the hours he worked in excess of the guidelines. The attorney wrote on his fee application that his total fee request included two hearings, one on June 7 and one on July 8, 1993, the first of which the attorney was not informed of the continuance until he arrived in (city) from (city). The hearing officer approved the attorney's requested hourly rate of \$100 per hour. The hearing officer approved only 10.75 hours of the requested 16.75 hours. The hearing officer approved all of the \$409 requested in expenses for airfare and a rental car on the attorney's travel from (city) to (city) and back on both June 7th and on July 8th.

This order on the attorney's fee was sent to the attorney with the cover letter which specifically explained the applicable procedure to the attorney: "Should you wish to contest the fee ordered, you must request review by the Appeals Panel in compliance with Rule 152.3(g)." The attorney challenged the award of the attorney's fees with a request for review by the Appeals Panel.

The amount of attorney's fees is not controlled by the contract between the attorney and the client, but must be determined by the trial judge in the exercise of his discretion because the fixing of such attorney's fees constitutes original rather than appellate jurisdiction. Brooks v. Texas Employers Insurance Association, 358 S.W.2d 412, 416 (Tex. Civ. App.--Houston 1962, writ ref'd n.r.e.). The hearing officer exercises his discretion to

award attorney's fees 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 attorney's fees. Royal Insurance Company of America v. Goad, 677 S.W.2d 795, 802 (Tex. Civ. App.--(city) 1984, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91010, decided September 4, 1991.

"The amount of an attorney's fee for defending an insurance carrier in a workers' compensation action brought under [the Act] must be approved by the commission or court and determined by the commission or court to be reasonable and necessary." Section 408.222(a). The judge (hearing officer) should decide the amount of attorney's fees without the aid of a jury, and the amount of the recoverable fee is within the judge's discretion. Texas Insurance Company Association v. Motley, 491 S.W.2d 395, 397 (Tex. 1973). An award should not be set aside merely because the appellate court would have allowed a different amount because "[t]he range of what is reasonable is wide." Espinoza v. Victoria Bank & Trust Co., 572 S.W.2d 816, 828 (Tex. Civ. App.--Corpus Christi 1978, writ ref'd n.r.e). The judgment of a trier of fact on an attorney's fees should not be reversed without a clear showing that the fact finder abused his discretion. *Id.* However, in reviewing the entire record, a reviewing court does have the authority to determine whether a particular award of fees is excessive by using its own knowledge as lawyers and judges, and by determining the issue while looking at the record, the testimony, and the amount. *Id.* In the present appeal on attorney's fees, we have no testimony on fees, no hearing on fees, and the only evidence as to attorney's fees are the application and time sheets provided by the Commission which the attorney filled out and the hearing officer examined and on which he made notations.

A defense attorney who is requesting fee approval should present written evidence not just of the time and expenses incurred, but also other written evidence considered necessary by the Commission in order to reach a decision on attorney's fees. Section 408.222(b)(1)-(2). The Commission rules suggest guidelines for maximum fees allowed for specific services performed by a carrier's attorney. Texas W. C. Comm'n, 28 TEX. ADMIN. CODE §§ Rule 152.3 and Rule 152.4 (Rules 152.3 and 152.4). Rule 152.4, which Rule 152.3(b) says to consider, requires an attorney to demonstrate to the Commission that fees in excess of the guidelines are justified. Rule 152.4(c). The Commission must determine whether a defense attorney's fee is "reasonable and necessary." Section 408.222(a); Rule 152.3(b). The hearing officer reduced the six hours requested by the attorney for travel time and approved zero hours for travel time. Apparently, the notes on the fee application concerning the approval or reduction of the fees and other related comments were those of the hearing officer. The hearing officer noted that the hourly rate for travel time claimed by the attorney was "[paid as] travel expense" in his decision on attorney's fees.

The Act contains some of the factors to be considered in determining what is a reasonable and necessary carrier's attorney's fee: "(1) time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal

services properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved in controversy; . . . and (7) the experience and ability of the attorney performing the services." Section 408.221(c) and 408.222(b).

The burden is on the attorney to present evidence to the hearing officer of the overall attorney/client relationship as well as any other factors to justify a need for more hours than the maximum allowed under the guidelines. Texas Workers' Compensation Commission Appeal No. 91014A, decided September 20, 1991. Here, the attorney argues on appeal that he was required to travel to (city) from (city) twice, and the first occasion was justified because of a lack of notice to the attorney of another continuance because of the claimant's incarceration. Noting an exception to the guidelines, the hearing officer did approve hours in excess of the maximum for client conferences and hearings due to a "special circumstance (official notice)." The special circumstance apparently was the claimant's incarceration which was not communicated to the attorney for the carrier until his arrival at the June 7th setting for the contested case hearing. The attorney need not present any justification for excess hours spent at a hearing because the hearing officer who presided would obviously know of those proceedings. Texas Workers' Compensation Commission Appeal No. 92381, decided September 14, 1992. In the present matter, the hearing officer had actual knowledge of the attorney's travel and of the continuance granted. The hearing officer approved the travel expenses, but did not approve the travel time. We do not believe this is either a consistent or a reconcilable approach by the hearing officer. Under the specific facts argued in the appeal of this matter, the approval of expenses as to travel time warrants the concurrent approval of the hourly rate for travel time as long as the attorney's time was dedicated to the client.

The attorney argues on appeal that the hearing officer abused his discretion in reducing the amount of fees requested for the travel time spent in defense of the carrier, and we agree. The attorney requested three hours for work on June 7, 1993, and three hours for work on July 8, 1993, to travel to and from the hearing location. Travel time is allowed to be recovered as part of an attorney's fees and can be compensated at the attorney's hourly rate. Texas Workers' Compensation Commission Appeal No. 93162, decided April 19, 1993. We reverse the hearing officer's decision and approve six hours for travel time because we determine the attorney did provide written justification that the travel time was doubled because the first hearing was continued and no notice was given to the attorney until arrival. We cannot reconcile a holding which does not allow travel time but does allow travel expenses as reasonable and necessary expenses as required by the Act. See Section 408.222(a). The Act allows for approval of both the time spent and the expenses incurred in defending a case. Section 408.222(b).

We find that the hearing officer abused his discretion, under the present circumstances, and reverse the hearing officer's reduction of six hours from the attorney's travel time and his denial of the \$600 claimed for this item. We render a decision that the

attorney's travel time is recoverable and we approve an additional \$600 in attorney's fees in accordance with our decision. The remainder of the hearing officer's decision is affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Susan M. Kelley  
Appeals Judge