APPEAL NO. 94141

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The sole issue in this appeal is whether the hearing officer erred in denying a portion of the attorney's fees claimed by the appellant (attorney), the attorney for the claimant, in an application for attorney fees (TWCC-152) concerning preparation for and attendance at two contested case hearings (CCH) - one which took place on October 14, 1993, and the other on January 10, 1994. The hearing officer, (hearing officer), denied 4.45 hours of the 6.60 hours claimed by the attorney for the first CCH and all of the 4.15 hours claimed for the second CCH. In regard to the hours claimed for the first CCH, the hearing officer noted on the TWCC-152 that the hours claimed by the attorney were "over the guidelines" with no justification required by Tex. W. C. Comm'n 28, TEX. ADMIN. CODE § 152.4 (Rule 152.4). In regard to the hours claimed for the second CCH, the hearing officer wrote on the application: "2nd session necessitated solely because of [attorney's] conduct; therefore, no fees for preparing for this 2nd session allowed."

The attorney appeals contending that with regard to the first CCH, the attorney provided computer-generated time slips justifying the time expended. The attorney also argues that in the past this same hearing officer has accepted this type of documentation in approving fees over the guidelines and attaches to his request for review an example. In regard to the second CCH, the attorney contends that the hearing officer made multiple unjustified, disparaging remarks regarding the handling of the claim and preparation for the hearing by the attorney at the first CCH, leading the attorney to object and assert that further such remarks were unacceptable. The attorney asserts that this confrontation led to the case being set for a second CCH. The attorney also asserts that the issues in this case were not routine and required additional preparation. The attorney's request for review indicates it was sent to the attorney for carrier, but does not indicate whether it was sent to claimant.

DECISION

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

Our review of the record fails to disclose whether or not the claimant was ever sent a copy of the attorney's request for review. Rule 152.3(a) requires that "an attorney representing any party shall submit written evidence of the attorney's time and expenses on Form TWCC-152, Application and Order for Attorney's Fees. A copy of the form shall be sent simultaneously to the attorney's client." Rule 143.3(a)(4) provides that a request for review shall "be served on the other party on the same day filed with the commission." Rule 143.1 defines "[s]erved on [a party]" as follows: "Presented to a party in person or mailed by certified mail, return receipt requested." Rule 140.1 defines "party" as follows: "[p]arty to a proceeding--A person entitled to take part in a proceeding because of a direct legal interest in the outcome." These rules clearly contemplate that claimant be informed of an appeal of an application for attorney fees. The Texas Workers' Compensation Commission

(Commission) sends the claimant a copy of the hearing officer's ruling regarding attorney fees and has done so in the present case. Rule 143.3(4) requires another party be notified of an appeal and the claimant is obviously a party pursuant to Rule 140.1 having a direct legal interest in the outcome. To interpret the foregoing rules otherwise would simply lead to a situation where a claimant thinks a hearing officer has made a ruling regarding fees with which the claimant is satisfied but has not had an opportunity to respond to an appeal of such ruling because he is unaware of an appeal. Such a nonsensical result was not intended.

At this point, we believe that our only options are to reverse and remand the case to ascertain whether the claimant has been served with a copy of the request for review or to notify the claimant of the attorney's request for review and give him 15 days to file a response if he desires to do so. We choose to follow the former course in the interest of judicial efficiency since due to deficiencies in the record, which will be discussed *infra*, an intelligent review of the merits of this case is not possible without remand.

The Act requires that all attorney fee requests for representation of any party be approved by the Commission. Factors to be considered in approving fees are contained in Section 408.221(c) and 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's 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's 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. *See* Texas Workers' Compensation Appeal No. 93790, decided October 19, 1993; Texas Workers' Compensation Commission Appeal No. 931077, decided January 7, 1994.

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 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* Appeal No. 931077, *supra*.

The problem in the present case is that we simply lack sufficient information to meaningfully review the decision of the hearing officer. Nor can we sufficiently fault the

attorney for failure to make a record and simply find that the hearing officer did not abuse her discretion. *See* Appeal No. 931077, *supra*. In the present case the hearing officer gave reasons for denying the attorney's fees above the guidelines. In regard to the first CCH, her reason was that the attorney refused to provide justification as required by Rule 152.4. The attorney contends that he did provide a justification in that he provided a computer generated list of actions he took. While this list provides more detailed descriptions of his work on the case than is found in the application itself, whether the information therein justifies the fee or not would be a question that we might leave to the sound discretion of the hearing officer. *See* Appeal No. 931077, *supra*. However, the attorney attaches documentary evidence to his request for review which indicates that the hearing officer has in a previous case accepted similar information as justification for approving a fee above the guidelines. This raises additional questions which we must address.

The first question is whether we should consider these attachments to the attorney's 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); 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 Commission Appeal No. 93463, decided July 19, 1993. In fact, in attorney's fees cases we have considered additional information 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's fees. *See* Texas Workers' Compensation Commission Appeal No. 93469, decided July 23, 1993. Thus we will consider the attachment in the present case.

This leaves us with similar concerns to those we had in Texas Workers' Compensation Commission Appeal No. 93645, decided September 14, 1993. In that case the hearing officer had reduced the attorney's hourly rate from an hourly rate that he had awarded in the past without explanation. We remanded in that case to obtain that rationale so that we could review it. By the same logic we must remand in this case to obtain the hearing officer's rationale for rejecting the same type of justification for fees above guidelines she had accepted in the past. This is not to say that she cannot reject this justification, but merely that we cannot determine whether or not her reason for doing so constitutes an abuse for discretion without knowing the reason.

The denial of all attorney's fees in the second CCH is even more difficult to review given the current state of the record. We have absolutely no record of what transpired at the first CCH. We do have a notation from the hearing officer stating the attorney's behavior at the first CCH necessitated the second CCH. We also have the assertions in attorney's request for review that the hearing officer made unjustified attacks upon him leading him to object strenuously. Without a record of the first CCH we cannot review the circumstances.

We reverse the decision of the hearing officer and remand this case. While we hope

that this matter may be resolved below upon remand, we wish to make clear that if this case comes back up we need the record of the proceedings (tapes or transcript) of both the hearings. If the hearing officer chooses to hear additional evidence, we also will need this. We need a clear indication that the claimant has been served with any request for review. 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.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge