

APPEAL NO. 94342

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Appellant, the attorney for the carrier, filed an application for his attorney's fees with the Texas Workers' Compensation Commission (Commission) pursuant to Section 408.222 for representing the carrier in a claim under the 1989 Act. The attorney argues that he originally sent the application for attorney's fees to the Commission on November 9, 1993. After not hearing from the Commission, the attorney sent a copy of the November 9, 1993, letter and application with a cover letter dated January 3, 1994, and Commission records indicate that the application was filed with the Commission's (city) field office on January 4, 1994. The application for fees was for work done through three different dates of a benefit review conference, and the attorney submitted the application for fees to the benefit review officer (BRO), DV, of the (city) field office for work done through the benefit review conference (BRC) at the (city) field office. In a letter to the BRO dated February 15, 1994, the attorney again requested the BRO contact the attorney regarding the application. In yet another letter to the BRO dated March 7, 1994, the attorney sent another copy of the application to the BRO. All of these requests for approval of the fees of carrier's attorney were properly sent to the (city) field office BRO who presided over the matters in the request. Meanwhile on March 3, 1994, a decision was made by CD, a (city) field office hearing officer, who had presided over the contested case hearing (CCH) for the claimant's action, and the decision on the fees was sent out by the Commission on March 9, 1994, with a cover letter dated March 9, 1994. The hearing officer approved only six hours totalling \$690.00 of time for the attorney's fees out of the requested 53.2 hours totalling \$6,118.00 requested, and the hearing officer approved only \$205.61 of expenses out of \$253.61 requested. An appeal of the decision was filed by the appellant, the carrier's attorney, and no response has been received from

either the claimant or the carrier. We would note that it took the Commission approximately four months after the attorney's first request to finally make an initial decision.

DECISION

Finding an abuse of discretion, we reverse the decision and order of the hearing officer and render a decision in favor of the carrier's attorney.

Section 408.222 provides that the Commission must approve the amount of attorney's fees for defending an insurance carrier in a workers' compensation action and identifies factors that must be considered and written evidence thereof must be submitted by the defense counsel. Commission rules implement these provisions. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 152.1 (Rule 152.1) *et seq.* There was no hearing on attorney's fees following the benefit review conferences, after which is certainly the preferred time for an attorney to present any matters out of the ordinary and to insure that appropriate matters are brought to the attention of the Commission in a timely manner. The attorney for the carrier did file with the Commission a sworn affidavit attached to the written application for attorney fees to provide justification for the hours spent in excess of the guidelines.

The amount of the attorney's fees for defending the insurance carrier from a workers' compensation claim must be approved by the Commission. Section 408.222 (a). The carrier's attorney filed a "TWCC-152" Form, "APPLICATION AND ORDER FOR ATTORNEY'S FEES," on November 9, 1993. The fees application stated that "IF THE TIME REQUESTED EXCEEDS THE GUIDELINES IN RULE 152.4 BELOW, ATTACH

WRITTEN JUSTIFICATION." The attorney noted in a sworn affidavit attached to the fees application written justification for the hours he worked in excess of the guidelines. The attorney wrote in his fees affidavit that his total fees request exceeded the guidelines because:

A great deal of activity occurred in this case beyond that contemplated by Rule 152.4.

There were substantial documents, including medical records and employment documents, that had to be reviewed in order to present arguments requested by the carrier. There were also a number of complicated legal issues that required particular attention on my part. In addition, three separate benefit review conferences were held regarding this claim, making it necessary for the carrier to continue developing information and evidence supporting its position. Therefore, I would request that the fee greater than that permitted by the guidelines be approved.

This decision and order on the attorney's fees contained the following hand-written notes by the hearing officer in the section titled "COMMISSION ORDER FOR ATTORNEY'S FEES" under the part printed "(4) DENIED because ____" that stated:

partial denial attorney hours excessive when compared w/ guidelines & the fact clmt did not appear at CCH plus these are out of line for BRC's.

We would note that an attorney's hours are not "excessive" by the mere fact that the hours requested are more than the guidelines. Furthermore, an attorney's hours are not

automatically "out of line" for a BRC especially where reasonably justified by an attorney. The hearing officer also apparently wrote on the first itemized page of the fees application:

BRC 3.00

BRC prep & research 3.00

6.00

see front: 6 Hrs total allowed

The cover letter sent to the carrier's attorney stated "Should you wish to contest the fee ordered, you must request review by the Appeals Panel in compliance with Rule 152.3(g)." Disturbing to the Appeals Panel is that the hearing officer did not even attempt to properly fill out the Commission application for fees because the line item spaces corresponding to the attorney's line item hours are all blank except on the expense portion. See Texas Workers' Compensation Commission Appeal No. 931191, decided February 1, 1994, (where the hearing officer apparently circled some of the entries made by the attorney). We have held attorneys, carriers, claimants, and doctors to the requirement to properly, or to at least make a good faith effort, fill out Commission forms, and Commission employees, and certainly hearing officers, should use their best efforts to fill out Commission forms. In the matter on appeal, the hearing officer has left us with only a scintilla of evidence, if any, to support her decision. The attorney challenged the hearing officer's decision and order on the attorney's fees with a timely request for review by the Appeals Panel.

A defense attorney who is requesting fees 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. Rule 152.3; Rule 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 fees are "reasonable and necessary." Section 408.222(a); Rule 152.3(b). The hearing officer clearly reduced the hours requested by the attorney for travel and long distance telephone time, and approved only 3 hours for "BRC" and 3 hours for "BRC prep & research." The hearing officer did not state that the attorney's request was not "reasonable and necessary." Apparently, the notes on the fees application concerning the approval or reduction of the fees and other related comments were those of the hearing officer. Rule 152.4(d) allows for two hours per month of client conferences (the attorney's request covers two months allowing four hours for conferences under the guidelines), allows for 2.5 hours for a BRC on the issue of compensability (three different dates of the BRC were involved here), and allows for one hour of basic research (complicated issues of jurisdiction and borrowed servant were involved). The hearing officer obviously did not even allow four hours for client conferences in the two months at issue, and the hearing officer did not provide any justification as required for her action of reducing the attorney's time requested below the guidelines. Texas Workers' Compensation Commission Appeal No. 94141, decided March 21, 1994, and Texas Workers' Compensation Commission Appeal No. 93646, decided September 13, 1993.

The Act contains some of the factors to be considered in determining what are reasonable and necessary carrier's attorney's fees: "(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; (6) the benefits to the [carrier] that the attorney is responsible for securing; and (7) the experience and ability of the attorney performing the services." Section 408.221 (c) and 408.222(b). The Act puts the burden on the defense attorney to present written evidence of time, expenses, and any other evidence considered necessary by the Commission or a court in order to make a determination on attorney's fees. Section 408.222(b). The fees application had instructions to provide written justification when the request exceeds the guidelines. The carrier's attorney won on all issues at the CCH regarding the claimant's alleged injury and entitlement to compensation, and the hearing officer ordered the claimant take nothing.

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 noted in the itemization of expenses that he was required to travel to (city) from Houston and back, and the hearing officer approved the requested \$66.83 for 243 miles of travel. The hearing officer approved the travel expenses but did not approve the travel time to the BRC in (city) but not all of the six hours the attorney requested to attend the BRC in (city). A BRC on the claim was originally held on September 15, 1993, in (city), Texas. A second BRC

reconvened by telephone on October 7, 1993. The carrier's attorney attended a third BRC by telephone on October 18, 1993. The attorney requested \$83.10 for telephone conferences at the BRC and \$15.30 for telephone conferences with the (the employer) personnel, claimant's attorney, and the Commission between September 15, 1993, and October 27, 1993. The hearing officer approved all of the expenses of the long distance telephone conferences. However, the hearing officer apparently approved only a portion, if any, of the time which corresponded to the telephone conferences. The approval of expenses, which necessarily correspond to time involved, cannot be reconciled with the disallowance of the corresponding time.

The matter of establishing the justification for the particular fee or expense item is for the attorney to provide and it is not incumbent upon the hearing officer to seek further justification or to otherwise perfect the application. Nevertheless, the hearing officer should then provide reasoned justification to deny any excessive hours for which an attorney, unopposed by any party, has submitted written justification. Apparently, pertinent information was not considered by the hearing officer, very possibly because of misunderstanding and a lack of personal knowledge of the attorney's efforts for the carrier. The BRO, to whom the attorney, we believe, rightfully submitted the application, would have been in the best position to determine the amount of time spent and the complexity of the law and the facts up through the end of the benefit review conference. Without any testimony or other evidence, except the evidence in the sworn affidavit of the attorney, that was presented to and considered by the fact finder, we have little upon which to base an informed decision. Increasing our concern on review is the fact the hearing officer approved less than one seventh of the requested fees with scant reasoning partially based on the inappropriate irrelevant factor of the claimant not having been at the CCH, which time

for the CCH is not even contained in the application for fees at issue. See Texas Workers' Compensation Commission Appeal No. 93790, decided October 19, 1993, and Texas Workers' Compensation Commission Appeal No. 93469, decided July 23, 1993. In his affidavit, the attorney argues that this case demanded extra time for preparation, research, review, and the three dates of the benefit review conference. The responsibility is on the attorney requesting fees to follow the requirements of the statute and rule and to provide the information and evidence necessary for the proper adjudication of his request. The most efficient and appropriate time is at the end of the various stages in the dispute resolution process. The attorney would be faulted for failing to submit required information and failing to follow the statute and rules. In this case, unlike Appeal No. 93790, the attorney did provide written and sworn justification for the hours billed in excess of the guidelines as well as notations in his application for fees as to the different types of research he engaged. The hearing officer had no evidence to the contrary of the attorney's application for fees and accompanying sworn affidavit. If a reduction in fees is warranted in the private attorney-client relationship with the attorney and the carrier, we are certain, after the attorney makes full disclosure of all this information to his client, the carrier, that the carrier will be in the best position to reject or approve payment of all or part of the fees.

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. 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 fees 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. (city) 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 her 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 along with his accompanying sworn affidavit as to his excess fees.

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, and the same would apply to a BRC and a BRO. See Texas Workers' Compensation Commission Appeal No. 92381, decided September 14, 1992. The hearing officer appears to have taken into account the fact that "clmt did not appear at CCH" as a factor in ruling on the attorney's fees of the carrier's attorney. This is clearly irrelevant to a decision on a fees application for work done prior to and not including time spent or worked for the CCH. The hearing officer would have no knowledge of the amount of time spent at the three dates of

the BRC, and we do not know how the hearing officer could reasonably justify reducing this time without having any evidence entered by any party or taking official notice of time actually spent.

The attorney argues on appeal that the hearing officer should be reversed, and we agree. A hearing officer does have the authority to issue decisions on attorney's fees requested for work already completed. See Texas Workers' Compensation Commission Appeal No. 91014A, decided September 20, 1991. When looking at the record as a whole, we will find error when an erroneous decision results in the denial of a party's rights and causes injury to the complaining party. See Texas Power & Light Co. v. Hering, 224 S.W.2d 191, 192-193 (Tex. 1949). In the present matter, the hearing officer had no actual knowledge of the attorney's travel and of the telephone conferences. The hearing officer approved the travel and long distance telephone expenses, but did not approve the travel and the long distance telephone time. This is neither a consistent nor a reconcilable decision by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93800, decided October 22, 1993. We find a situation difficult to imagine when the hearing officer approves expenses for attorney travel and long distance telephone use, but then the hourly rate for such time spent traveling and on the telephone is not approved. Under the specific facts argued in the appeal of this matter, the approval of expenses as to travel and telephone time demands the concurrent approval of the hourly rate for travel and telephone time as long as the attorney did not bill another client for any work done in that time period.

In this matter, the attorney did provide reasonable written justification for the time requested in excess of the guidelines. Further, we cannot reconcile a hearing officer's

decision which does not allow travel and long distance telephone time but does allow travel and long distance telephone expenses as reasonable and necessary expenses as required by the Act. See Section 408.222. The Act allows for approval of both the time spent and the expenses incurred in defending a case. Section 408.222(b).

Therefore, we determine that the hearing officer abused her discretion because the attorney did provide reasonable written justification for the time in excess of the guidelines, including time for travel and long distance telephone time, as required by the Act and the Rules. See Texas Workers' Compensation Commission Appeal No. 93800, decided October 22, 1993, and Texas Workers' Compensation Commission Appeal No. 93646, decided September 13, 1993. Furthermore, the hearing officer did not provide any reasoned justification or have any evidence or knowledge for reducing the fees for the attorney's time for any of the amounts the attorney requested in excess of the guidelines including, but not limited to, the attorney traveling to and telephonically talking at the benefit review conferences and in other long distance calls (but inconsistently the hearing officer approved expenses for this time), and in doing so the hearing officer abused her discretion. See Appeal Nos. 94141 & 93800.

As stated, the record does not contain sufficient evidence to support the hearing officer's decision on the attorney's fees. To support a reduction in the attorney's fees below the time requested when the attorney has provided reasonable written justification, the hearing officer must develop sufficient evidence and must make necessary findings and conclusions to justify the reduction of attorney's fees. Appeal No. 94141, *supra*. The attorney, having presented reasonable justification in writing for his fees in excess of the

guidelines, should receive his entire time since no evidence was before the hearing officer to the contrary. A remand is not needed in this case, where we can determine reasonable and necessary fees from our knowledge as lawyers and judges.

Finding the hearing officer abused her discretion, as stated above, as to the challenged decision on attorney's fees, we reverse the hearing officer's decision and order on the approval of the attorney's time. Under the specific circumstances of this case on attorney's fees, we render judgment that the attorney's time spent in excess of the guidelines is recoverable and we approve the entire \$6118.00 in time for fees in accordance with our decision. The rest of the hearing officer's decision allowing only \$205.61 of \$253.61 requested for expenses was not appealed, and we affirm the hearing officer's decision and order on expenses.

CONCUR:
