

APPEAL NO. 94729

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE § 401.001 *et seq.* (1989 Act). Mr. S (attorney) filed a fee application with the Texas Workers' Compensation Commission for approval of fees he requested for representing (Carrier). On May 23, 1994, hearing officer issued a decision on the fees requested. The hearing officer approved the full attorney's time and rate of seven hours at \$95 per hour for a total of \$665, but reduced the expenses from \$183 requested and approved only \$111.44. The attorney (appellant) appeals the hearing officer's decision and order on attorney's fees only over the issue of his expenses. No response to the attorney's appeal has been filed.

DECISION

Finding that the hearing officer abused his discretion, we reverse the decision and order of the hearing officer concerning expenses. We render a new decision which allows all the expenses requested.

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 attorney filed a "TWCC-152" Form, "APPLICATION AND ORDER FOR ATTORNEY'S FEES," on May 19, 1994. The hearing officer approved all of the \$665 requested in time. The attorney requested \$131 for airfare from "(City 1)/(City 2) on [sic clearly meant (City 3) where hearing was held]" and \$45 for car rental and \$7 for parking. The hearing officer apparently decided the attorney should be paid on a mileage basis and made the following notations:

186.5
186.5
373.0 X 28@ = 104.44

Furthermore, the hearing officer apparently noted that car rental was "INCLUDED" in the mileage allowance and disallowed all the rental expense. The hearing officer approved the \$7 car parking expense.

The abuse of discretion standard for review applies to a decision by a hearing officer to award attorney's fees. 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). 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 is the application and time sheets provided by the Commission which the attorney filled out and the hearing officer examined and then made notations.

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; (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).

Apparently, the hearing officer relied on Rule 152.5(b)(1) which allows an attorney to recover travel expenses, if the attorney is required to attend a hearing more than 25 miles from the attorney's office. Rule 152.5(b)(1) allows for travel expenses "at the rate set for state employees by the legislature in the General Appropriations Act." We have examined the travel provisions of the General Appropriations Act Sections 12 through 18, and find nothing prohibiting travel by commercial aircraft; rather, the Appropriations Act seems to encourage air travel, and the state will reimburse such travel if it is cheaper overall for air fare and other expenses to travel to a destination a day or more earlier. Here, there is no evidence contrary to show the overall fees and expenses of the attorney would have been cheaper with different transportation.

A mileage based rate would be appropriate where a car was driven. If an expense is not reasonable and necessary, such as a first class airline ticket versus coach, then a hearing officer could reduce the expense to a reasonable amount. But here, as the attorney points out in his appeal, it is clear that the attorney saved the carrier drive time expenses which from (City 1) to (City 3) and back would be at least seven hours. At \$95 an hour this would have cost the carrier \$665 on top of the hearing time. We agree any method of travel used which cuts overall costs below the mileage rate and driving travel time is "reasonable."

Further, we cannot reconcile a holding which does not allow travel expense complimentary to travel time saved by the mode of transportation. The Act allows for approval of both the time spent and the expenses incurred in defending a case. Section 408.222(b).

The hearing officer approved the travel time by plane (obviously shorter than drive time), but did not approve reasonable air travel expenses. In Texas Workers' Compensation Commission Appeal No. 93800, decided October 22, 1993, the hearing officer approved travel expenses but disallowed travel time, and we reversed and rendered

allowing the travel expenses. Further, 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. The carrier's attorney clearly saved the carrier in overall costs. 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). We reverse the hearing officer's decision and approve all the expenses for air travel and the car rental along with all the other amounts already approved.

Under the circumstances of this case, we render judgment that the attorney's air travel and car rental expenses are recoverable and we approve all of the attorney's expenses. The rest of the hearing officer's decision and order is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge