

APPEAL NO. 950074
FILED FEBRUARY 24, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 22, 1994. The appellant, attorney for the claimant, sought approval of fees in the amount of \$587.50 for legal services rendered in the representation of the claimant at a hearing convened pursuant to the Texas Administrative Procedure and Texas Register Act (APTRA hearing), TEX. REV. CIV. STAT. ANN. art. 6252-13a (now Administrative Procedure Act (APA), TEX. GOV'T CODE ANN. § 2001.001 to 2001.092.) Attorney's fees and expenses in the amount of \$996.25 requested for representing the claimant through a benefit review conference (BRC) had previously been approved in full by a benefit review officer. The hearing officer determined that he had no jurisdiction to approve attorney's fees for representing a claimant in an APTRA proceeding and, for this reason, did not approve the requested fees. The attorney appeals this decision arguing that the APTRA hearing and the BRC were "so inexorably intertwined that proper representation of Claimant could not occur without representation at both proceedings." He also contended that disallowance of attorney's fees in this case is manifestly unjust and would have the effect of violating the equal protection guarantee of the Texas Constitution, (TEX. CONST. art I, § 3). There is no evidence that the attorney served a copy of his appeal on the claimant in accordance with Section 410.202(a). In view of our disposition of this case on jurisdictional grounds, we decline to hold this appeal in abeyance until service is accomplished. Claimant was present at the CCH and expressed no opposition to attorney's request for fees.

DECISION

Finding no statutory or regulatory authority to approve attorney's fees for services in connection with an APTRA hearing, we reform and affirm the decision and order of the hearing officer.

Section 408.221 deals with attorney fees for claimant's counsel. Despite the somewhat broad language in subsection (a) that attorney's fees "for representing a claimant before the commission . . . must be approved by the commission . . .," (emphasis added) we observe that this section is part of Subchapter 408 which deals with benefits. Benefits are defined in Section 401.011(5) as "a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury." Fees for claimant's attorneys can only be paid from, and cannot generally exceed 25% of the claimant's recovery. Subsections (b) and (h). Payments of attorney's fees are to be by "separate draft" which clearly presumes that the payment will come from the carrier responsible for the income benefits awarded the claimant. Subsection (g). Benefits are adjudicated under Chapter 410 to which APTRA generally does not apply. See Section 410.003.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1 *et seq.* (Rule 152.1 *et seq.*) provide further guidance on attorney's fees specifically limiting fees to a percentage of benefits awarded and defining how the claimant's award is computed for purposes of applying the percentage. The Guidelines for the maximum hours for legal services contained in Rule 152.4 address only the dispute resolution process and make no mention of APTRA hearings.

From this review of both the statutory and regulatory provisions on the award of fees to a claimant's attorney, we conclude that benefit review officers, hearing officers and the Appeals Panel have approval authority only in those cases where income benefits are awarded under the dispute resolution process. This excludes the authority either to approve or disapprove attorney's fees earned in connection with APTRA hearings.

In reaching this conclusion, we believe it important to point out that we are not holding that attorney's fees for APTRA hearings either do or do not require approval. The first sentence of the DECISION & ORDER reads: "The additional attorney's fees requested by [appellant], attorney for Claimant is not approved." Because this may be construed to constitute an affirmative disapproval of attorney's fees, we reform the decision and order to delete this sentence. *Compare* Texas Workers' Compensation Commission Appeal No. 92659, decided January 20, 1993, a case involving a request for approval of attorney's fees in connection with a guardianship proceeding. There Judge Kelley wrote:

To the extent that an attorney renders legal services that collaterally relate to the injury, such as guardianship provisions or pursuit of non-workers' compensation benefits, we have no jurisdiction to approve such fees.

In that case, an alternative forum for the approval of attorney's fees existed, a situation not now present in this case. That case, nonetheless, points out the limited authority of decision makers in the benefits dispute resolution process to address attorney's fees.

The decision and order of the hearing officer in this case is affirmed as reformed.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge