

APPEAL NO. 990143

This appeal arises 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 October 23, 1998. The issues at the CCH were whether the claimed injury arose out of the act of a third person, which was not directed at the claimant as an employee, or was the result of horseplay; whether the claimant has sustained disability; and whether the employer (self-insured or carrier) has extended a bona fide offer of employment to the claimant. The claimant, who was a health care provider, was assaulted by the grandson of a patient. The self-insured presented allegations that the grandson and the claimant were having an affair, which the claimant denied. The hearing officer determined that the claimant did not sustain a compensable injury on \_\_\_\_\_; the claimant has sustained no disability; and the self-insured extended a temporary bona fide offer of employment to the claimant, which offer was effective from January 20 through February 27, 1998.

On January 13, 1999, the hearing officer issued a Commission Order for Attorney's Fees (Order), covering services for the period from October 2 through October 28, 1998, approving 15.00 hours out of 20.50 requested, for an approved fee, including expenses, of \$2,170.40 out of \$3,239.93 requested. All of the hours disapproved were disapproved for the reason "Ex Guideline/Unreasonable." The expense item for travel expense for the CCH was approved for \$50.40 out of \$54.88 requested, with the remaining \$4.48 disapproved for the reason "Exceeded Guidelines." All of the other expense items were disapproved for the reason "Service Provided Unclear." The appellant (attorney) appealed, filing an "ADDITIONAL JUSTIFICATION TEXT, OR IN THE ALTERNATIVE, CARRIER'S APPLICATION FOR APPEALS PANEL REVIEW." The attorney contends that the Texas Workers' Compensation Commission (Commission) abused its authority by reducing his fees without explanation when he had filed an original justification text and asks that the Appeals Panel approve the 5.5 hours of attorney's time which was originally denied. The file contains no response from the carrier or the claimant.

DECISION

Finding no abuse of discretion by the hearing officer, we affirm.

We review attorney's fees cases under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 951196, decided August 28, 1995. The Attorney Fee Processing System (AFPS) shows the following justification text submitted by the attorney:

AT THE REQUEST OF THE CARRIER THE UNDERSIGNED PARTICIPATED AND AS[S]ISTED THE CARRIER IN INVESTIGATING THIS CLAIM AND RE[P]RESENTING THE CARRIER'S INTERESTS BEFORE THE [COMMISSION]. ALL THE HOURS REQUESTED WERE REASONABLE AND NECESSARY [I]N ASSISTING THE CARRIER TO INVESTIGATE AND DEFEND THIS CLAIM BEFORE THE [COMMISSION]

PLEASE NOTE; AS THERE WER[E] MANY COMPLEX ISSUES INVOLVED IN THIS CLAIM, ADDITIONAL TIME WAS NEEDED TO KEEP THE CARRIER INFORMED AS TO THE STATUS OF THIS CLAIM AND TO BE[S]T REPRESENT THE CARRIER'S INTERESTS. TO THE EXTENT THE ENCLOSED APPLICATION EXCEEDS THE MINIMUM GUIDELINES SUCH SERVICES AND RELATED EXPENSES WERE REQUESTED BY THE CARRIER AND SHOULD BE AWARDED.

The AFPS also shows the following log text entered by the hearing officer:

EXCEEDING GUIDELINES UNNECESSARY IN THIS CASE[.] EXPENSE ITEMS DENIED AS APPEARING TO VIOLATE RULE 152.5(C)(2) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.5(c)(2) (Rule 152.2(c)(2))].

The Appeals Panel has generally refused to consider evidence presented for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. In a like vein, we will not consider a supplemental justification text on appeal which was not submitted to the hearing officer before she issued the Order; evidence submitted for the first time on appeal is generally not considered absent some compelling circumstances. Texas Workers' Compensation Commission Appeal No. 94606, decided June 30, 1994. See also Texas Workers' Compensation Commission Appeal No. 971216, decided August 7, 1997 (Unpublished). The attorney cites Texas Workers' Compensation Commission Appeal No. 970756, decided June 5, 1997, and Texas Workers' Compensation Commission Appeal No. 970770, decided June 13, 1997, for the proposition that the Commission abuses its discretion by reducing attorney's fees when the attorney has submitted a justification text. We note that in Appeal No. 970756, *supra*, the hearing officer disapproved, *inter alia*, the item for the attorney in that case to attend the CCH and the Appeals Panel approved that time plus two hours in excess of the guidelines.

In Appeal No. 970770, *supra*, the hearing officer's log text, in discussing his disapproval of a certain time for research, commented that the date shown for the research was a Sunday and that it had taken the hearing officer less time to do the research that had been requested by the attorney. The Appeals Panel, in reversing, noted that the factors listed in Sections 408.221 and 408.222 to be considered by the Commission in approving a fee did not include the day of the week on which the attorney's labor was performed or the skill of the hearing officer. In the case at hand, we note that much of the justification text originally submitted to the hearing officer consisted of generic comments which did not differentiate this case from the ordinary case to which the guidelines would apply. We note that in the category of participation at the CCH the hearing officer approved 8.70 hours, which is 1.10 hours in excess of the guidelines while the attorney requested 6.60 hours in excess of the guidelines. The hearing officer's log text comments, although expressed in terms of exceeding the guidelines not being necessary in this case, indicate that, having presided at the CCH and being familiar with the issues and the relative complexity of the case, she did not conclude that further hours in excess of the guidelines were reasonable and necessary.

We do not determine that she abused her discretion in so concluding. The attorney's original justification text also argues that any hours in excess of the guidelines were

requested by the self-insured and therefore should be approved. Although a few previous attorney's fee cases have expressed the opinion that a carrier is in the best position to determine its attorney's fees, the provisions of Sections 408.221 and 408.222 and Rule 152.1 *et seq.* place that responsibility on the Commission.

As to the expense items, the attorney does not address them in his appeal or ask that the Appeals Panel approve the disapproved expenses, asking only that the Appeals Panel approve the disapproved attorney's hours. The expense items not having been appealed, we will not address them in this decision.

Finding no abuse of discretion by the hearing officer, the Order is affirmed.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge