

## APPEAL NO. 990723

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Contested case hearings (CCH) were held on November 30, 1998, and February 22, 1999, with (hearing officer 1) presiding as hearing officer at the first session and (hearing officer 2) presiding as the hearing officer at the second session and authoring the decision. The issues at the CCH were whether the claimant's compensable injury of \_\_\_\_\_, is a producing cause of the claimant's current chronic low back pain; what is the correct impairment rating (IR); whether the carrier is entitled to a reduction of impairment income benefits and supplemental income benefits (SIBS) based on contribution; whether the carrier was entitled to reduce or suspend income benefits to recoup a previous overpayment; whether the claimant was entitled to SIBS for the first and third compensable quarters; and whether the carrier waived its right to contest the first quarter of SIBS by failing to timely request a benefit review conference. Hearing officer 2 determined that the compensable injury of \_\_\_\_\_, was a producing cause of the claimant's current chronic low back pain; that the claimant's IR is 18%; that the carrier is not entitled to reduce or suspend the claimant's income benefits or to recoup a previous overpayment; that the claimant was not entitled to SIBS for the first or third quarters; and that the carrier did not waive its right to contest the claimant's entitlement to SIBS for the first quarter. The claimant appealed only this last determination dealing with waiver and the carrier appealed the issues dealing with contribution and recoupment. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 990668, decided May 20, 1999, affirmed on the waiver issue and the contribution issue and reversed on the recoupment issue and rendered a decision that the carrier is entitled to reduce or suspend income benefits to recoup for overpayments to be determined by the Texas Workers' Compensation Commission (Commission).

On March 25, 1999, hearing officer 2 issued a Commission Order for Attorney's Fees (Order), covering services from February 1, 1999, through March 22, 1999, approving 16.85 hours out of 21.35 hours requested, for a total approved fee, including expenses, of \$2,249.68 out of \$2,924.68 requested. The only disapproval of a fee was for preparation for the CCH on February 20, 1999, for which hearing officer 2 approved 4.00 hours out of 8.50 hours requested for that date. The appellant (attorney) appeals, contending that, in view of the complexity of the case and the large volume of documents involved, hearing officer 2's disapproval of the 4.50 hours of preparation time on February 20, 1999, is against the great weight of the evidence and is contrary to the standards for attorney's fees set out in Section 408.221. The file contains no response from the claimant or the carrier.

## DECISION

We affirm the Order.

We review attorney's fees cases under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 951196, decided August 28, 1995. The copy of the Application for Attorney's Fees (TWCC-152) submitted as an exhibit and the

Attorney Fee Processing System (ADPS) show the following justification text submitted by the attorney:

GUIDELINES EXCEEDED DUE TO ADDITIONAL TIME NEEDED TO SORT AND REVIEW DOCUMENT RECEIVED FROM CLAIMANT, CARRIER, CARRIER'S ATONY & TWCC.

The justification text also has attached to it documents relating to two long-distance telephone calls. The attorney notes in his appeal, "[because of the limited space available, the justification was somewhat cryptic." The ADPS shows the following log text by hearing officer 2:

ATTY REQUESTED 8.50 HOURS OF PREPARATION TIME ON FEB 20, BUT DID [NOT] GIVE ANY JUSTIFICATION FOR THE EXCESSIVE NUMBER OF HOURS OTHER THAN] THE GENERALIZED ONE IN THE JUSTIFICATION WINDOW. THIS WAS A LONG [AND COMPLEX CASE WITH SEVEN DISPUTED ISSUES, BUT THIS HO NEEDS MORE O[illegible]N EXPLANATIVE REASON FOR BILLING 8.50 HOURS OF PREP TIME.

Section 408.221, as noted by the attorney, sets out the factors to be considered by the Commission in approving an attorney's fees, including the time and labor involved and the novelty and difficulty of the questions involved. The Commission's guidelines for legal services allow for participation in a CCH, the actual time in the CCH plus 4.00 hours. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.4(c)(6) (Rule 152.4(c)(6)). Rule 152.4(b) provides:

An attorney may request, and the commission may approve a number of hours greater than those allowed by these guidelines, if the attorney demonstrates to the satisfaction of the commission that the higher fee was justified based on the Texas Labor Code, § 408.221 and § 408.222.

While the attorney has stated that his justification text was "somewhat cryptic," he was not limited in what he could submit and additional pages could have been attached to his TWCC-152 to provide a fuller explanation of his preparation for the CCH, as he did in his appeal. We do not consider a new justification provided for the first time on appeal. It appears that hearing officer 2 considered the justification text and the length and complicated nature of the CCH, as he noted these factors in his log text. Hearing officer 2 approved actual time at the second session of the CCH plus 7.60 hours, almost twice the number of hours provided in the guidelines. We cannot determine that the failure to approve the further hours requested by the attorney was an abuse of discretion.

The Order is affirmed.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge