

## APPEAL NO. 001197

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 March 14, 2000. On May 12, 2000, the hearing officer issued a Commission Order for Attorney's Fees (Order), covering services for the period from February 29, 2000, through March 30, 2000, approving 15.80 hours out of 19.10 hours requested, for a total approved fee, including expenses, of \$2,157.29 out of \$2,562.29 requested. The hearing officer disapproved eight communications items and part of the requested travel time to attend the CCH, all for the reasons that they exceed the guidelines/are unreasonable. The appellant (attorney) appeals the denial of those items, contending that the disapproved items are reasonable and justified. The appeal file contains no response from the carrier or the claimants.

### DECISION

After reviewing the record in this case, we approve some additional fees for travel time. We reverse the order and render a new decision approving a greater amount.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.3(a) (Rule 152.3(a)) provides that to claim a fee, an attorney representing any party shall submit written evidence of the attorney's time and expenses on an Application for Attorney's Fees (TWCC-152). Section 408.222 provides that in determining whether a defense counsel's fee is reasonable, the Commission shall consider issues analogous to those listed under Section 408.221(c) pertaining to claimant's counsel. Rule 152.4 provides that in considering whether a defense counsel's fee is reasonable and necessary, the Commission shall consider the attorney's fee guidelines set out in Rule 152.4. Travel time may be recovered as part of an attorney's fees. Texas Workers' Compensation Commission Appeal No. 93162, decided April 19, 1993; see *also* Texas Workers' Compensation Commission Appeal No. 952077, decided January 8, 1996.

The standard for reviewing a hearing officer's determination of attorney's fees is an abuse of discretion standard. See Texas Workers' Compensation Commission Appeal No. 92481, decided October 21, 1992, and Texas Workers' Compensation Commission Appeal No. 92375, decided September 14, 1992. To obtain reversal based on an abuse of discretion standard, some showing must be made that the determination is arbitrary or without any basis in the record, that is, that the hearing officer acted without reference to any guiding rules and principles. Texas Workers' Compensation Commission Appeal No. 951762, decided December 12, 1995.

Attorney first contends that the hearing officer erred in disapproving the eight items under communications. Attorney asserts that the amounts requested were reasonable.

The issues at the CCH were:

1. Was the deceased in the course and scope of employment at the time of the injury?
2. Who is entitled to reimbursement for the deceased [sic] funeral expenses?
3. Who are the proper legal beneficiaries of the deceased?
4. What is the average weekly wage [AWW]?
5. Is the Carrier entitled to reopen the issue of compensability based on newly discovered evidence that could not have been reasonably discovered at an earlier time?
6. Was the deceased in a state of intoxication at the time of the fatal motor vehicle accident [MVA] on \_\_\_\_\_?

The hearing officer determined:

1. That the deceased was in the course and scope of her employment at the time of her fatal MVA.
2. That the deceased was in a state of intoxication at the time of her fatal MVA.
3. That the deceased was not involved in a compensable injury and therefore the carrier is not liable for funeral expenses.
4. That the deceased's AWW is \$446.36.
5. That there are no legal beneficiaries under the 1989 Act.
6. That the carrier is entitled to reopen the issue of compensability based on newly discovered evidence that could not have been reasonably discovered at an earlier time.
7. The Subsequent Injury Fund is not entitled to death benefits because the deceased's death was not compensable.

The attorney submitted the following justification text:

IN SOME INSTANCES IT WAS NECESSARY FOR COUNSEL FOR CARRIER TO EXCEED THE MAXIMUM RECOMMENDED HOURLY FEE GUIDELINES PROMULGATED BY THE TEXAS WORKERS' COMPENSATION COMMISSION [COMMISSION] TO THOROUGHLY AND EFFECTIVELY PREPARE FOR CCH ON BEHALF OF CARRIER INCLUDING REVIEW OF CORRESPONDENCE AND WAGE STATEMENT FOR CLMT.; TELEPHONE CONFERENCES WITH [THE COMMISSION] AND OMBUDSMAN AND CARRIER REGARDING WITNESS'S TESTIMONY BY PHONE; PHONE CONFERENCE WITH DPS [DEPARTMENT OF PUBLIC SAFETY] REGARDING TESTIMONY. CARRIERS ATTORNEY PREPARED CARRIERS EXHIBITS EVIDENCE AND OUTLINED CASE PRESENTATION. CARRIERS ATTORNEY TRAVELED TO (CITY 1) TO ATTEND CCH.

In this case, the hearing officer considered the justification text and the length and complicated nature of the CCH. He approved 2.90 hours for communications, which was over the 2.50 hours per month permitted by the guidelines. The hearing officer was at the CCH and was in a position to consider the amount of attorney preparation time involved in this case, as shown by the discussion of the exhibits and issues at the CCH. We cannot conclude that the failure to approve the additional hours for communications requested by attorney was an abuse of discretion.

Attorney next contends that the hearing officer erred in disapproving two of the requested six hours of travel time. The hearing officer entered the following log text:

SOME OF THE TIME WAS UNREASONABLE AND EXCESSIVE. REDUCED THE TRAVEL TIME FROM 6 TO 4. I HAVE DRIVEN TO (CITY 2) 100'S OF TIMES IN LESS THAN 2 HOURS. 6 HOURS TRAVEL IS UNREASONABLE. ALL NECESSARY AND REASONABLE TIME HAS BEEN APPROVED.

The CCH was held in (city 1). The office address for the attorney is (address). The justification text submitted by attorney stated that she traveled to (city 1) to attend the hearing. There is an uncontroverted statement in attorney's appeal that the approximate distance from the city of (city 2) to (city 1) is 130 miles. The mileage to any applicable offices was not set forth in the record. However, the uncontroverted evidence from the attorney is that her travel time was six hours round trip. Carrier did not introduce any evidence showing that the attorney did not spend six hours in travel time. The hearing officer had no evidence contrary to the attorney's application regarding travel time. If a reduction in fees is warranted in the private attorney-client relationship between the attorney and the carrier, the carrier is in the best position to offer evidence regarding rejection or approval of the fees, after full disclosure of the facts regarding actual travel time. Texas Workers' Compensation Commission Appeal No. 94342, decided May 4,

1994. The hearing officer had no actual knowledge of road conditions, actual or permissible rate of speed, weather conditions, or traffic conditions. The hearing officer had no actual knowledge of the attorney's time spent traveling to the CCH. It is an abuse of discretion for the hearing officer to assume facts not in evidence regarding the amount of time it took to travel the applicable 260 miles, plus the mileage to the respective offices. The hearing officer's statement regarding his own travels to (city 2) is outside the record. Based on the uncontroverted application, the fact that the attorney's appeal is not contested, and the hearing officer's scant explanation for denial of the fees, we are satisfied that appropriate guiding rules and principles were not followed in this case. Accordingly, we find an abuse of discretion in the hearing officer's failure to approve the additional requested two hours in travel time and we approve the additional two hours of travel time requested.

We reverse the Order and render a new decision increasing the attorney's fee awarded by 2.00 hours for the attorney's time.

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Judy Stephens  
Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

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Kathleen C. Decker  
Appeals Judge