

APPEAL NO. 002523

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 6, 2000. The issue at the hearing was whether the claimant is entitled to supplemental income benefits (SIBs) for the 11th quarter. The hearing officer determined that the claimant is entitled to those benefits.

On October 13, 2000, the hearing officer issued a Commission Order for Attorney's Fees (Order), covering services for the period from December 6, 1999, through September 6, 2000, approving 18.00 hours, as requested, at a rate of \$150.00 per hour rather than the requested rate of \$250.00 per hour, for a total approved fee of \$2,700.00 out of \$4,500.00 requested. The fees are to be paid under the provisions of Section 408.147(c) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1(f) (Rule 152.1(f)). The appellant (attorney) appeals, urging that the requested rate of \$250.00 per hour be approved, emphasizing the factors he believes make the \$250.00 hourly rate reasonable and necessary. The file contains no response from the claimant or the carrier.

DECISION

Reversed and remanded.

At the hearing on the underlying issue of the claimant's entitlement to SIBs, the hearing officer permitted the attorney to present evidence on the question of whether the \$250.00 hourly rate was reasonable and necessary. The attorney stated that \$250.00 per hour is a reasonable fee for the same or similar services in _____ County for attorneys of comparable experience. However, the hearing officer further stated that the attorney's fee hearing at the end of the hearing on the merits was not the carrier's opportunity to be heard on the reasonableness of the fees. The hearing officer declined to order an hourly rate of more than \$150.00, stating that he had to "do these [attorney's fee orders] on the computer, and the only thing the computer will let us do is \$150.00 an hour." In addition, the hearing officer stated that "the most I could do is \$150.00 an hour. I'm locked into that." The hearing officer then suggested that the attorney appeal the fees to the Appeals Panel or contact the Texas Workers' Compensation Commission's Executive Director about possible action on attorney's fees in the coming legislative session.

The Appeals Panel reviews attorney's fees cases under an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 970463, decided April 23, 1997. Section 408.147(c) specifically provides that attorney's fees payable under that subsection are not subject to the guidelines or to the 25% limitation of Section 408.221. The fees must be reasonable and necessary. Rule 152.1(f) contains similar provisions. Thus, the \$150.00-per-hour limit of Rule 152.4(d) does not apply in this case. The hearing officer did not exercise his discretion in this case. His decision was based instead on what the computer would let him do. Discretion in attorney's fees cases is delegated to the hearing officer, not to an anonymous computer programmer.

The hearing officer having abused his discretion by failing to exercise that discretion, the Order is reversed and remanded for a hearing on attorney's fees, so that the hearing officer may determine what hourly rate is reasonable and necessary in this case.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge