

APPEAL NO. 012288
FILED NOVEMBER 15, 2001

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 June 27, 2001. The issue at the hearing was whether the respondent's (claimant) compensable injury of _____, extended to and included her lumbar spine and L4-5 herniated nucleus pulposus (HNP). The hearing officer determined that the compensable injury extended to the lumbar spine and L4-5 HNP. The respondent (carrier) had filed an appeal in that case, asserting that the evidence was insufficient to support the hearing officer's determination. The Appeals Panel affirmed, finding that the evidence sufficiently supported the hearing officer's determination. Texas Workers' Compensation Commission Appeal No. 011711, decided September 4, 2001.

On September 5, 2001, the hearing officer issued a [Texas Workers' Compensation] Commission Order for Attorney's Fees (Order 1), covering services by the attorney for carrier from June 1, 2001, through June 27, 2001, approving 8.65 hours of the 28.30 hours requested for a total of \$729.50 of the \$2,045.63 requested. The hours requested included paralegal support. The hearing officer did not approve the expenses requested in the amount of \$54.63. The appellant (attorney) appeals, contending that the fees requested were reasonably necessary.

On September 24, 2001, the hearing officer issued a Commission Order for Attorney's Fees (Order 2) covering services from July 10, 2001, through July 31, 2001, approving 1.2 hours of the 3.5 hours requested for a total of \$105.50 of the \$422.94 requested. The hours requested included paralegal support. The hearing officer did not approve the \$74.44 of expenses requested. Attorney appeals, contending that the fees and expenses requested were reasonable and necessary.

Attorney asks that the Appeals Panel approve all of the denied fees. The appeal file contains no response from claimant or carrier.

DECISION

We affirm in part and reverse and render in part.

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(d), which pertains to a claimant's counsel. 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.

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 (Unpublished); 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 7, 1995.

In his appeal, Attorney recites the services performed and requests that the award of attorney's fees be increased by an additional \$1,316.13 for Order 1 and an additional \$317.44 for Order 2.

Four expense items in Order 1 totaling \$54.63 for cost of records and two expense items in Order 2 totaling \$74.44 for cost of records were disapproved for the reason "Service Provided Unclear." Rule 152.5(a) provides that the TWCC-152 must include an itemized list of expenses incurred, clearly identifying the nature of the expense. Attorney did not include such an itemized list. While Rule 152.5(b)(3) allows the cost of records necessary to prepare or present a claim or defense, Rule 152.5(c)(2) provides that the Commission shall not allow, as attorney expenses, overhead costs of operating a law office, including copies, fax, telecopier, postage, and shipping. The justification text provided no detailed explanation of the expenses requested. The burden of proof is on the attorney to show his entitlement to the requested fees and expenses. We conclude that the denial of the expenses on this basis was not an abuse of discretion.

The guidelines allow for 2.5 hours for communications each month. Rule 152.4(c)(2). Eighteen of the telephone conference entries of Order 1 were disallowed for "Ex Guideline/Unreasonabl[e]" and two entries for telephone conferences of Order 1 were disallowed for "Multiple Reasons." The hearing officer approved 2.4 hours for communications.

While we generally do not consider reasons for denial such as "Multiple Reasons" to be sufficient for our review, the hearing officer's log text and the other documents in the file provide a sufficient basis for us to review the order to determine if there was an abuse of discretion. The hearing officer's log stated that this case was neither factually nor legally complex and that it was not reasonable to exceed the guidelines. The denial of these items by the hearing officer was not an abuse of discretion.

In the application for attorney's fees applicable to Order 2, Attorney requested approval of 3.5 hours but incorrectly used the code for a contested case hearing. The justification supplied by Attorney as well as the dates of service indicate the services were for participation in the administrative appeal process and the amount of time spent is less than that allowed by the guidelines. The guidelines allow 5.00 hours for participation in the administrative appeal process. Rule 152.4(c)(7). Denying 2.3 of the hours requested was an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 972304,

decided December 22, 1997 (unpublished).

We reverse that part of Order 2 that denied 2.3 hours requested by Attorney and render a decision approving an additional 2.3 hours. In all other respects, we affirm Order 1 and Order 2.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge