APPEAL NO. 090008
FILED MARCH 10, 2009

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 December 3, 2008. Texas Department of Insurance, Division of Workers' Compensation (Division) issued an Order for Attorney's Fees on September 29, 2008, for dates of service from September 11 through September 18, 2008, approving 3.90 of the 3.90 hours requested for the attorney's services at a rate of $150.00 per hour and approving 1.10 of the 1.10 hours requested for services of the legal assistant at a rate of $50.00, for a total amount of $640.00.

At issue was whether the Division Order for Attorney's Fees dated September 29, 2008, was excessive. The hearing officer decided that the Division Order for Attorney's Fees dated September 29, 2008, was excessive and that attorney's fees in the amount of $0.00 are reasonable and necessary. The appellant (attorney) appealed the hearing officer's determination on the issue of attorney's fees. Also, the attorney contends that the hearing officer incorrectly placed the burden of proof on the attorney in determining the issue in dispute. The appeal file does not contain a response from either respondent 1 (claimant) or respondent 2 (self-insured).

DECISION

Reversed and remanded.

FACTUAL SUMMARY

It was undisputed that the claimant sustained an injury at work on _____. The claimant testified that he was receiving temporary income benefits (TIBs) and medical benefits for his left leg injury, but that the self-insured was denying medical treatment for his hip and back. The claimant testified that he hired the attorney on September 11, 2008, to assist him in obtaining medical benefits for his hip and back. Documentation dated September 11, 2008, from the attorney's office summarizes the initial interview with the claimant and states in part that: (1) on _____, the claimant fell off the back of a truck at work and injured his "left knee/leg/hip/ankle and back"; (2) the self-insured "is denying the back"; (3) the claimant is receiving "$400/wk" in TIBs; and (4) "25% will be coming out of his 400/wk so we will get 100/wk and [the claimant] will get 300/wk."[1] A Contract of Employment and Fee Agreement dated September 11, 2008, shows the claimant's initials at the bottom of the agreement and the agreement notes that the claimant's injury is to the "left knee/leg/ankle/hip, back & depression."

[1] 28 TEX. ADMIN. CODE § 152.1(c) (Rule 152.1(c)) provides, in part, that the fee approved by the Division shall be limited to 25% of each weekly income benefit payment to the employee, up to 25% of the total income benefits allowed and shall also be based on the attorney's time and expenses, subject to the guidelines and standards set forth in the Act and Division rules.

The claimant testified that he was notified by his treating doctor's office that the self-insured had approved medical treatment for his hip and that the treatment would help his back injury. The claimant testified that he contacted his attorney's office on September 19, 2008, and on that same date discharged his attorney because he received notification that medical treatment for his hip was approved by the self-insured. The claimant testified that the treating doctor's office secured his medical benefit, not the attorney. In evidence is a Notice of Representation or Withdrawal of Representation (DWC-150) dated and filed on September 30, 2008.

It is undisputed that the attorney requested attorney's fees for dates of service from September 11 through September 18, 2008. The attorney provided written evidence to support that services were provided to the claimant from September 11 through September 18, 2008. An affidavit from the attorney's legal assistant dated December 1, 2008, states that "[o]ne of the main reasons [the claimant] retained the firm was for assistance in getting medical treatment for his lumbar spine, which had been disputed by the [self-insured]" and that "[o]n September 19, 2008 [the claimant] called the office to inform me of the approval for his physical therapy regarding his back."

ATTORNEY'S FEES

The standard employed by the Appeals Panel in the review of an attorney's fees order by the Division is the abuse-of-discretion standard. Appeals Panel Decision (APD) 961387, decided August 26, 1996; APD 93640, decided September 10, 1993. The Appeals Panel has previously noted that where a claimant is disputing his attorney's fees, there is a split burden of proof. The attorney has a threshold burden of proving up the fees and the services rendered. If the attorney meets that burden, then the claimant has the burden to prove that the challenged fees were not reasonable and necessary. *See* APD 021626, decided August 6, 2002, citing APD 992121, decided November 12, 1999, and APD 982969, decided February 2, 1999.

Section 408.221(b) provides, in part, that an attorney's fee under this section is based on the attorney's time and expenses according to written evidence presented to the division or court. Except as provided by Subsection (c) or Section 408.147(c), the attorney's fee shall be paid from the claimant's recovery. *See also* Section 408.221(d). Rule 152.2(b) provides, in part, that for purposes of computing the maximum amount of a fee that may be fixed and approved for a claimant's attorney, "claimant's recovery" shall not include:

> (1) the amount of benefits paid to the claimant prior to hiring the attorney;
>
> (2) benefits initiated or offered by an insurance carrier when the initiation or offer is based upon documentation in a claimant's file, and has not been the subject of a dispute with the carrier;
>
> * * * *

(4) the value of medical and hospital benefits provided to the claimant.

Section 401.011(5) defines "[b]enefit" as a medical benefit, income benefit, a death benefit, or a burial benefit based on a compensable injury.

In the Background Information section of the decision, the hearing officer refers to Rule 152.2(b) and states that "[a]s of the date of this [CCH], there has been no dispute with the [self-insured] over income benefits" and that "[b]ecause it was not established that the attorney's efforts that are the subject of this order were made in connection with disputed income benefits or otherwise resulted in the payment of income benefits, the attorney is not entitled to the fees ordered." The hearing officer found that the attorney and paralegal services from September 11 through September 18, 2008, were not reasonable and necessary, and he concluded that an attorney's fee in the amount of $0.00 is reasonable and necessary for services rendered from September 11 through September 18, 2008.

In APD 950418, decided April 28, 1995 (a case similar to the instant case) the hearing officer determined that "the original order awarding attorney's fees was improper because there was insufficient evidence to show that the attorney 'secured any benefits for the claimant or resolved any disputes in connection with the claimant obtaining benefits' and ordered the attorney to be paid no fees." The attorney appealed, arguing that she was hired in connection with securing benefits and resolving a certain dispute, "but was dismissed by the claimant before these efforts could come to fruition." The Appeals Panel stated that according to the claimant's own testimony as well as that of the attorney, the claimant hired the attorney for purposes of assisting her in obtaining spinal surgery, a medical benefit under the statute. Also, a primary reason why this medical benefit was not achieved or any dispute about it resolved while the attorney was still acting on behalf of the claimant, was that the claimant discharged the attorney. The Appeals Panel stated that "[a]lthough medical benefits do not generate money from which to pay fees (*see* Rule 152.2), we believe the securing of medical benefits by virtue of the legal representation satisfies the statutory provision quoted above [Section 408.221] for awarding fees and that fees can be awarded for securing medical benefits if there are other income benefits being paid from which the attorney's fees could be collected." Further, the Appeals Panel held that "the hearing officer erred in disapproving all attorney's fees solely because the attorney failed to secure a benefit for the claimant when the great weight and preponderance of the evidence established that this failure was caused by the discharge of the attorney before the entitlement to the benefit could be established." The Appeals Panel reversed and remanded the case to the hearing officer to identify the services performed by the attorney in connection with the attorney's attempt to secure spinal surgery for the claimant and to approve fees for those services which are reasonable in light of the factors contained in Section 408.221. *See also* Rule 152.1(e) which provides that a client who discharges an attorney does not, by this action, defeat the attorney's right to claim a fee.

The evidence in this case establishes that: (1) the claimant was receiving benefits ($400 TIBs/week) prior and subsequent to hiring the attorney on September 11,

2008; (2) the claimant hired the attorney to assist him in obtaining a medical benefit for his back injury; (3) the back injury was in dispute with the self-insured; (4) the claimant received a medical benefit (physical therapy for his hip); and (5) the attorney was discharged on September 19, 2008. Further, the hearing officer found that a reasonable hourly rate for the attorney in this matter is $150.00, and a reasonable hourly rate for the paralegal is $50.00, and that from September 11 through September 18, 2008, the attorney devoted 3.90 hours, and the paralegal devoted 1.10 hours to this case.

The hearing officer erred in determining that an attorney's fee in the amount of $0.00 is reasonable and necessary for services rendered from September 11 through September 18, 2008. Accordingly, we reverse the hearing officer's determination that the Division Order for Attorney's Fees dated September 29, 2008, was excessive, and that the attorney's fees in the amount of $0.00 are reasonable and necessary. We remand to the hearing officer to identify the services performed by the attorney in connection with the attorney's attempt to secure benefits for the claimant and to approve fees for those services which are reasonable and necessary pursuant to Section 408.221.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is (**a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge