APPEAL NO. 950229

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (hereinafter "claimant") appeals from a determination by hearing officer (hearing officer) awarding attorney's fees in the amount of $150.00 to ("attorney"), the attorney who represented the claimant in a workers' compensation case. The claimant appeals, contending that the attorney should not receive any attorney's fees. The appeals file does not contain a response by the attorney.

DECISION

Affirmed.

The attorney had originally requested fees in the amount of $300.00, and such request was approved on August 25, 1994. The claimant requested a contested case hearing (CCH) to determine whether the award was excessive, and such hearing was held on November 18, 1994. The attorney did not appear at the hearing; the hearing officer stated that a member of the attorney's office staff told her that the Texas Workers' Compensation Commission (Commission) had been previously contacted and advised he would not be present, although she could find no record of this. The hearing officer wrote the attorney, advising him to contact her if he wanted an opportunity to present evidence in the case; she also stated that the record would be closed if she did not hear from him by November 28, 1994. The hearing officer's decision reflects that as of January 31, 1995, the attorney had not communicated with the Commission.

At the hearing the claimant testified that he met with the attorney on July 22, 1994, and on the same day signed an employment contract which was made part of the record. He said the attorney told him he would file with the Commission an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) and Employee's Request to Change Treating Doctors (TWCC-53) and that he advised that claimant see a doctor whom the attorney recommended. The claimant said he spoke with the attorney for approximately 30 to 45 minutes that day, and that the attorney's paralegal, and not the attorney, assisted him in filling out the forms. The claimant also said he told the attorney that he did not wish to see a chiropractor. On a later date he said he telephoned the attorney's office and again spoke with the paralegal for approximately ten minutes, after finding out that the attorney had referred him to a chiropractor after all. The claimant said that on August 30, 1994, he sent the attorney a letter asking him to withdraw from the case.

The attorney's application for fees was also made part of the record; it shows that the attorney assessed 1.5 hours of his own time on July 22nd, and .5 hours on August 4th; the claimant said the latter date could have been the day he called to complain about the doctor. A Commission order was signed on August 25, 1994, approving a total of $300.00 in fees (two hours at $150.00 per hour).

The attorney for the workers' compensation insurance carrier made an appearance at the hearing to note that no benefits had been paid in claimant's case.

The hearing officer made findings of fact that a reasonable hourly rate for attorney's fees is $150.00 and $50.00 is a reasonable hourly rate for paralegal fees, and that attorney time of .5 hours and paralegal time of 1.5 hours was reasonable, necessary, and performed; no amount for expenses was approved. Accordingly, the hearing officer ordered that the original Commission order be superseded, and that the carrier pay the attorney $150.00 in fees (consisting of $75.00 in attorney's fees and $75.00 in paralegal fees), to be paid from income benefit payments made to the claimant in an amount not to exceed 25% of each payment.

In his appeal the claimant contends that the attorney should not receive any compensation, because of the evidence presented in the case (presumably referring to claimant's testimony that the paralegal prepared the forms, and the exhibit containing the attorney's advertisement which states "Free case evaluation") and because the attorney did not appear at the hearing. The attorney apparently did not file a response to the claimant's appeal.

The claimant does not cite to any authority for the proposition that the attorney should receive no fees because he did not appear at the hearing. We note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 145.19 (Rule 145.19) provides that if a party seeking relief does not appear for a hearing, after presentation of a *prima facie* case by the opposing party, a default decision will be entered, absent good cause that prevented the party's appearance. (The rule also provides that "An administrative violation may be written by the hearing officer;" *see also* Section 410.156, which notes that parties shall attend CCHs and that failure to attend can constitute an administrative violation) In this case, however, the claimant was the party seeking relief; we note that the record also contains evidence, including the claimant's testimony and the attorney's fee request and the original Commission order, from which a decision could be rendered.

This panel has no jurisdiction to make an attorney's fee determination based upon a particular attorney's advertisement. *See also* Texas Workers' Compensation Commission Appeal No. 92284, decided August 13, 1992 (claimant's understanding that no fee would be due does not constitute a basis upon which the Commission may uphold consideration of a request for approval of attorney's fees). The 1989 Act and its rules contain provisions concerning the circumstances under which attorney's fees are approved by the Commission. *See generally*, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Chapter 152; Section 408.221; and Rule 152.4 which contains guidelines for legal services provided to claimants and carriers. That rule allows a maximum of 1.5 hours for an attorney's initial interview with a client and research and for setting up a file and completing and filing forms; it also allows 2.5 hours per month for communications with a client, health care provider, or other persons involved in the case. The hearing officer, based upon claimant's testimony concerning his original visit to the attorney as well as the attorney's affidavit, determined that

the attorney's request for two hours of his own time was unreasonable, but that attorney time of .5 hours and paralegal time of 1.5 hours was reasonable and necessary. Our standard of review in attorney's fee cases is whether the hearing officer abused his or her discretion. We do not overturn the hearing officer's order because we may have exercised our discretion differently; rather, the order is reviewed to determine whether the hearing officer made his or her decision arbitrarily or capriciously, without resort to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1985). Based upon our review of the evidence in this case, we do not believe the hearing officer abused her discretion by reducing the attorney's fees to $150.00.

The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge