

APPEAL NO. 950259

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The appellant (hereinafter "attorney"), who represented the claimant in a workers' compensation case, appeals from a determination by hearing officer (hearing officer) awarding the attorney a total of \$225.00 in fees. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

The attorney had originally requested fees in the amount of \$412.50, which request was approved by the Texas Workers' Compensation Commission (Commission) by order of November 9, 1994. The claimant requested a contested case hearing to determine whether any part of the fee award was excessive.

The fees assessed by the attorney included six telephone conferences (three with the claimant, two with providers, and one with the ombudsman) and one draft of a letter to the carrier's adjuster. A copy of the latter was included as an attorney's exhibit, and was allowed. The hearing officer in her decision also reasoned that, although the attorney could not remember which medical providers he spoke with, such charges were reasonable as the claimant testified that the attorney did assist him in obtaining prescription medication.

As to the remaining telephone calls, the hearing officer with the consent of the parties checked the Commission's dispute resolution computer log and found no record of a telephone call between the attorney and the ombudsman's office on the date claimed. Further, the claimant testified that the three one-half hour telephone calls claimed by the attorney (on May 12, August 24, and September 12, 1994) did not take place; he said he had spoken twice with the attorney's assistant on September 12th for a total of ten minutes. The attorney, who testified by telephone, stated at the hearing that all calls to claimant were long distance and that he would later be submitting telephone bills to the Commission for these expenses. He declined the hearing officer's offer to leave the record open so that the telephone bills could be offered as evidence of the dates and length of the telephone conversations claimed.

The hearing officer determined that the hourly rate billed by the attorney, \$150.00 an hour, was reasonable, and that 1.5 hours of attorney time was reasonable, necessary and performed; she also found that the remaining 1.25 hours were not reasonable, necessary, and performed.

In his appeal the attorney contends that the hearing officer made her decision with no substantiation and that his time slips documenting the telephone calls in question should be adequate to support his fee request.

The 1989 Act and its rules contain provisions concerning the approval of attorney's fees by the Commission. See *generally*, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE Chapter 152; Section 408.221; and Rule 152.4. While many Appeals Panel decisions have involved whether or not an attorney's fees either fall within the stated guidelines or, if in excess of the guidelines, whether the services were reasonable, it is axiomatic that to be approved by the Commission the services must have actually been performed by the attorney or his or her staff. In this case the claimant testified as to the dates on which he had contact with the attorney's office and to the fact that he had spoken with the attorney's assistant; he also stated that he had tried several times unsuccessfully to speak with the attorney. The attorney, on the other hand, supplied his time slips and stated that they were accurate. (We note that these slips do not indicate to whom the claimant spoke, and that three give the amount of time as .30.) In short, a question of fact was presented for the hearing officer's decision. Our standard of review in attorney's fees cases is whether the hearing officer abused his or her discretion; that is, 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). Contrary to the attorney's assertions, the hearing officer clearly based her decision upon the evidence presented at the hearing and stated such reasoning in her decision. Based upon our review of the evidence, we do not believe the hearing officer abused her discretion by reducing the attorney's fees to \$225.00.

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

Lynda H. Neseholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge