

## APPEAL NO. 93743

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On June 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held to decide several disputed issues regarding the claim of (claimant), the primary issue being whether the claimant's lung cancer was work related. The hearing officer decided that the claimant's lung cancer was not work related, that she did not sustain a compensable injury, and that she was not entitled to workers' compensation benefits. The Appeals Panel affirmed the hearing officer's decision in Texas Workers' Compensation Commission Appeal No. 93744, decided October 1, 1993.

The appellant represented the claimant at the contested case hearing and filed an application for attorney's fees with the hearing officer. The hearing officer issued an order for attorney's fees approving some, but not all, of the fees requested. The appellant appeals the hearing officer's order for attorney's fees in essence contending that all the fees requested should be approved. No one has responded to the appeal of the order for attorney's fees.

### DECISION

Because the claimant has made no recovery of workers' compensation benefits, the hearing officer's order for attorney's fees is reversed and a decision is rendered that the appellant is not entitled to any attorney's fees.

Section 408.221(b) (formerly Article 8308-4.09(b)) provides in part that, except as provided by Section 408.147(c), the attorney's fee shall be paid from the claimant's recovery. Section 408.147(c) (formerly Article 8308-4.28(l)(2)) is not relevant to this case since it concerns a carrier's liability for a claimant's attorney's fees when the claimant prevails on certain disputes relating to supplemental income benefits (SIBS). Section 408.221(c) (formerly Article 8308-4.09(c)) sets forth certain matters to be considered by the Commission in approving attorney's fees for a claimant's counsel. One matter to be considered is the benefits to the claimant that the attorney is responsible for securing. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.2(d) (Rule 152.2(d)) provides that the total amount that the Commission approves for the attorney's time and expenses constitute the fee, and shall not exceed 25% of the claimant's recovery, except as provided in Article 8308-4.28(1) (2) (now Section 408.147(c)) and Rule 152.1(f) (relating to a claimant's attorney's fees in a dispute regarding SIBS).

In the instant case, the claimant is not entitled to any recovery of benefits since the Appeals Panel has affirmed the hearing officer's decision that the claimant did not sustain a compensable injury. Since the appellant's fees must be paid from the claimant's recovery, and since the claimant has no recovery of benefits, there are no attorney's fees to be paid. This decision is consistent with our decision in Texas Workers' Compensation Commission Appeal No. 91005(A), decided August 14, 1991, wherein we reversed a hearing officer's

order awarding attorney's fees to the employee's attorney and held that the carrier "pay no attorney's fee to respondent's (employee's) attorney" because the employee was not entitled to workers' compensation benefits. See *also* Texas Workers' Compensation Commission Appeal No. 91021, decided September 25, 1991; and Texas Workers' Compensation Commission Appeal No. 91040, decided November 21, 1991.

Our decision is also consistent with the case of National Farmers Union Property and Casualty Company v. Degollado, 844 S.W.2d 892 (Tex. App.-Austin 1992, writ denied) wherein the court stated:

Attorney's fees shall not be awarded unless the trial court finds that benefits have accrued to the claimant by virtue of the legal representation, and then the award must be based on the value of the services performed and the benefits accruing to the beneficiary. Act of March 6, 1969, 1969 Tex. Gen. Laws at 52; See *also* Tex. Rev. Civ. Stat. Ann. art. 8308-4.09(c) (West Supp. 1993).

The order for attorney's fees is reversed and a decision rendered that appellant is not entitled to any attorney's fees.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Joe Sebesta  
Appeals Judge