

APPEAL NO. 130386
FILED APRIL 16, 2013

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 November 22, 2010, in [City], Texas, with [hearing officer] presiding as hearing officer. In that case, the hearing officer determined that the respondent (claimant) reached maximum medical improvement on September 20, 2009, as certified by [Dr. K], the second designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division), and that the claimant's impairment rating is 5%, as certified by Dr. K. Division records show that the claimant appealed the hearing officer's determinations, and that the hearing officer's determinations were affirmed.

A Division Order for Attorney's Fees was issued on January 2, 2013, by [hearing officer], another hearing officer, awarding 12.6 hours of attorney fees at \$135.00 an hour and 2.5 hours of legal assistant fees at \$50.00 an hour for a total of \$1,826.00 to the attorney for the claimant.

The appellant (carrier) appealed the order on attorney's fees, contending that it had entered into an agreement with the claimant's attorney resolving all attorney's fees related to this workers' compensation claim. The appeal file does not contain a response from either the claimant or the claimant's attorney.

DECISION

Reversed and remanded.

The carrier contends in its appeal that the issue of all attorney's fees in this case has been resolved by agreement. The carrier attached to its appeal the parties' agreement dated December 27, 2012, for the amount of \$37,500.00, and the Agreed Order Approving Fees and Expenses (Agreed Order) by the 152nd Judicial District Court of Harris County, Texas, dated December 28, 2012, in the amount of \$37,500.00. The agreement specifically states that it includes "any claims for legal services, costs, and expenses incurred . . . before the [Division] . . . past or future, arising out of, relating to, and/or those which might hereafter arise out of or have to do with the workers' compensation claim of [the claimant]. . . ."

As a general rule, the Appeals Panel has refused to consider new evidence presented for the first time on appeal. See *generally*, Appeals Panel Decision (APD) 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ); see *a/so* APD 101100, decided October 13, 2010. In determining

whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See APD 051405, decided August 9, 2005.

This case presents one of those few circumstances where the carrier has provided newly discovered evidence on appeal which warrants a remand based on that evidence. In this case, the claimant's attorney filed a request for attorney's fees with the Division on December 13, 2012, prior to the parties' agreement and the Agreed Order dated December 28, 2012, and that request was approved on January 2, 2013. There is nothing in the record showing that the carrier was aware the claimant's attorney had filed for attorney's fees with the Division. The unavailability of the new evidence is not due to lack of diligence on the carrier's behalf nor is it cumulative of other evidence. It also appears that the new evidence is so material that it would probably result in a different decision. APD 100457, decided June 25, 2010.

We therefore reverse the Division Order for Attorney's Fees Sequence No. 19, dated January 2, 2013, and remand the issue of attorney's fees in Sequence No. 19 to the hearing officer to allow the development of the record concerning the newly discovered evidence and to permit the parties to present evidence on the merits of the attorney's fees in Sequence No. 19 at the CCH on remand. The hearing officer should then make a determination regarding attorney's fees in Sequence No. 19 consistent with this decision.

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 **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JAMES H. MOODY, III
2001 BRYAN STREET, SUITE 1800
DALLAS, TEXAS 75201-3070.

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge