

APPEAL NO. 030572
FILED APRIL 18, 2003

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 January 22, 2003. With regard to the two issues before her, the hearing officer determined that the compensable injury _____, does not include "depression diagnosed as Cognitive Disorder" and that the appellant (claimant) is entitled to supplemental income benefits (SIBs) for the 14th quarter. The hearing officer's determination on the SIBs issue has not been appealed and therefore has become final pursuant to Section 410.169.

The claimant appeals the extent-of-injury issue, asserting that her psychiatrist has opined that the cognitive disorder is related to the compensable injury. The appeal file does not contain a response from the respondent (carrier).

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable lumbar spine injury on _____. It is undisputed that the claimant has had four spinal surgeries and has failed back syndrome. At issue is whether the medication administered due to the surgeries or the subsequent narcotic pain medication may have caused the claimant's cognitive disorder. The claimant's treating doctor, an orthopedic surgeon, testified at the CCH, and as the hearing officer commented, he "basically deferred to [Dr. E, the claimant's psychiatrist] with respect to making a connection between the compensable injury and the diagnosed cognitive disorder." The hearing officer commented that Dr. E is a psychiatrist who treated the claimant for depression "for several months." The hearing officer referred to one of Dr. E's reports, which noted "we will never know the exact etiology of her slowing down of cognition" and concluded that "[w]hile there is no question the Claimant is suffering from a cognitive disorder, the evidence simply does not prove . . . that it was caused by Claimant's compensable injury."

In the appeal file before us, and included in the claimant's appeal, is a letter report dated February 13, 2003 (some three weeks after the CCH), from Dr. E, submitted for the first time on appeal, where Dr. E states that it is "with great embarrassment and a humble apology" that he failed to be available at the January 22, 2003, CCH. Dr. E makes clear that he had promised the claimant that he would be available but due to "a misunderstanding of [his] office staff" he was not paged when called. (The record supports that there were three attempts to contact Dr. E by phone at the CCH.) The letter report contains several strong statements regarding causality of the cognitive disorder.

As a general rule the Appeals Panel has refused to consider new evidence presented for the first time on appeal. See Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992, and Texas Workers' Compensation Commission Appeal No. 951215, decided September 7, 1995. However, we have also held that in determining whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing; whether it is cumulative of other evidence; whether it was through lack of diligence that it was not offered at the hearing; and whether it was so material that it probably would produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). See also Texas Workers' Compensation Commission Appeal No. 93463, decided July 19, 1993.

We believe that this case presented one of those very rare circumstances where the appellant has provided newly discovered evidence on appeal where a remand is warranted based on that evidence. In this case Dr. E's letter report was not even in existence at the time of the CCH. The claimant exercised due diligence because Dr. E apparently promised the claimant that we would be available to testify at the CCH, and Dr. E's unavailability was through no fault of the claimant. Although there were other reports from Dr. E in evidence those reports were either not clear or were subject to misinterpretation so this letter report was not cumulative of the other reports. It also appears this report possibly would produce a different result because as the carrier argued on this issue in closing "the final word has to come from [Dr. E] who said 'unknown etiology.'"

The hearing officer's decision and order are reversed and the case is remanded for the hearing officer to admit into evidence Dr. E's report dated February 13, 2003. The carrier is to be provided a copy of the report and both parties should be allowed to comment on the report. The hearing officer is to then consider the report and the parties' arguments, if any, and reconsider her decision on the extent-of-injury issue.

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 Texas Workers' Compensation Commission's Division of Hearings, 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 Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge