

APPEAL NO. 033189
FILED JANUARY 20, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 31, 2003. The record was reopened and closed on November 3, 2003. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter, August 5 through November 3, 2003. The claimant appealed the determination of nonentitlement. The respondent (carrier) responded, contending that there was sufficient evidence to support the disputed determinations.

DECISION

Reversed and rendered.

The claimant attached documents to his appeal, some of which were not admitted into evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally* 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). 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 Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence, in that the claimant did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing or that its inclusion in the record would probably result in a different decision. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated that the claimant sustained a compensable injury in a motor vehicle accident on May 15, 2001; that the claimant had an impairment rating of 15%; and that the qualifying period for the third quarter was April 23 through July 22, 2003. At issue was whether the claimant's unemployment was a direct result of the impairment from the compensable injury and whether the claimant had a total inability to work during the qualifying period. The hearing officer's findings that the claimant provided a narrative report from a doctor that specifically explained how or why the impairment, specifically memory loss, from the claimant's compensable injury caused him to have a total inability to do any work at all during the qualifying period and that no record in evidence showed that the claimant was able to return to some type of work during the qualifying

period, were not appealed. Additionally, the hearing officer's finding that during the qualifying period, considering all the factors that affected him at that time, the claimant was not able to perform any type of work in any capacity was not appealed.

The hearing officer determined that during the qualifying period the claimant did not return to work but that this was not a direct result of the claimant's impairment from his compensable injury. The hearing officer was persuaded that during the qualifying period the claimant suffered from a memory loss that precluded his employment but that the claimant had this preexisting memory loss prior to his compensable injury, which was caused as a side effect of long-term use of Vicodin, and from cerebrovascular disease in the arteries in his head. The evidence reflects that the claimant's impairment rating was determined using criteria contained in the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) for disturbances of mental status and integrative functioning.

With regard to the direct result criteria, Rule 130.102(c) provides that an "injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings." The Appeals Panel has held that the "direct result" criteria may be established by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the preinjury employment. Texas Workers' Compensation Commission Appeal 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771 decided June 29, 1995. We have also held that to meet the direct result requirement, one only need prove that the unemployment was a direct result of the compensable injury. See Texas Workers' Compensation Commission Appeal No. 001786, decided September 13, 2000.

With these principles in mind, we are unable to affirm the hearing officer's determination in this case that the claimant's unemployment was not a direct result of his compensable injury. The claimant certainly had a significant injury, the claimant's impairment rating was assessed in part on his memory loss, and the hearing officer found that the narrative report specifically explained how the memory loss caused him to have a total inability to work during the qualifying period. While direct result is normally a fact question for the hearing officer, we believe that the hearing officer's direct result determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We reverse that determination and render a new determination that the claimant's unemployment is a direct result of her compensable injury.

The hearing officer's determinations that the claimant's unemployment in the qualifying period for the third quarter was not a direct result of her impairment from the compensable injury and that he is not entitled to SIBs for the third quarter are reversed and a new decision rendered that the claimant's unemployment in the qualifying period was a direct result of his impairment from the compensable injury and that the claimant

is entitled to SIBs for the third quarter. Accrued and unpaid benefits should be paid in a lump sum with interest.

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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge