APPEAL NO. 071721
FILED NOVEMBER 19, 2007

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 August 8, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the date of injury is _____; (2) the appellant's (claimant) compensable injury does not extend to or include a cervical strain; and (3) the claimant did not have disability due to her compensable injury. The claimant appealed the hearing officer's extent of injury and disability determinations. The respondent (self-insured) responded, urging affirmance. The hearing officer's date of injury determination was not appealed and it has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

FACTUAL SUMMARY

The parties stipulated that the "Claimant sustained only one compensable injury, with a date of injury of _____ or (alleged date of injury)." The hearing officer determined that the date of injury is _____, and that determination was not appealed. The claimant testified that while she was in the restroom at work, she slipped and struck her forehead on a toilet on _____. The claimant testified that she returned to work on February 17, 2007. However, the claimant experienced headaches and numbness to her left arm and leg on (alleged date of injury), and she was taken to the hospital by ambulance that same day. The hospital medical records dated February 21, 2007, state that the claimant was diagnosed with "Concussion, mild," "Cervicalgia with pinpoint tenderness of the paraspinal muscles including the occiput," and that the claimant "may have a flexion, extension injury to the neck." In a "Letter of Medical Causation" dated May 2, 2007, Dr. D states that the claimant sustained a work-related injury on _____, when she slipped and struck her head on a toilet and complained of headaches and neck pain. Dr. D states that "[d]ue to the mechanism of injury, she hyper-extended her neck causing an injury to her cervical spine."

The parties stipulated that Dr. K was the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, and that Dr. K was requested by the Division to determine the extent of the claimant's compensable injury, and to determine whether the claimant's disability is a direct result of the work-related injury. Dr. K examined the claimant on May 25, 2007, and he stated that the claimant's compensable injury extended to "a forehead contusion only" and that the claimant did not have disability due to the compensable injury. The hearing officer found that Dr. K's determinations that the cervical strain is not a part of the claimant's

injury and that her claimed disability is not related to the compensable injury are supported by the preponderance of the evidence.

NEWLY DISCOVERED EVIDENCE

The claimant attaches to her appeal a copy of Dr. K's narrative report dated August 3, 2007, in which he certifies maximum medical improvement (MMI) and assigns an impairment rating (IR). The claimant states that "[t]he August 3, 2007, report was not available until after the [CCH]" and requests that Dr. K's narrative report of August 3, 2007, be considered for the first time on appeal. Dr. K states in his narrative report of August 3, 2007, that he did not previously have the treating doctor's medical records dated May 2, 2007, and that he would amend his prior narrative report dated May 25, 2007, regarding the extent of the compensable injury. 28 TEX. ADMIN. CODE § 126.7(i)(1) (Rule 126.7(i)(1)) provides that the treating doctor and insurance carrier shall provide to the designated doctor copies of all the employee's medical records in their possession relating to the medical condition to be evaluated by the designated doctor. For subsequent examinations with the same designated doctor, only those medical records not previously sent must be provided.

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 appellant after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to the lack of diligence, and whether it is so material that it would probably result in a different decision. Appeals Panel Decision (APD) 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We believe that in this case Dr. K's narrative report of August 3, 2007, came to the knowledge of the appellant after the CCH, that it is not cumulative of other evidence of record, that it was not due to lack of diligence that it was not offered at the CCH, and that it is so material that it would probably result in a different decision. The claimant has provided newly discovered evidence on appeal where a remand is warranted based on that evidence.

EXTENT OF INJURY

Section 408.0041(a)(3) provides that at the request of the insurance carrier or an employee, or on the Commissioner's own order, the Commissioner may order a medical examination to resolve any question about the extent of the claimant's injury. Rule 126.7(c)(3) provides, in part, that a designated doctor examination shall be used to resolve the question about the extent of the compensable injury. *See also* Rule 126.7(i)(1). Rule 126.7(w) provides that Rule 126.7 is effective on January 1, 2007, and a request for a designated doctor under Rule 126.7 may be made on or after January 1, 2007.

In this case, Dr. K's narrative report dated May 25, 2007, states that he obtained a "history from the examinee, perform[ed] a physical examination, and thoroughly review[ed] the available medical records" and he opined that the extent of injury is a

"forehead contusion only." Dr. K's states his opinion "is based primarily on review of the medical records, which are very inconsistent with examinee's history and complaints."

In a second narrative report dated August 3, 2007, Dr. K certifies that the claimant reached MMI and assigned an IR for the claimant's compensable injury. This second narrative report was attached to the claimant's appeal as newly discovered evidence. Dr. K states in that second narrative report that:

> Please refer to my report of May 25, 2007. There is one more medical record to add and that is:
> On May 2, 2007, a letter from [Dr. D] stating that [claimant] had a work-related injury on _____, and opined at the mechanism of injury she hyperextended her neck causing an injury to her cervical spine. (I agree that she sustained a hyperextension injury to her cervical spine, which I did not note on the extent of injury and will dictate an addendum to that report). He further states that the cervical injury is related to her work injury on _____. Her work injury was actually on (alleged date of injury). Her injury of _____, was at home in her bathroom.[1]

It is clear from Dr. K's second narrative report that he did not have the treating doctor's medical records, specifically Dr. D's report dated May 2, 2007, as required by Rule 126.7(i), when he determined the extent of the compensable injury. Additionally, Dr. K states that he will amend his first report dated May 25, 2007, in which he determined the extent of the claimant's compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant's compensable injury does not extend to or include a cervical strain and we remand the extent-of-injury issue to the hearing officer.

DISABILITY

Section 408.0041(a)(4) provides that at the request of the insurance carrier or an employee, or on the Commissioner's own order, the Commissioner may order a medical examination to resolve any question about whether the injured employee's disability is a direct result of the work-related injury. *See also* Rules 126.7(c)(4), 126.7(i)(1), and 126.7(w).

Dr. K's second narrative report dated August 3, 2007, establishes that he did not have the treating doctor's medical records, specifically Dr. D's report dated May 2, 2007, as required by Rule 126.7(i), when he determined whether the claimant's disability is a direct result of the claimant's work-related injury. Accordingly, we reverse the hearing officer's determination that the claimant did not have disability, and we remand the disability issue to the hearing officer.

[1] As previously noted, the hearing officer determined that the date of injury for the compensable injury is _____, not (alleged date of injury).

ON REMAND

We remand this case for further consideration and development of the evidence. The hearing officer is to allow the parties the opportunity to offer into evidence Dr. K's report of August 3, 2007. If either party requests clarification of Dr. K's report of May 25, 2007, regarding extent of injury or disability, or if the hearing officer chooses at his discretion to obtain clarification of that report, then the hearing officer is to contact Dr. K to obtain such clarification, after determining that Dr. K is still qualified and available to be the designated doctor. If clarification of Dr. K's May 25, 2007, report is sought, then the hearing officer shall cause to be forwarded to Dr. K copies of all the claimant's medical records relating to the medical condition to be evaluated, including Dr. D's report of May 2, 2007, that have not previously been provided to Dr. K. The hearing officer is to provide Dr. K's response to the request for clarification to the parties and allow the parties an opportunity to respond, and then make a determination regarding the issues of extent of injury and disability.

SUMMARY

We reverse the hearing officer's determination that the claimant's compensable injury does not extend to or include a cervical strain and we remand the extent-of-injury issue to the hearing officer. We reverse the hearing officer's determination that the claimant did not have disability and we remand the disability issue to the hearing officer.

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 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge