

APPEAL NO. 101100
FILED OCTOBER 13, 2010

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 July 14, 2010. The hearing officer resolved the sole issue before him by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 12th quarter. The appellant (carrier) appealed the hearing officer's determination as well as attached documentation for consideration as newly discovered evidence. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____, which resulted in an impairment rating (IR) of 15% or greater; the qualifying period for the 12th quarter of SIBs was from January 1 through April 1, 2010; and during the qualifying period for the 12th quarter of SIBs the claimant was unemployed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142(a)(2) provides that a threshold requirement for entitlement to SIBs is that the employee has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment. The claimant's theory of entitlement to SIBs for the 12th quarter was a combination of active work search efforts documented by job applications and active participation in a vocational rehabilitation program conducted by the Department of Assistive and Rehabilitative Services or a private vocational rehabilitation provider. See Section 408.1415(a)(1) and (3) referencing work search compliance standards. The claimant testified at the CCH that she had not worked since (month) of 2004.

The evidence attached to the carrier's appeal, is a (City), Texas Police Department Arrest Report, an Affidavit for Arrest Warrant or Capias for the State of Texas, County of (county name), and a signed Magistrate's Determination of Probable Cause for the arrest of the claimant, each document dated July 22, 2010, referencing the claimant's attempted use of another person's credit card and possession of a fake (state) identification card. In its appeal, the carrier states that following the July 14, 2010, CCH, it received a phone call from the (City) Police Department and a detective provided information to the carrier that the claimant had told the detectives that she possessed a fake (state) driver's license so that she could work in Texas undetected by the carrier and the Texas Department of Insurance, Division of Workers' Compensation (Division) and simultaneously receive workers' compensation benefits. The carrier contends that the claimant is currently charged with tampering with government records.

The carrier requests that the case be remanded to the hearing officer for development of the record because the newly discovered evidence is material to the hearing officer's determination not only as to the credibility of the claimant's testimony at the July 14, 2010, CCH but as to the threshold requirement of direct result and the requirement of active work search efforts under the claimant's theory of entitlement. We agree. Section 408.142(a) provides:

An employee is entitled to [SIBs] if on the expiration of the impairment income benefit [IIBs] period computed under Section 408.121(a)(1) the employee:

- (1) has an [IR] of 15% or more as determined by this subtitle from the compensable injury;
- (2) has not returned to work or has returned to work earning less than 80% of the employee's [AWW] as a direct result of the employee's impairment;
- (3) has not elected to commute a portion of the [IIBs] under Section 408.128; and
- (4) has complied with the requirements adopted under Section 408.1415.

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). 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.

We believe that this case presents one of those few circumstances where the carrier has provided newly discovered evidence on appeal where a remand is warranted based on that evidence. In this case, the newly discovered evidence was not in existence at the time of the July 14, 2010, CCH and the claimant had not yet made statements contrary to her CCH testimony as she did during her July 22, 2010, arrest. The alleged statements made on July 22, 2010, if true, call into question whether the claimant meets the threshold requirement for SIBs entitlement under Section 408.142(a)(2). The unavailability of the new evidence at that CCH 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.

The hearing officer's decision and order are reversed and the case is remanded for the hearing officer to take evidence concerning the newly discovered evidence and to permit the parties to present evidence on the merits of the claim at the CCH on remand.

Accordingly, we reverse the hearing officer's determination that the claimant is entitled to SIBs for the 12th quarter and we remand this case back to the hearing officer to allow the development of the record concerning the newly discovered evidence.

Given that we have reversed the hearing officer's SIBs determination and remanded the case to the hearing officer on the basis of newly discovered evidence, we do not reach the carrier's point of error concerning the sufficiency of the evidence challenge to the claimant's entitlement to 12th quarter SIBs.

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

**RICHARD A. MAYER
11910 GREENVILLE AVENUE, SUITE 600
DALLAS, TEXAS 75243.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge