

APPEAL NO. 110304
FILED MAY 4, 2011

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 February 10, 2011. The hearing officer resolved the disputed issue by deciding that the compensable injury of _____, extends to a rotator cuff tear with tears of the supra and entire infraspinatus tendons, and shoulder contusion with microfracture of the humerus but that the compensable injury of _____, does not extend to a prominent strain to the subscapularis tendon, extreme thickening of the biceps tendon consistent with tendinosis, damage to the subacromial and subdeltoid bursa, and a subtle marrow edema involving the humeral head and neck.

The appellant/cross-respondent (carrier) appealed, disputing the hearing officer's determination that the compensable injury of _____, extends to a rotator cuff tear with tears of the supra and entire infraspinatus tendons and shoulder contusion with microfracture of the humerus. The carrier attached to its appeal newly discovered evidence and contended that the hearing officer failed to address all of the conditions listed in the extent-of-injury issue at the CCH. The respondent/cross-appellant (claimant) responded, urging affirmance of the determinations appealed by the carrier. The claimant also cross-appealed, disputing those extent-of-injury determinations that were unfavorable to him. The carrier responded, urging affirmance of the determinations cross-appealed by the claimant.

The hearing officer's determination that the compensable injury of _____, extends to shoulder contusion with microfracture of the humerus in the right shoulder was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part as reformed and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____, and that (Dr. P) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to serve as the designated doctor to determine the extent of the claimant's compensable injury.

The carrier attached to its appeal, various medical reports dated prior to the date of injury at issue and the claimant's recorded statement taken on June 18, 2010, which had not been offered or admitted into evidence at the CCH. Documents submitted for the first time on appeal (or in this case in a response) are generally not considered unless they constitute newly discovered evidence. See *generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.—Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response 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. Upon review we cannot agree that these documents meet the requirements of newly discovered evidence and they were not considered.

The hearing officer's determination that the compensable injury of _____, extends to a rotator cuff tear with tears of the supra and entire infraspinatus tendons is supported by sufficient evidence and is affirmed. We reform the hearing officer's determination to reflect the conditions at issue were in the claimant's right shoulder.

The hearing officer's determination that the compensable injury of _____, does not extend to a prominent strain to the subscapularis tendon, extreme thickening of the biceps tendon consistent with tendinosis, damage to the subacromial and subdeltoid bursa, and a subtle marrow edema involving the humeral head and neck is supported by sufficient evidence and is affirmed.

The carrier correctly noted in both its request for review and its response that the hearing officer failed to make a determination on one of the conditions at issue in the extent of injury dispute at the CCH. The hearing officer correctly stated the issue in his decision and order but failed to address all of the extent-of-injury conditions at issue. The hearing officer failed to make a finding of fact, conclusion of law, or decision on whether the compensable injury of _____, extends to a subcortical cystic erosion involving the anterior humeral head.

The hearing officer erred in failing to address all of the extent-of-injury conditions as stated in the issue reported out of the benefit review conference report. Accordingly, we reverse the hearing officer's decision as being incomplete and remand the case for the hearing officer to consider and make a finding of fact, conclusion of law, and a decision on whether the compensable injury of _____, extends to a subcortical cystic erosion involving the anterior humeral head. No additional evidence is required.

SUMMARY

We affirm as reformed the hearing officer's determination that the compensable injury of _____, extends to a right shoulder rotator cuff tear with tears of the supra and entire infraspinatus tendons.

We affirm the hearing officer's determination that the compensable injury of _____, does not extend to a prominent strain to the subscapularis tendon, extreme thickening of the biceps tendon consistent with tendinosis, damage to the subacromial and subdeltoid bursa, and a subtle marrow edema involving the humeral head and neck.

We reverse and remand this case for the hearing officer to make a determination on whether the compensable injury of _____, extends to subcortical cystic erosion involving the anterior humeral head.

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.

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge