

APPEAL NO. 130484
FILED APRIL 22, 2013

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 10, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained a compensable injury on [date of injury]; (2) the employer did not make a bona fide offer of employment (BFOE) to the claimant, therefore, the appellant (carrier) is not entitled to adjust the post-injury weekly earnings from July 4, 2012, to the date of the CCH; and (3) the claimant had disability resulting from the compensable injury of [date of injury], beginning June 23 through June 25, 2012, and from June 29, 2012, through the date of the CCH.

The carrier appealed the hearing officer's determinations, as well as attached documentation for consideration as newly discovered evidence. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she sustained an injury to her left shoulder at work on [date of injury], when she was lifting two boxes weighing approximately 20 to 25 pounds.

BFOE

The hearing officer's determination that the employer did not make a BFOE to the claimant, and therefore, the carrier is not entitled to adjust the post-injury weekly earnings from July 4, 2012, to the date of the CCH is supported by sufficient evidence and is affirmed.

NEWLY DISCOVERED EVIDENCE

The carrier contends in its appeal that on January 25, 2013, after the January 10, 2013, CCH, the carrier received information that the claimant had been working full time beginning in January 2013 at a chiropractic clinic. An investigation of the claimant's activities was conducted, and it was revealed in a formal surveillance report that the claimant began working full time for the chiropractic clinic since January 2, 2013. The carrier further contended it received the surveillance report on February 7, 2013, which documented the claimant's activities and verified the claimant's date of hire was January 2, 2013. The carrier attached the surveillance report to its appeal, arguing it

constituted newly discovered evidence and requests reversal of the hearing officer's determinations. The carrier points out in its appeal that the hearing officer based her determinations that the claimant sustained a compensable injury on [date of injury], and that the claimant sustained disability in part on the claimant's "credible testimony."

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); see *also* APD 101100, decided October 13, 2010. 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 this case presents one of those few circumstances where the carrier has provided newly discovered evidence on appeal which warrants a remand based on that evidence. In this case, the carrier was not made aware of the claimant's employment with the chiropractic clinic until January 25, 2013, after the CCH. The carrier received the surveillance report confirming the claimant's activities on or about February 7, 2013, and filed its appeal on February 8, 2013.

The claimant testified at the CCH that she had not earned any wages since her last day of work with the employer, June 28, 2012, and that, when asked what she has been doing since September for the last year, she said that she has been doing "nothing," just staying at home. In evidence were conflicting statements from witnesses regarding whether the claimant sustained an injury on [date of injury]. The hearing officer makes clear in her decision that she based her determinations that the claimant sustained a compensable injury on [date of injury], and that the claimant sustained disability for the claimed periods in part on the claimant's "credible testimony."

The claimant's alleged full time employment beginning nine days prior to the CCH, if true, calls into question her credibility on the issues of compensability and disability. The unavailability of the new evidence at that CCH was 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.

We therefore reverse the hearing officer's determinations that the claimant sustained a compensable injury on [date of injury], and that the claimant had disability resulting from the compensable injury of [date of injury], beginning June 23 through

June 25, 2012, and June 29, 2012, through the date of the CCH (January 10, 2013), and remand the case for the hearing officer to allow the development of the record concerning the newly discovered evidence and to permit the parties to present evidence on the merits of the claim at the CCH on remand.

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 Department of Insurance, Division of Workers' Compensation, 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 **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge