

APPEAL NO. 191285
FILED SEPTEMBER 5, 2019

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 June 20, 2019, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the appellant (claimant) reached maximum medical improvement (MMI) on November 8, 2018; and (2) the claimant's impairment rating (IR) is zero percent. The claimant appealed, disputing the ALJ's determinations. The claimant contends that he received a utilization review dated June 21, 2019, the day after the CCH, approving a requested surgical procedure for his compensable injury that should be considered as newly discovered evidence. The respondent (carrier) responded, urging affirmance of the ALJ's determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), in the form of right elbow mild epicondylitis. The claimant testified he felt pain in his right elbow while using a lot of force to insert a shaft into a Toyota Tacoma.

The claimant contends that after the June 20, 2019, CCH he received a utilization review determination dated June 21, 2019, that approved surgery requested as treatment for his compensable injury. The claimant further contends this utilization review determination shows there is reasonable medical probability that further material recovery could reasonably be anticipated for the compensable injury. The claimant attached the utilization review determination to his appeal and contends it constitutes newly discovered evidence.

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 claimant has provided newly discovered evidence on appeal which warrants a remand based on that evidence. The utilization review determination approving the requested surgery was not available at the time of the June 20, 2019, CCH, it is not cumulative of other evidence in the record, its unavailability was not due to any lack of diligence on the claimant's part, and appears to be so material that it would probably result in a different decision. See APD 100457, decided June 25, 2010; APD 130484, decided April 22, 2013; APD 182031, decided November 8, 2018.

We therefore reverse the ALJ's determinations that the claimant reached MMI on November 8, 2018, with a zero percent IR, and remand this case for the ALJ 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 ALJ, 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 **mitsui sumitomo insurance company of america** 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:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge