

APPEAL NO. 200029
FILED MARCH 5, 2020

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 6, 2019,¹ September 30, 2019, and concluded on November 21, 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 compensable injury of (date of injury), extends to lumbar sprain/strain, right buttocks contusion, right back contusion, right flank contusion, and abdominal sprain/strain; (2) the compensable injury of (date of injury), does not extend to umbilical hernia or right acute axonal L5-S1 radiculopathy and denervation; (3) the respondent (claimant) has not reached maximum medical improvement (MMI); (4) the claimant's impairment rating (IR) is not ripe for adjudication; and (5) the claimant had disability from September 7, 2018, through September 3, 2019.

The appellant (carrier) appealed the ALJ's determinations of MMI, IR, and disability. The carrier attached documentation for consideration as newly discovered evidence. The appeal file does not contain a response from the claimant to the carrier's appeal. The ALJ's determinations that the compensable injury of (date of injury), extends to lumbar sprain/strain, right buttocks contusion, right back contusion, right flank contusion, and abdominal sprain/strain but does not extend to umbilical hernia or right acute axonal L5-S1 radiculopathy and denervation were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that extends to an abdominal contusion and low back contusion; and that the claimant's date of statutory MMI is September 10, 2020. The claimant testified she was injured when she fell from a rung on one level of a scaffold into the entrance hole of a lower level of the scaffold.

We note the decision states in the Evidence Presented section that the following exhibits were admitted at the CCH: ALJ's Exhibits 1 through 4; Claimant's Exhibits 1 through 13; and Carrier's Exhibits A through O. However, the record reflects that ALJ's Exhibits 1 through 5 and Claimant's Exhibits 1 through 15 were admitted at the CCH.

¹ We note the decision incorrectly states the first CCH setting occurred on August 8, 2019.

NEWLY DISCOVERED EVIDENCE

The carrier contends on appeal that after the CCH it received information the claimant worked during the period of disability at issue, which is contrary to her testimony that she has not worked since (date of injury), the date of injury. An employment verification report dated December 23, 2019, revealed the claimant had applied for and began working full time on September 10, 2018, and continued working through October 17, 2018. The carrier attached the employment verification report to its appeal, arguing it constituted newly discovered evidence. The carrier also contends that “[m]ultiple other employers have confirmed verbally that [the claimant] worked for them after her compensable injury,” but due to “holiday availability issues” the carrier does not yet have written confirmation of the claimant’s work activities. The carrier requests reversal of the ALJ’s MMI, IR, and disability determinations and that the case be remanded to the ALJ to consider this 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 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 during the claimed period of disability until a date after the CCH. The carrier received the employment verification on or about December 23, 2019, and filed its appeal on December 30, 2019.

The claimant testified at the CCH held on August 6, 2019, that she has not been able to return to work and has not worked since (date of injury), the date of injury. When asked by the ALJ at the CCH held on November 21, 2019, whether she still had not returned to work, the claimant replied that she had not. We note that (Dr. T), the designated doctor appointed to determine MMI, IR, and return to work, examined the claimant on September 3, 2019, and discussed in his report the claimant’s “ongoing pain burden” and her “ability to return as a productive member of the job force.”

The claimant's alleged full-time employment between September 10 through October 17, 2018, if true, calls into question her credibility on the issues of disability, MMI, and IR. The unavailability of the new evidence at the 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. See APD 100457, decided June 25, 2010, and APD 130484, decided April 22, 2013.

We therefore reverse the ALJ's determinations that the claimant had disability from September 7, 2018, through September 3, 2019, that the claimant has not reached MMI, and that the claimant's IR is not ripe for adjudication, and we remand those issues for the ALJ to allow the development of the record concerning the newly discovered evidence and to permit the parties to present evidence at the CCH on remand.

We note the disability issue as agreed by the parties was from September 7, 2018, through the present. As noted above the ALJ determined the claimant had disability from September 7, 2018, through September 3, 2019. The ALJ made no findings of fact, conclusions of law, or a decision regarding disability from September 4 through November 21, 2019, the date of the CCH. The ALJ stated in the Decision portion that "disability after September 3, 2019, is not determined in this decision." The ALJ's disability determination is incomplete. On remand the ALJ is to make findings of fact, conclusions of law, and a decision whether the claimant had disability from September 7, 2018, through the date of the CCH, to conform to the disability issue before him.

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

**RICHARD J. GERGASKO, PRESIDENT
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge