

APPEAL NO. 012227
FILED OCTOBER 17, 2001

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 27, 2001. The hearing officer determined that the respondent/cross-appellant's (claimant) compensable (left foot) injury of _____, includes an injury to the left ankle, that the hearing officer "does not have authority to determine disability for the period _____, through August 31, 1998," (because another hearing officer at a CCH held on August 31, 1998, had previously decided disability for that period) and that the claimant had disability from September 1, 1998, through the date of the CCH (even though temporary income benefits (TIBs) would be payable only through the date of statutory maximum medical improvement (MMI) (Section 401.011(30)(B))).

The appellant/cross-respondent (carrier) appeals contending that the extent of injury to the ankle had also been previously decided at the August 31, 1998, CCH and in Texas Workers' Compensation Commission Appeal No. 982449, decided November 23, 1998. The claimant appeals the hearing officer's findings that he began missing work without pay on _____, and that disability through December 31, 1997, had been determined at the prior CCH, contending that the employer's checks for a period of time "were no good." The carrier urges affirmance of the hearing officer's decision on the claimant's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant was a 70-plus-year-old employee who sustained a compensable injury when a heavy steel pipe fell on his foot/ankle.

A CCH conducted by another hearing officer was held on August 31, 1998, to determine (1) who the employer was, (2) whether the claimant sustained a compensable injury on _____, and (3) whether the claimant had "disability from August 1 through December 31, 1997." That hearing officer determined who the employer was, that "the claimant sustained a compensable left foot injury" and that the claimant had disability from August 1, 1997, through December 31, 1997. The carrier appealed that decision and the Appeals Panel affirmed the hearing officer's decision on all the issues in Appeal No. 982449, *supra*.

The carrier in this proceeding argues that the August 31, 1998, CCH and our affirmance in Appeal No. 982449 limited the compensable injury to the claimant's left foot and that decision was *res judicata* regarding the claimed ankle injury. We would first note that the great majority of the 1998 CCH and Appeal No. 982449 dealt with who the employer was. Further, a careful reading of both the 1998 decision and order and Appeal No. 982449 in evidence fails to indicate anywhere that the ankle was mentioned, much less

litigated. In its appeal the carrier references the transcript of the 1998 CCH, which was briefly discussed in this case, but was never placed in evidence and is not before us now. The carrier relies on, and cites, the claimant's testimony, on cross-examination in this case, that the claimant told the other "lady judge" that he "had hurt [his] ankle on the March the 5th;" "Q. Just like you did today? A. yes." What the carrier does not quote is that the claimant went on to say:

- A. As well as I remember. I can't remember it all because I'm --
- Q. Well, but that's the truth, right?
- A. That's right.
- Q. So that must have been what you told her, right?
- A. Right.

The hearing officer, in this case, did not address the carrier's contention that the ankle injury had been litigated and resolved in the 1998 CCH, but rather addresses the evidence that supports the fact that the pipe hit both the claimant's foot and ankle injuring the "anterior talofibular ligament, a part of the ankle." In view of the evidence that the claimant may have mentioned that he hurt his ankle at the 1998 CCH but "can't remember it all" and the lack of any mention in the 1998 decision and order or Appeal No. 982449, *supra*, of a claimed ankle injury, we decline to hold that the existence of an ankle injury was fully litigated and decided in the 1998 CCH and our Appeal No. 982449. In that respect we do not find Texas Workers' Compensation Commission Appeal No. 950690, decided June 15, 1995, cited by the carrier, dispositive of this case.

Regarding the claimant's appeal, the claimant's testimony established that after his injury on _____, the claimant had been promised some sort of pay continuation by one of the employer's owners because he had been a longtime family friend and the claimant had been given 13 checks from the employer after his injury, but the checks had been returned unpaid ("no good"). In any event, the claimant's testimony was that after _____, he was unable to work because of his compensable injury for at least two weeks before he got any of the checks (income benefits began to accrue, in accordance with Section 408.082). The hearing officer at the 1998 CCH found that the claimant had disability, and was entitled to TIBs from August 1, 1997, through December 31, 1997. The hearing officer in this case commented that statutory MMI would be on or about March 10, 1998. Section 408.102(a) provides that TIBs from August 1, 1997, continue until the employee reaches MMI. In this case the hearing officer found that the claimant had disability beginning on September 1, 1998 (the day after the 1998 CCH). Section 408.102(a) limits the payment of TIBs to when the claimant reaches MMI, in this case statutory MMI which by operation of law was on or about March 10, 1998.

The record before us is not clear why the claimant only claimed disability from August 1, 1997 through December 31, 1997, however, that is how the issue in the 1998 CCH was framed and the prior hearing officer found disability for that period of time. The hearing officer in this case makes a conclusion of law that "[t]his hearing [officer?] does not have authority [jurisdiction?] to determine disability for the period March 6, 1996 through

August 31, 1998.” We disagree that the hearing officer did not have authority or jurisdiction to decide disability for this period, although the period of August 1, 1997 through December 31, 1997, was resolved by the prior hearing. The stated issue in the 1998 CCH only covered the period of August 1 through December 31, 1997. As noted previously we are unaware of why the December 31, 1997, was the end date placed in issue and why claimant at that time only claimed disability to that date. The Appeals Panel has early held that an injured employee may go in and out of, or have intermittent periods of disability. Texas Workers’ Compensation Commission Appeal No. 92463, decided October 14, 1992. Because the period of disability claimed at the 1998 CCH was limited to the period of August 1, 1997 to December 31, 1997, we remand the case for the hearing officer to determine whether the claimant had disability after December 31, 1997.

The hearing officer’s decision on the extent of injury is affirmed as being supported by the evidence. The issue of disability is remanded for the hearing officer to determine disability after December 31, 1997. The hearing officer may find it necessary to obtain additional evidence on the limited issue of disability.

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 Workers’ Compensation Commission’s Division of Hearings, pursuant to Section 410.202 (amended June 17, 2001). See Texas Workers’ Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS SUITE 750, COMMODORE 1
AUSTIN TEXAS 78701**

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge