

APPEAL NO. 021051
FILED JUNE 20, 2002

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 originally on October 18, 2001. A hearing was held on February 22, 2002, pursuant to a remand by the Appeals Panel, Texas Workers' Compensation Commission Appeal No. 012870, decided January 4, 2002. The hearing officer found that the respondent/cross-appellant (claimant) had disability for the period from February 9 through March 12, 2000, and "1/2 disability" for the period from March 13 through December 31, 2000. He further found that the claimant reached maximum medical improvement (MMI) on January 1, 2001, per agreement of the parties.

The appellant/cross-respondent (carrier) has appealed and argues that there is no basis to support findings of any disability. The claimant responds that the decision should be affirmed on these points. The claimant has appealed the determination that he did not have any disability prior to the periods of time found by the hearing officer. The claimant also questions why the carrier has not been held to compliance with various statutes and rules relating to disputing compensability. There was no response from the carrier to the claimant's appeal.

DECISION

Affirmed in part; reversed and rendered in part.

We affirm the determination that the claimant had disability (the inability to obtain and retain employment at wages equivalent to his preinjury average weekly wage (AWW)) for the period from February 9 through March 12, 2000. The record supports this finding. While the claimant argues facts that he believes support a finding of disability prior to February 9, 2000, we have reviewed the record and, while we find conflicting evidence from which different inferences could be drawn, we cannot agree that the hearing officer's determination that the claimant had disability from February 9 through March 12, 2000, is against the great weight and preponderance of the evidence, given somewhat imprecise testimony from the claimant about his periods of work, his volunteer work conducted in lieu of employment, various time periods that he may have contended he was "retired," and his other medical problems not related to the compensable injury. The presence or absence of a release from a doctor is not conclusive on the existence or absence of disability. Likewise, the analysis is also broader than whether a claimant can return to his former occupation with existing medical restrictions. The hearing officer erred, however, in finding "1/2 disability" from March 13 through December 31, 2000.

When a worker has returned to work after an injury and has earned wages that he contends are less than his prior wage, a determination of the amount of the preinjury AWW is essential to an accurate analysis of the disability issue and is effectively

subsumed in that issue. This is why the Appeals Panel suggested (and perhaps should have directed) that either stipulations or findings should be made on AWW. There was no indication of an active dispute by the carrier about the amount of AWW in either hearing session and, indeed, any such dispute for a July 1997 injury should have been activated well before the February 22, 2002, CCH. Because the carrier had not brought forward any dispute to the AWW in the years since the claimant was injured, and because we cannot remand for the AWW finding needed to review the existence of disability, we find that the claimant's preinjury AWW was \$1,326.85 (the amount described by the hearing officer as a "reference point") and have reviewed the appealed determinations using this figure.

Disability is analyzed by comparing the preinjury AWW of the worker and the post-injury earnings; if there is a differential, and it cannot be said that the post-injury earnings (if any) are "equivalent to" the preinjury AWW, then the facts are analyzed to determine whether the injury is a factor (not necessarily the sole factor) in leading to diminished post-injury earnings. The analysis is the same whether the injured worker has returned to work or not. Whether a worker has disability and whether he or she has reached MMI are separate issues; it is payment of temporary income benefits (TIBs), not disability, that is ended by MMI. Sections 408.101 and 408.102(a).

Whether the post-injury earnings exceed the state AWW established under Section 408.061 is irrelevant to the analysis of disability, because the state AWW is intended merely to cap the amount of the TIBs payment. Section 408.103. Consequently, the hearing officer's assertion that disability is "moot" for 1998 because the claimant earned more than the state AWW is legally wrong. However, this is not reversible error as the hearing officer also indicated that he did not believe he could rely on the claimant's testimony alone to support disability during this period.

There is no such concept in the 1989 Act as "1/2 disability" as the hearing officer has found in this case. This conclusion of law appears to emanate from the hearing officer treating the claimant's work restrictions as tantamount to a credit for a bona fide job offer (Section 408.103(e)), which was neither in issue nor in evidence. Therefore, given the believed medical evidence that the claimant had restrictions on his ability to work for the period from March 13 through December 31, 2000, and because we cannot remand again for the correct application of the law, we reverse the determination that the claimant has "1/2 disability" and render a decision that the claimant had disability for the entire period of February 9 through December 31, 2000. As stated above, we otherwise affirm the decision.

We would, in conclusion, note that various arguments by the claimant concerning the timeliness of disputes by the carrier in accordance with Section 409.021 were not raised for consideration by the hearing officer but should have been if a ruling on timely dispute was desired.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE** and the name and address of its registered agent for service of process is

**BARBARA SACHSE
9020 N. CAPITAL OF TEXAS HWY, SUITE 555
AUSTIN, TEXAS 78759-7232.**

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Judge