

APPEAL NO. 021772  
FILED ON AUGUST 30, 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 was held on April 16, 2002. In Texas Workers' Compensation Commission Appeal No. 021144, decided June 12, 2002, the Appeals Panel affirmed the hearing officer's decision that the appellant (claimant) had sustained a compensable hernia injury on \_\_\_\_\_. The Appeals Panel reversed the hearing officer's decision that the claimant had no disability commenting that given "the hearing officer's decision that the hernia was compensable as affirmed in [Appeal No. 021144], the determination that the claimant did not have disability is against the great weight and preponderance of the evidence." The claimant had two surgeries, one on November 12, 2001, and the other (as found by the hearing officer in this decision) on February 17, 2002. Although the Appeals Panel suggested that the hearing officer, at his discretion, might receive additional evidence, the hearing officer declined to do so and found disability only on the dates of surgery (*i.e.* November 12, 2001, and February 17, 2002).

The claimant appealed, contending that she had greater disability than two days, that she was never released to "full duty status," and that she may have "worked some 2-3 days but not full days." The claimant submitted an additional medical report (indicating the infected mesh was removed "on January 17, 2002," and that the hernia would be "repaired in the near future"). The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The hearing officer, in his discussion recites that "the claimant did not know the dates when she missed work." That may be partially correct, however, the claimant testified that Dr. B took her off work "on October 25th of 2001" but she may have worked some after that and the only way "to get the precise days I did work is to go through human resources." The claimant testified that she returned to work "towards the end of February [2002]." (TR page 37). The hearing officer comments that a relative (Ms. M) "testified to the effect that the claimant did house work at times when she did not work for employer." What Ms. M testified to was:

Q: But you think that the surgery that [claimant] had in November she should have been able to return to work; is that correct?

A: Yes. Because again I reiterate, I've seen things that she'd do. When I come home, she'd be vacuuming, our clothes would be done, she'd cook. And to me, a person that's in pain does not need

to be doing those kinds of physical activities whatsoever. And if she can do that, why couldn't she be at work or doing something less strenuous.

Q: But you are -- Are you aware her treating doctor had taken her off of work to recover from the hernia surgery?

A: I didn't know anything after December 1st. After December 1st, we have had our parting ways . . . .  
(TR pages 82 and 83).

We would note that being able to do some housework does not equate to the definition of disability in Section 401.011(16). There was evidence that part of the claimant's job duties were to lift crates. In the Statement of the Evidence, the hearing officer writes as justification for no disability; "someone would have lifted the crates for the claimant if the claimant had been unable to do this after her \_\_\_\_\_, injury." Clearly the employer made no job offer accommodating the claimant in lifting crates and the hearing officer in this statement also adopts a wrong standard for disability, in essence finding the claimant could not lift crates but someone else could have done it for her, therefore she did not have disability. In that we have already remanded this case once and may not do so again (See Section 410.203(c)), and the hearing officer has used the wrong standard regarding his determination on disability, we render our own judgement on that issue.

It is relatively undisputed that the claimant had hernia surgery on November 12, 2001. In evidence are various progress notes from Dr. B. A Work Status Report (TWCC-73) takes the claimant off work for "6-8 weeks post-op" from November 5, 2001. A November 20, 2001, note indicates no heavy lifting for six weeks and that the claimant "may return to lite duty in a week." However, the November 26, 2001, note notes "[d]raining through her drain site . . . ." and use of a colostomy bag. The December 4, 2001, note indicates "still draining," that Dr. B. "stitched this" and placed the claimant on antibiotics. The December 11, 2001, note comments that the site was still draining and resuturing was needed. A December 13, 2001, note states:

12-13-2001: The drain site is grossly infected. I need to remove the suture, open it wide, get drainage going, put a pit-small ¼ inch Penrose drain in there. Sutured in with 3-0 nylon.

Other notes indicate continued infection and drainage culminating in a note which states: "On 2/17/02, underwent removal of infected mesh primary closure with JP drainage." See the first paragraph of the Decision portion of Appeal No. 021144, *supra*, regarding the date of the second surgery. Although there were different dates of the mesh removal surgery mentioned, the parties appear to have accepted February 17, 2002, as the date.

We hold that the hearing officer's decision that the claimant had disability for only two days on November 12, 2001, and February 17, 2002, to be against the great weight and preponderance of the evidence and that Ms. M's testimony regarding the claimant doing housework as not showing disability uses an incorrect standard. We reverse the hearing officer's decision and render a new decision that the claimant had disability beginning on November 12, 2001, (when she had the first surgery) and that the claimant had disability through February 17, 2002, based on the parties acceptance of this date as the date of the second surgery, the medical evidence, and the hearing officer's finding that the claimant had disability on February 17, 2002.

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

**JEFF W. AUTREY  
400 WEST 15TH STREET, SUITE 710  
FIRST STATE BANK TOWER  
AUSTIN, TEXAS 78701.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Daniel R. Barry  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge