

APPEAL NO. 052254
FILED DECEMBER 7, 2005

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 29, 2005. The disputed issue was whether the respondent (claimant) has had disability as a result of his compensable injury of _____, and if so, for what period(s). The hearing officer resolved the disputed issue by deciding that the claimant had disability beginning May 12 through May 25, 2005. The appellant (self-insured) appealed, contending that the hearing officer's determination is against the great weight and preponderance of the evidence. No response was received from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

BACKGROUND INFORMATION

It is undisputed that the claimant sustained a compensable injury on _____, while working as an industrial mechanic for the self-insured. The injury occurred when the claimant stepped on a grate while getting off a ladder and the grate collapsed, causing the claimant to fall. Medical records reflect that the claimant injured his knees and elbows and was also diagnosed with a back strain.

The claimant was initially examined by (Dr. M), who diagnosed bilateral elbow contusions and bilateral knee contusions and abrasions. Dr. M's Work Status Report (TWCC-73) of _____, reflects that the claimant is allowed to return to work on _____, performing sedentary work only.

The claimant began treating with (Dr. B) on April 1, 2005. Dr. B prescribed physical therapy and knee braces and took the claimant off work for two weeks. A left knee MRI done on April 6, 2005, revealed a tear of the medial meniscus, and an MRI of the right knee done on April 15, 2005, revealed a tear of the medial meniscus and another tear. Dr. B reported on April 11, 2005, that the claimant was to stay off work for another two weeks. Dr. B referred the claimant to (Dr. G), who, in a report of April 18, 2005, recommended arthroscopic surgery of the left knee. On April 20, 2005, Dr. G reported that the plan was to perform surgery on the claimant's left knee and that after the claimant recovered from that surgery, he would proceed with surgery on the right knee. Dr. G also wrote "no work status." Dr. B's clinical impression of May 4, 2005, was left knee internal derangement, left patellar subluxation, right knee internal derangement, right elbow internal derangement, left elbow sprain/strain, and lumbar sprain/strain. In the May 4, 2005, report, Dr. B wrote that the claimant would be placed on modified duty for two weeks starting on May 9, 2005, and that Dr. G would have surgery preauthorized in the near future. Dr. B's TWCC-73s reflect that he took the claimant off work due to the compensable injury from April 1 through May 8, 2005, and

that he released the claimant to return to modified duty "desk work only" from May 9 through May 19, 2005.

In a report dated May 11, 2005, Dr. B took the claimant off work for 30 days. Dr. B noted that the claimant presented for a follow-up examination on May 11th; that the claimant complained of knee and elbow pain; that the claimant had been attempting to work in a modified status, but that, even with knee braces on, it had been difficult due to swelling in the knees; that both knees had internal derangement and were unstable; and that the claimant was suppose to have surgery that week, but that surgery had to be rescheduled to May 26, 2005, because Dr. G was ill. In a TWCC-73 dated May 12, 2005, Dr. B took the claimant off work from May 11 through June 8, 2005, and in another TWCC-73 took the claimant off work through July 20, 2005. An operative report reflects that Dr. G performed surgery on the claimant's left knee on May 26, 2005. The claimant said he had the right knee surgery done in July 2005.

By letter dated April 20, 2005, the self-insured offered the claimant a full-time clerk position based on Dr. M's medical report of _____. The letter describes the duties of the position as computer work doing work orders and preventive maintenance reports, and states that the maximum physical requirements of the job include entering data into the computer and that the self-insured agrees to abide by the physical limitations under which Dr. M authorized the claimant's return to work. The benefit review conference (BRC) report notes that one of the disputed issues was "[d]id the employer tender a bona fide offer of employment to the claimant?" The BRC report states that the resolution of that issue was "[p]arties agree that there was a bona fide offer that was accepted."

In a Notification of Suspension of Indemnity Benefit Payment (PLN-9) dated May 11, 2005, the self-insured notified the claimant that it had suspended payment of temporary income benefits (TIBs) on May 9, 2005, because the claimant was released to return to work by his treating doctor with modified duties on May 9, 2005, and the claimant had returned to work on May 9, 2005, earning full pre-injury wages. In a PLN-9 dated May 12, 2005, the self-insured notified the claimant that it was disputing entitlement to TIBs because the claimant is capable of performing sedentary/light-duty work. The self-insured noted in the May 12, 2005, PLN-9 that it had made a bona fide offer of employment, which the claimant accepted and returned to work; that the claimant stopped working on May 11, 2005; that the self-insured disputes disability because there has been no change in condition to indicate a total inability to work; that per Dr. M and a peer review doctor, the claimant is able to perform sedentary duty; and that the carrier disputes the treating doctor's amended report indicating a total inability to work. In a PLN-9 dated June 3, 2004, the self-insured notified the claimant that TIBs had been reinstated effective May 26, 2005, because it had received notice that the claimant had knee surgery on May 26, 2005.

In a May 23, 2005, letter requesting a BRC, the claimant wrote that he had been receiving TIBS from April 1 through May 8, 2005; that his benefits ceased because he had returned to modified work duty from May 9 through May 11, 2005; that Dr. B had

again taken him off work on May 11, 2005, and that he is no longer receiving benefits. The claimant explained in the letter that he had returned to work on May 9, 2005, but after three days his knees began to swell, and that at work he had to climb stairs and sit for long periods of time.

The claimant testified that Dr. B released him to return to sedentary work on May 9, 2005, and that he worked in the clerk position offered by the employer on May 9, 10, and 11, 2005. He indicated that he was paid his preinjury wage. He said his supervisor would supply him with a stack of work orders to input into the computer in the morning, but that when he was through doing those orders, there was no one around to bring him more work. He said he was not informed that he should call his supervisor or a coworker to get him more work to do and that the administrative assistant who had more work orders for him to process was in another building and was not able to bring him more work because she was busy with phone calls. He said that he would walk over to the other building, which had several steps to climb, and give the administrative assistant the orders he had processed and pick up more work orders to process and then return to his work station and do that work. He said he walked over to the other building to get more work four or five times on May 9, 2005, but made less trips the next two days. The claimant said that he had painful locking and popping in his knees during the three days he worked modified duty.

The self-insured presented the testimony of the claimant's supervisor, a foreman, and a maintenance director. They testified that the claimant's modified position consisted solely of computer data entry, that the claimant was not suppose to be walking around at work, that the claimant could have and should have called either the supervisor or a coworker to get more work orders to process, and that they did not know that the claimant was walking over to the other building to get more work to do during the three days that the claimant worked modified duty. The supervisor said that it was not until the third day of modified duty, May 11, 2005, that the claimant told him his knees were hurting and that he had a doctor's appointment later that afternoon, at which time the claimant was taken off work.

The administrative assistant provided a written statement that confirmed the claimant's testimony that when the claimant had finished a stack of paperwork, he would walk to her desk in the administrative building and drop off that paperwork and pick up another stack of paperwork and then walk back to his desk in the maintenance building and that that occurred three or four times a day. The administrative assistant stated that she was unable to leave her desk because she had to answer incoming calls, and that other coworkers were in the field and could not be called back into the office just to transfer a stack of paperwork.

DISABILITY ISSUE

As previously noted, the BRC report reflects that the parties agreed that there was a bona fide offer of employment that was accepted. The unresolved disputed issue listed in the BRC report is "[d]id the Claimant have disability resulting from the injury of

_____, and if so, for what dates?” According to the BRC report, the claimant’s position at the BRC was that he had disability from May 12 through May 25, 2005, and the self-insured’s position was that the claimant accepted a bona fide offer of employment and that Dr. B gave no reason as to why the claimant was taken off work as of May 12, 2005. The benefit review officer recommended that the claimant had disability from May 12 through May 25, 2005.

At the CCH, the parties agreed that the disputed issue was “[d]id the claimant have disability as a result of his compensable injury of _____, and if so, for what period(s)?” The parties stipulated that the claimant sustained a compensable injury on _____, but there was no stipulation or agreement concerning periods of disability. A stipulation or agreement on disability was not asked for nor tendered. In opening statement, the ombudsman said that the claimant had disability from May 12 through May 25, 2005, and that on May 26, 2005, he had surgery. The hearing officer asked whether they were at the CCH over two weeks of disability only, and the ombudsman said yes. When the hearing officer asked whether TIBs had been paid for the period of April 1 through May 8, 2005, the ombudsman indicated they had been paid and also indicated that there was no dispute regarding disability for that period of time. When the hearing officer asked about “after May 26,” the ombudsman said “he had TIBs paid as well.” The self-insured said in opening statement that the claimant’s modified duty position did not require walking; that it was the claimant who extended the physical requirements of the modified position to include walking and stair climbing; and that “this goes beyond two weeks,” but did not elaborate on that statement. In closing argument, the self-insured argued that the modified position met the claimant’s work restrictions “consequently there would be no disability for that two-week period from May 12 through May 25, 2005.”

In the Background Information section of his decision, the hearing officer noted that:

At issue in this case is disability for the period beginning May 12, 2005, after the Claimant stopped working pursuant to the offer of employment, through May 25, 2005. He underwent a left knee meniscectomy on May 26, 2005, at which time the Carrier resumed [TIBs] and has continued them. The parties agreed at the [BRC] “that there was a bona fide offer that was accepted.”

The hearing officer found that the self-insured’s offer of employment to the claimant included not only data entry, but other activities such as obtaining a steady supply of work by means of his own effort if the work was not otherwise available to him; that while working from May 9 through May 11, 2005, the claimant was not supplied a steady stream of work and acted reasonably and not contrary to the offer of employment by walking to the other office to obtain work; and that the walking and climbing by the claimant in pursuit of employment under the offer of employment exceeded his work restrictions. The hearing officer found that as a result of his work-related injury of _____, the claimant was unable to obtain and retain employment

at wages equivalent to his preinjury wage for the period beginning May 12 through May 25, 2005. The hearing officer concluded that the claimant had disability beginning May 12 through May 25, 2005.

The self-insured appeals the hearing officer's decision that the claimant had disability from May 12 through May 25, 2005, contending that the decision is against the great weight and preponderance of the evidence. The self-insured asserts that the claimant voluntarily exceeded the physical requirements of the bona fide offer of employment. The self-insured requests that we render a decision that the claimant had no disability beginning May 12 through May 25, 2005.

From the evidence and representations of the parties, it appears that the claimant was paid TIBs for the period of April 1 through May 8, 2005; that TIBs were stopped when the claimant returned to work in a modified duty position on May 9, 2005; that the claimant worked modified duty May 9, 10, and 11, 2005; that Dr. B took the claimant off work again on May 12, 2005; that the claimant had left knee surgery on May 26, 2005; and that TIBs were reinstated effective May 26, 2005. Thus, the period in dispute was from May 12 through May 25, 2005, as recognized by the hearing officer. We conclude that the hearing officer's determination that the claimant had disability beginning May 12 through May 25, 2005, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Dr. B's report of May 11, 2005, explains that the claimant had internal derangement and instability in his knees and was in need of surgery and took the claimant off work pending the surgery that had to be postponed to May 26, 2005, due to the surgeon's illness. Dr. B's report taking the claimant back off work due to his knee condition effectively ended the bona fide offer of employment. The hearing officer could also believe the claimant's testimony and the written statement of the administrative assistant with regard to how and why the claimant walked over to the other building to obtain more work to do in his modified position.

Although the CCH record reflects that the time period in dispute was from May 12 through May 25, 2005, the disability issue before the hearing officer for resolution, and agreed to by the parties, was not modified to reflect that period of time but instead remained the broad issue of whether the claimant had disability, and if so, for what period(s). There was no agreement or stipulation by the parties as to disability for the period of March 31 through May 11, 2005, or for the period of May 26, 2005, through the date of the CCH, nor did the hearing officer make any findings of fact with regard to any period of time except for the period of May 12 through May 25, 2005. It appears that the claimant would not have disability for the three days he worked at his preinjury wage, May 9, 10, and 11, 2005. It also appears that the self-insured accepted disability for the period of April 1 through May 8, 2005, and for the period of May 26 through August 29, 2005, but that is not affirmatively stated on the record by the self-insured. There are no agreements, stipulations, or findings of fact that cover the time period from the date of the compensable injury to the date of the CCH. The hearing officer has found disability only for the period of May 12 through May 25, 2005, and the self-insured has appealed the hearing officer's determination on the disability issue. Thus, the

disability issue is before us on appeal. The hearing officer's decision leaves in doubt other time periods between the date of the compensable injury and the date of the CCH because they are not covered in the decision, except for the statement that the self-insured resumed TIBs on May 26, 2005, and has continued them. Accordingly, because the disability issue was framed in broad terms of whether the claimant had disability, and if so, for what periods, and because the hearing officer's decision does not address the entire period from the date of injury to the date of the CCH, we remand the disability issue to the hearing officer for the hearing officer to make findings of fact and a decision on the periods of time from the date of the compensable injury through the date of the CCH that the claimant had disability. We affirm that portion of the hearing officer's decision that finds disability from May 12 through May 25, 2005, but our affirmance does not mean that that is the only period of time the claimant had disability and we remand for determinations on the other periods 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 Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge