

APPEAL NO. 052334
FILED NOVEMBER 18, 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 September 12, 2005. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) had disability beginning on October 20, 2004, and continuing through May 11, 2005, but not thereafter, up to the date of the CCH. The claimant appealed, arguing that the beginning date of disability is incorrect and was an inadvertent error caused by the typographical error in the date of injury found in Finding of Fact Nos. 3 and 4. The claimant additionally appeals the ending date of disability determined by the hearing officer, arguing that the medical evidence supported his disability through the date of the CCH. The respondent (carrier) responded, urging affirmance of the disability determination of the hearing officer.

DECISION

Affirmed in part, reformed in part, and reversed and remanded in part.

The sole issue in dispute at the CCH was whether the claimant had disability. The parties stipulated that that the claimant sustained a compensable injury on (Date of Injury). Both parties agree in their respective pleadings that Finding of Fact Nos. 3 and 4 mistakenly refer to the date of claimant's compensable injury as (Assumed Date of Injury), rather than (Date of Injury). Both parties agree that the Findings should be reformed to correct the typographical error. We reform Finding of Fact No. 3 to read as follows: "On (Date of Injury), the claimant sustained a fracture to his left foot/ankle in a fall from a ladder at work." Finding of Fact No. 4 is reversed and remanded for reasons discussed below. However, we note that Finding of Fact No. 4 also mistakenly refers to the date of injury as (Assumed Date of Injury), rather than the stipulated date of (Date of Injury).

The carrier contends that the claimant attempted to insert in his appeal additional testimony regarding his physical ability and comments from his treating doctor as well as an unidentified co-worker. The carrier maintains that this evidence was not presented at the CCH and should not be considered. Evidence or information submitted for the first time on appeal to the Appeals Panel is generally not considered. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ) for the standard, which might require a remand. We note that the information referred to by the carrier appears to merely be elaboration of the claimant's testimony. We will however only consider the testimony at the CCH.

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The hearing officer found that the claimant's disability began on October 20, 2004. The claimant argues that the beginning date of October 20, 2004, is

due to the error regarding the date of injury and that disability began on October 10, 2004, the day after the compensable injury was sustained rather than October 20, 2004.

The claimant testified that on (Date of Injury), he was on a ladder performing his job duties when the ladder slipped out from under him causing him to land on his left foot. The claimant testified that he went to the emergency room and the evidence reflects that he followed up with his doctor on October 20, 2004, and was taken completely off work. The evidence also reflects that the claimant began to lose wages the day following the compensable injury. The hearing officer's mistake regarding the date of injury precluded him from finding a period of disability prior to the date of injury which he found to have been on (Assumed Date of Injury). We remand this case back to the hearing officer to find a beginning date of disability, considering the correct date of injury, (Date of Injury).

The hearing officer found that disability ended on May 11, 2005, finding that the claimant's activities as portrayed on a surveillance video on May 12 and May 13, 2005, "demonstrate that on those days he was capable of performing work duties equivalent to those of his preinjury job (both in type of work and time at work) with little or no difficulty, save and except for a slight limp at times." There is sufficient evidence to support the hearing officer's determination of the ending date of disability.

We affirm the hearing officer's determination that the claimant's disability continued to May 11, 2005, but not thereafter, up to the date of the CCH. We reverse the hearing officer's date that the claimant's disability began and remand back to the hearing officer to make a determination regarding the beginning date of disability considering the correct date of injury.

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 Worker's 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.

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

**LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251-2237.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge