APPEAL NO. 071152
FILED AUGUST 21, 2007

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 May 9, 2007. With regard to the three issues before him the hearing officer determined: (1) the compensable injury of _____, extends to and includes an L4-5 recurrent herniated disc after (intervening 2006 injury);[1] (2) The Texas Department of Insurance, Division of Workers' Compensation (Division) abused its discretion in appointing Dr. S as a second designated doctor; and (3) the appellant (claimant) had disability beginning April 14, 2005, and continuing through October 3, 2005, "but at no other times through the date of the [contested case] hearing." The hearing officer's determination that the compensable injury of _____, extends to an L4-5 recurrent herniated disc after (intervening 2006 injury), has not been appealed and has become final pursuant to Section 410.169.

The claimant appeals the disability issue, contending that the hearing officer's determination that the compensable injury of _____, extends to a recurrent herniated disc after (intervening 2006 injury), is inconsistent with a finding of no disability after October 3, 2005, due to a sole cause "intervening injury" of (intervening 2006 injury). The claimant also appeals the determination that the Division abused its discretion in the appointment of Dr. S as a second designated doctor. The respondent (carrier) responded conceding it has not appealed the extent-of-injury determination and otherwise urges affirmance contending that the intervening injury of (intervening 2006 injury), "was the sole cause of the Claimant's disability." Regarding the abuse of discretion in the appointment of the second designated doctor, the carrier contends that "[t]he suspension of benefits is automatic upon the Claimant's failure to appear for the designated doctor's evaluation (without good cause shown)."

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was a maintenance mechanic. The parties stipulated that the claimant sustained a compensable injury to his lumbar spine on _____. The claimant had spinal surgery for a L4-5 herniated disc in the form of a microdiskectomy at L4-5 on July 6, 2005. The claimant testified that the surgery was successful and that he was released to return to work as of October 3, 2005. The claimant returned to work with the employer for a day or so and then began working for another employer doing the same work as his preinjury job at a higher pay. The carrier paid temporary income benefits (TIBs) to October 3, 2005. On December 1, 2005, Dr. D was appointed as a designated doctor to assess maximum medical improvement and an impairment rating with an appointment to examine the claimant on December 21, 2005. The claimant did

[1] We note that the hearing officer's finding on extent of injury after September 16, 2007, is clearly a typographical error and was meant to be after September 16, 2006.

not attend that appointment. The claimant continued working full time for the second employer until (intervening 2006 injury), when he sustained a "recurrence" of the disc herniation at L4-5 carrying an ice chest during a fishing trip. Based on the medical evidence the hearing officer found that the original _____, injury was a producing cause of the (intervening 2006 injury), recurrent herniation. The hearing officer commented, in the Background Information, "that the original injury extends to and includes the claimant's current herniation on the right at L4-5."

DISABILITY

The claimant's disability initially ended on October 3, 2005, when the claimant received a full duty release and returned to work. The claimant continued full time work until the (intervening 2006 injury), incident. The claimant saw Dr. C on September 26, 2006, and was referred out for diagnostic testing. A lumbar MRI report dated September 27, 2006, showed a recurrent herniated disc at L4-5. The claimant changed treating doctors, which was approved by the Division on October 17, 2006. Subsequently, the new treating doctor in a Work Status Report (DWC-73) dated October 20, 2006, took the claimant off work from October 20, 2006, through November 15, 2006, due to a work injury diagnosis of recurrent disc herniation. Another DWC-73 dated November 15, 2006, from a referral doctor, takes the claimant off work for an unknown ("Unk") period due to lower back pain with a notation that the claimant is considering surgery. The claimant testified that he has been unable to work since (intervening 2006 injury), and that additional spinal surgery has been recommended.

The hearing officer while finding the recurrent disc herniation on (intervening 2006 injury), was part of the compensable injury, a determination which has not been appealed, nonetheless determined that the claimant did not have disability after October 3, 2005. The hearing officer, in the Background Information commented:

> The preponderance of the evidence supports the Carrier's contention that the recurrence of the herniation was triggered by carrying an ice chest during the fishing trip to the lake in 2006 . . . . Pursuant to [Appeals Panel Decision (APD)] 022753, decided December 19, 2002, the sole cause of the Claimant's disability after (intervening 2006 injury), was the non-work-related incident of carrying an ice chest. The Claimant's disability ended when he returned to full-duty work with the Employer on October 4, 2005. The termination of that employment was not a result of the Claimant's compensable injury. Further support for disability ending on that date is that the Claimant went to work for another employer, doing the same work at a higher pay rate on October 27, 2005. In addition, the Claimant failed to appear for a designated doctor appointment on December 21, 2005, and he failed to contact that doctor and reschedule the appointment.

We hold the hearing officer erred in finding that disability ended on October 4, 2005. Disability is defined in Section 401.011(16) as the inability because of a

compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Once the hearing officer found that the compensable _____, injury extended to include the (intervening 2006 injury), recurrent herniation, then the (intervening 2006 injury), recurrent injury became a part of the compensable injury. The fact that the claimant returned to full duty work at a higher pay rate prior to the recurrent disc herniation does not preclude a deterioration of the compensable injury which causes intermittent disability. The Appeals Panel has long held that a claimant can have intermittent periods of disability. APD 032725, decided December 8, 2003.

The hearing officer relies on APD 022753, *supra*, in determining that carrying the ice chest on a personal, non-work-related fishing trip on (intervening 2006 injury), precluded the claimant from having disability. APD 022753, is factually distinguishable from the instant case. There was no extent-of-injury issue in APD 022753. In that case the claimant's minor injury did not cause any lost time from work "until the aggravation of the minor injury [by a non-work related laundry bag episode] resulted in the claimant's being taken off work." The Appeals Panel found that "the laundry bag episode at home was the 'sole cause' of any subsequent disability." In the instant case the hearing officer found the recurrent herniated disc of (intervening 2006 injury), was part of the compensable injury. As noted, that determination has not been appealed. In APD 022753 the injury from the laundry bag episode at home was not found to be part of the compensable injury.

The hearing officer in this case, in an unappealed determination, also found that due to the ice chest incident the claimant was unable to obtain and retain employment at wages equivalent to the claimant's preinjury wage beginning on September 17, 2006, and continuing through the date of the CCH. We reverse the hearing officer's determination that the claimant's disability continued only through October 3, 2005, but at no other times through the date of the hearing and render a new decision that the claimant had disability from September 17, 2006, through the date of the CCH.

There was no issue before the hearing officer with regard to whether the carrier was entitled to suspend TIBs based on the claimant's failure to submit to a designated doctor examination without good cause, and the hearing officer made no findings on that matter. Thus we do not address that issue for the first time on appeal. Although the hearing officer found "no good cause was shown" in Finding of Fact No. 5, we read that as pertaining to the Division's appointment of Dr. S as the second designated doctor, rather than the claimant's failure to attend the appointment with Dr. D.

DESIGNATED DOCTOR

In this case Dr. D was appointed as the designated doctor in December 2005. Subsequently in December 2006 the claimant requested appointment of a designated doctor and Dr. S was appointed. 28 TEX. ADMIN. CODE § 130.5(d)(2) (Rule 130.5(d)(2)) (since repealed and superceded by Rule 126.7(h) adopted to be effective January 1, 2007) in effect in December 2006, provides that if a designated doctor has

been previously assigned, the Division shall use that doctor again, if the doctor is still qualified and available. There is no indication that Dr. D was not qualified or was unavailable to examine the claimant if requested. We affirm the hearing officer's decision on this issue.

SUMMARY

We affirm the hearing officer's determinations that the Division abused its discretion in the appointment of Dr. S as a second designated doctor, and that the claimant had disability beginning April 14, 2005, and continuing through October 3, 2005. We reverse the hearing officer's determination that the claimant's disability continued only through October 3, 2005, "but at no other times" and render a new decision that in addition to disability from April 14, 2005, through October 3, 2005, the claimant also had disability from September 17, 2006, through the date of the CCH.

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

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
DALLAS, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge