

APPEAL NO. 071703
FILED NOVEMBER 15, 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 August 15, 2007. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did sustain a compensable injury on _____, and that the claimant had disability beginning March 19 and continuing through May 2, 2007, but at no other times. The compensable injury determination was not appealed and has become final pursuant to Section 410.169. The claimant appealed, disputing the ending date of disability. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant testified that she was unloading boxes for her employer when she felt a pop and then a burning in her back. In her discussion of the evidence, the hearing officer stated that “[b]ased on the credible evidence and testimony presented, the [c]laimant did sustain a lumbar sprain/strain in the course and scope of her employment on _____, and she had disability as a result of that injury beginning March 19 and continuing through May 2, 2007, which is a consistent period of disability pursuant to the [Official Disability Guidelines—Treatment in Workers’ Comp, excluding the return to work pathways, published by Work Loss Data Institute (ODG)] and the medical records in evidence.”

The hearing officer’s finding that due to the claimed injury of _____, the claimant was unable to obtain and retain employment at wages equivalent to her pre-injury wage beginning March 19 and continuing through May 2, 2007, was not appealed. The claimant did appeal the ending date of disability found by the hearing officer. The claimant argues that the hearing officer erred because she made a determination of disability based on a diagnosis of a lumbar sprain/strain when extent of injury was not at issue. Although the hearing officer identified the nature of the injury as she saw it, she did not resolve an extent-of-injury issue and/or limit the scope of the injury because there was no such issue before her, thus, she did not have the authority to do so. In order to resolve the disability issue, the hearing officer had to identify the nature of the injury in order to resolve the issue presented to her. She was persuaded that the claimant’s injury was a sprain/strain and she was acting within her province as the fact finder in so finding. See Appeals Panel Decision (APD) 041415, decided July 26, 2004. However, the hearing officer stated that the disability period found was consistent with a period of disability pursuant to the ODG and the medical records in evidence.

28 TEX. ADMIN. CODE § 137.100(a) (Rule 137.100(a)) provides that health care providers shall provide treatment in accordance with the current edition of the ODG.

Rule 137.10(a) provides that insurance carriers, health care providers, and employers shall use the disability duration values in the current edition of the Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd. (MDA) as guidelines for the evaluation of expected or average return to work time frames. Rule 137.10(c) provides that the Texas Department of Insurance, Division of Workers' Compensation (Division) return to work guidelines shall be presumed to be a reasonable length of disability duration and explains how health care providers, insurance carriers, employers, and injured employees are to use the guidelines. However, Rule 137.10(e) clarifies that the disability duration values in the guidelines are not absolute values and do not represent specific lengths or periods of time at which an injured employee must return to work. Further, Rule 137.10(d) provides that the Division may consider co-morbid conditions, medical complications, or other factors that may influence medical recoveries and disability durations as mitigating circumstances when setting return to work goals or revising expected return to work durations and goals. Treatment for the compensable injury received by the claimant may be a consideration in determining whether or not the presumption of a reasonable length of disability duration of the MDA is overcome.

As previously noted in APD 071108-s, decided August 15, 2007, use of the MDA requires knowledge of the specific condition or conditions that are part of the compensable injury. Further, the disability duration tables differ not only according to specified conditions but also to job classifications. We note that it has long been held that a claimant may have intermittent periods of disability. See APD 062634, decided March 1, 2007 and APD 012689, decided December 20, 2001. The hearing officer's discussion of a specific condition or conditions that are part of the compensable injury in utilizing the MDA should not be construed as limiting the claimant from alleging that other conditions are included in the compensable injury.

In the instant case, we note that the carrier's attorney in his closing argument stated he printed out the provision of the ODG having to do with a heavy job classification and gave a copy to the hearing officer at the CCH. The printed document was not offered or admitted into evidence. A copy of a table in the MDA ("Supportive Treatment lumbar or lumbosacral spine sprain or strain") was in the appeal file and was highlighted with the corresponding maximum disability time (42 days) for a heavy job classification argued by the carrier's attorney at the CCH. However, the hearing officer specifically stated that the time period of disability found corresponded with the time period provided in the ODG. The ODG was adopted by the Division excluding the return to work pathways. Rule 137.100(a). It was legal error for the hearing officer to base her determination of disability on a specified time period provided in the ODG.

There is no evidence that the claimant has been released to work full duty by any doctor. The Appeals Panel has held that a light-duty or conditional work release is evidence that disability continues. APD 070005, decided February 13, 2007. We have also held that a claimant under a light-duty work release does not have an obligation to look for work or show that work was not available within his or her restrictions. APD 970597, decided May 19, 1997, and APD 030927, decided May 28, 2003.

We reverse that portion of the hearing officer's determination that the claimant did not have disability resulting from an injury sustained on _____, after May 2, 2007, and remand back to the hearing officer for a determination of an ending date of disability supported by the evidence. If the hearing officer bases her determination of disability on the MDA, she should include in her discussion of the evidence the job classification of the claimant, the specific condition or conditions considered to be part of the compensable injury (specifying the table in the MDA she considered), and any factors she considered as specified in Rule 137.10(d).

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 Division, 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. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge