

APPEAL NO. 080720
FILED JULY 11, 2008

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 April 15, 2008. The issues before the hearing officer were:

- (1) Did the appellant (claimant) sustain a compensable injury?
- (2) What is the date of injury?
- (3) Did the claimant have disability resulting from the claimed injury, and if so, for what periods?

The hearing officer determined that: (1) the claimant did not sustain a compensable injury on either (1st date of injury), or (2nd date of injury); and (2) because the claimant did not have a compensable injury, the claimant did not have disability. The claimant appealed the hearing officer's determinations, and requests that the Appeals Panel find that the claimant sustained a compensable injury on (claimant's alleged date of injury), and that the claimant had disability from January 5, 2005, through the date of statutory maximum medical improvement (MMI). The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

BACKGROUND INFORMATION

The claimant testified that she sustained a work-related injury to her neck, left side, left shoulder, and lower back while lifting a box of chickens weighing 75 to 100 lbs. The claimant initially claimed a date of injury of (1st date of injury), however the claimant later claimed that her date of injury was (claimant's alleged date of injury). The claimant testified that she sought treatment from the employer's onsite nurse the day after her work-related injury and that she was returned to work. The claimant testified that she sought emergency medical treatment in December 2004, and medical treatment from Dr. M in February 2005, for her work-related injury. The claimant testified that she was terminated from her employment on January 5, 2005, and has not worked since that date.

DATE OF INJURY, COMPENSABLE INJURY AND DISABILITY

The hearing officer failed to make a determination on the issue of date of injury. Although the hearing officer determined that the claimant did not sustain a compensable injury on either (1st date of injury), or (2nd date of injury), the evidence reflects that the claimant was also claiming alternate dates of injury other than (1st date of injury), or (2nd date of injury).

As previously mentioned, the claimant testified that the day after she sustained her work-related injury, she saw the employer's onsite nurse for her work-related injury. In evidence is a document, Employee Health Record, which lists in chronological order the claimant's history of health complaints to the employer. That document lists a visit date to the onsite nurse on (2nd date of injury), and that the claimant complained of "rt side neck & leg soreness & lower back discomfort due to lifting 75[lbs] . . . **on yesterday**; given thermacare patch & ibuprofen; [return to work (rtw)]." (Emphasis added). That same document contains a handwritten note stating "[t]his is the right date (2nd date of injury) when I injur[ed] myself at work not in (month of 1st date of injury)." Based on the Employee Health Record document and the claimant's testimony at the CCH that she saw the onsite nurse the day after her injury, a date of injury of (claimant's alleged date of injury), is supported by the evidence. However, the evidence could also support other possible dates of injury.

In evidence is an emergency room examination record dated December 16, 2004, in which the claimant complained of "back and shoulder pain . . . injury last month at work." Also, in evidence is a new patient accident form from Dr. M dated February 14, 2004 [sic should be 2005], in which the claimant listed her date of injury as (incorrect date of injury), and described that the injury occurred at work while she lifted a tub of chicken weighing 75lbs. A subsequent narrative report dated April 7, 2005, from Dr. M lists the claimant's date of injury as (1st date of injury). In evidence is an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (DWC-41) dated September 13, 2005, listing the date of injury as (1st date of injury). An initial medical report dated September 29, 2006, from Dr. N lists a date of injury of (claimant's alleged date of injury). The designated doctor, Dr. P examined the claimant on October 25, 2007, to determine the claimant's date of MMI and impairment rating (IR). Dr. P listed a date of injury of (1st date of injury), in the Report of Medical Evaluation (DWC-69), and in his narrative report he listed a date of injury of (claimant's alleged date of injury), and stated that the claimant "reported she was injured on (incorrect date of injury No. 2)."

When the date of injury is an issue, the hearing officer has wide latitude in deciding a date of injury, however the hearing officer may not refuse to resolve the issue before him by saying the claimant had not proven a date of injury. See Appeals Panel Decision (APD) 021632, decided July 25, 2002. The Appeals Panel has not required the date of injury found by a hearing officer to be the same as the date alleged by the claimant when the evidence indicates otherwise. See APD 941029, decided September

16, 1994. In the instant case, the hearing officer could have decided a date of injury based on the claimant's testimony and other evidence in the CCH record. It was legal error for the hearing officer to not determine a specific date of injury. Accordingly, we remand the date of injury issue back to the hearing officer to make a determination consistent with the evidence in this case.¹

Given that we are reversing and remanding the date of injury issue to the hearing officer, we likewise reverse the hearing officer's determinations that the claimant did not sustain a compensable injury either on (1st date of injury), or (2nd date of injury), and that the claimant did not have disability and we remand the compensable injury and disability issues to the hearing officer to make determinations consistent with the evidence in this case.

SUMMARY

We remand the date of injury issue back to the hearing officer to make a determination consistent with the evidence in this case. We reverse the hearing officer's determinations that the claimant did not sustain a compensable injury on (1st date of injury), or (2nd date of injury), and did not have disability and we remand the compensable injury and disability issues to the hearing officer to make determinations on those issues consistent with the evidence in this case.

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 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.

¹ In *Albertson's, Inc. v. Ellis*, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied), the court characterized the Appeals Panel's affirmance of a hearing officer's determination that the IR could not yet be determined because further development of the evidence was necessary through the appointment of a second designated doctor, as a remand. The court noted that the mere failure of the Appeals Panel to use the word "remand" in its opinion did not make its nonfinal decision final for the purpose of judicial review, and was, in effect, a remand.

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

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

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge