

APPEAL NO. 100778
FILED AUGUST 26, 2010

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 17, 2010. The issues before the hearing officer were:

- (1) Did the respondent (claimant) sustain a compensable repetitive trauma injury, with a date of injury (DOI) of (alleged date of injury)?
- (2) Did the claimant have disability resulting from an injury sustained on (alleged date of injury), from March 12, 2009, through the present?
- (3) What is the DOI? (upon agreement of the parties)

The hearing officer determined that:

- (1) The claimant sustained a compensable repetitive trauma injury to the lumbar spine and bilateral wrists on _____;
- (2) The claimant has disability resulting from an injury sustained on _____, from February 20, 2009, but not before, through the date of this hearing; and
- (3) The DOI is _____.

The appellant (carrier) appealed the hearing officer's determinations on all three issues, contending, among other matters, that there is no evidence that the DOI is _____. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

BACKGROUND INFORMATION

The claimant testified that he worked as the driver of two older model 18 wheeler trucks and that due to the movement of the seats without air suspension and the movement of changing gears and driving he suffered an L5-S1 lumbar disc herniation and bilateral carpal tunnel syndrome (CTS).

The claimant testified that his back hurt him throughout December of 2008, and that he reported it to his supervisor in that same month, without being able to recall a specific date. The claimant testified that his employer told him to go to the doctor for a check-up. In evidence is a medical report from (LMC) dated January 9, 2009. The

report states that the claimant complained of pain radiating down his left leg to his foot and that a lumbar spine MRI was recommended. In evidence is a lumbar spine MRI dated January 14, 2009, which revealed a large left posterolateral disk herniation at the L5-S1 level.

The evidence reflects that the claimant last worked for the claimed employer on February 19, 2009, and began receiving short term disability payments on February 20, 2009. In evidence is a medical report from LMC dated February 20, 2009, which indicates lumbar/hip pain continues unchanged with an assessment of radiculopathy and L5-S1 disk herniation. The claimant testified that after the MRI was performed, he saw (Mr. H), a physician's assistant at LMC, but Mr. H did not explain the results of the MRI to him, indicating that it should be done by a specialist. The claimant was referred to (Dr. P), who explained the results of the MRI to him.

Records in evidence establish that the claimant was first seen by Dr. P on March 13, 2009. Dr. P who indicated in his report of the same date that the claimant "presents with a 3-month history of severe low back pain radiating down the left leg as far as the foot, associated with numbness and tingling in the foot and weakness of the left ankle." The report listed "Diabetes, Hypertension, Hypercholesterolemia [and CTS]" as part of the claimant's past or previous medical history. The claimant testified that he complained to Dr. P of pain in his low back and in his hands and that Dr. P told him that his injury was caused by driving trucks. The claimant further testified that he then reported this to his employer.

In evidence are various documents listing (alleged date of injury), as the DOI. The claimant testified that he did not have symptoms in his arms/wrists until March or April of 2009, although in evidence is a medical report from Dr. P dated May 12, 2009, which states that the claimant "complains of bilateral hand numbness and tingling, right worse than left The problem has been going on for over one year."

In the Background Information of her decision, the hearing officer stated that "[t]he claimant was credible in his testimony that as a reasonable person he was aware of his low back symptoms since December 2008, but it was not until after the doctor at [LMC] explained the results of the lumbar MRI test did he know that his problems were work related. The [c]laimant's testimony supports a [DOI] of _____." However, the only reference to the _____, DOI is in the claimant's attorney's opening and closing statements in which she alleges _____, to be the DOI and in an undated, unsigned document entitled "Claimant's Responses To Carrier's Interrogatories To Claimant" in which there is an answer that "the [c]laimant also disputes the [DOI] and asserts the [DOI] is _____ and not [(alleged date of injury)]" as well as another answer that "the [c]laimant's position is the [DOI] is _____. The claimant therefore asserts he sustained a compensable repetitive trauma injury on _____ and that he has sustained disability from 2/15/2009 to the present."

These answers to the carrier's interrogatories are inconsistent with the claimant's testimony at the CCH, which the hearing officer stated was credible, and reflected that the claimant did not relate his injuries to his driving the trucks until the March 13, 2009, examination by Dr. P at which time Dr. P explained to him the MRI results and opined about the causation of his injuries.

There is insufficient evidence that _____, is the DOI. Section 408.007 provides that the DOI for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Accordingly, we reverse the hearing officer's determination that the DOI is _____, as being against the great weight and preponderance of the evidence and remand the DOI issue to the hearing officer to make a determination consistent with the evidence in this case.

Establishing a DOI is essential in resolving the compensability of a claim and to ascertain if benefits would have been awarded in this claim. See Appeals Panel Decision (APD) 081235, decided October 8, 2008; APD 080023, decided March 13, 2008. Given that we are reversing and remanding the DOI issue to the hearing officer, we likewise reverse the hearing officer's determinations that the claimant sustained a compensable repetitive trauma injury to the lumbar spine and bilateral wrists on _____, and that the claimant has disability resulting from an injury sustained on _____, from February 20, 2009, but not before, through the date of this hearing. We remand the compensable injury and disability issues to the hearing officer to make determinations 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.

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

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Carisa Space-Beam
Appeals Judge