

APPEAL NO. 132544
FILED DECEMBER 17, 2013

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 23, 2013, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], does not extend to L4-5 disc herniation/protrusion with superimposed annular tear and right L5 radiculopathy; (2) the appellant (claimant) reached maximum medical improvement (MMI) on July 11, 2012; (3) the claimant's impairment rating (IR) is five percent; and (4) the claimant did not have disability from July 12, 2012, through the date of the CCH.

The claimant appealed, disputing the hearing officer's determinations of the extent of the compensable injury; MMI; IR; and disability. The claimant contends he presented evidence at the CCH to establish that the disputed conditions were part of the compensable injury; that he has not yet attained MMI; because he has not yet attained MMI an IR cannot be assigned; and that he had disability for time period in dispute, July 12, 2012, through the date of the CCH. The respondent (carrier) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on [date of injury], the claimant sustained a compensable injury at least in the form of a lumbar sprain/strain and that the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor, [Dr. W] certified that the claimant reached MMI on July 11, 2012, and assigned a five percent IR. The claimant testified that he felt a pop in his back while lifting a box of supplies.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury does not extend to L4-5 disc herniation/protrusion with superimposed annular tear and right L5 radiculopathy is supported by sufficient evidence and is affirmed.

MMI

The hearing officer's determination that the claimant reached MMI on July 11, 2012, is supported by sufficient evidence and is affirmed.

IR

The hearing officer's determination that the claimant's IR is five percent is supported by sufficient evidence and is affirmed.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that he had disability as defined by Section 401.011(16). Disability is a question of fact to be determined by the hearing officer. See Appeals Panel Decision (APD) 042097, decided October 18, 2004. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. APD 041116, decided July 2, 2004. The claimant need not prove that the compensable injury was the sole cause of his disability; only that it was a producing cause. APD 042097, *supra*.

The hearing officer found that during the period at issue, July 12, 2012, through the date of the CCH, the claimant was not unable to obtain and retain employment at wages equivalent to his preinjury wage as a result of the compensable injury. In the Background Information portion of her decision, the hearing officer stated that Work Status Reports (DWC-73s) in evidence from [Dr. S] took the claimant completely off work "from August 2, 2012, through July 11, 2012, for the compensable diagnoses." However, a review of the record reflects that there are eight DWC-73s in evidence from Dr. S. Dr. S released the claimant to return to work with restrictions on August 2, 2012, and then took the claimant completely off work again on August 28, 2012. DWC-73s from Dr. S are in evidence that take the claimant completely off work through February 28, 2013. Most, but not all, of the DWC-73s in evidence reflect a lumbar strain as a work injury diagnosis. There are inconsistencies between the hearing officer's discussion of the DWC-73s and the record. Accordingly, we reverse the hearing officer's determination that the claimant did not have disability from July 12, 2012, through the date of the CCH and remand the disability issue for reconsideration of all of the evidence. We note that the Appeals Panel has previously explained that disability and MMI are different concepts under the 1989 Act, and that while a claimant's entitlement to temporary income benefits ends when he or she reaches MMI, disability as defined by Section 401.011(16) does not necessarily end on that date. See APD 051030, decided June 20, 2005.

SUMMARY

We affirm the hearing officer's determination that the compensable injury does not extend to L4-5 disc herniation/protrusion with superimposed annular tear and right L5 radiculopathy.

We affirm the hearing officer's determination that the claimant reached MMI on July 11, 2012.

We affirm the hearing officer's determination that the claimant's IR is five percent.

We reverse the hearing officer's determination that the claimant did not have disability from July 12, 2012, through the date of the CCH and remand the disability issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer should consider the claimant's testimony and all of the DWC-73s as well as the other evidence in the record and then make a determination of whether the claimant had disability from July 12, 2012, through the date of the CCH consistent with the evidence.

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 **NEW HAMPSHIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge