

APPEAL NO. 140303
FILED APRIL 14, 2014

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 12, 2013, in [City], Texas, with [hearing officer] presiding as the hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by [Dr. B] on November 26, 2012, did not become final under Section 408.123; (2) the respondent (claimant) has not reached MMI; (3) the claimant's IR cannot be determined at this time; and (4) the claimant had disability during the period at issue only beginning on June 18, 2013, and continuing through November 1, 2013, but not from October 2, 2012, and continuing through June 17, 2013, and not from November 2, 2013, and continuing through the date of the hearing.¹ The appellant (carrier) appeals the hearing officer's determinations, contending that the evidence clearly shows that Dr. B's certification was delivered to the claimant by verifiable means, that the preponderance of the evidence supports Dr. B's certification that the claimant reached MMI on October 1, 2012, with a five percent IR, and that the claimant did not have disability during the period at issue because the sole cause of his inability to obtain and retain employment at his preinjury wage was his immigration status. The appeal file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that: (1) on [date of injury], the claimant sustained a compensable injury; (2) the designated doctor selected by the Texas Department of Insurance, Division of Workers' Compensation (Division), Dr. B, certified that the claimant reached MMI on October 1, 2012, and assigned a five percent IR; and (3) the treating doctor referral, [Dr. F], certified that the claimant had not reached MMI on October 8, 2013. The claimant testified that on the date of injury he was putting pipes into a machine with a coworker to bend them and that when the pipe came out of the machine they were to grab the pipe together. However, the other person let go of the pipe and it hit him in his right upper arm and he felt like something "broke" inside his arm.

¹ We note that although Finding of Fact No. 7 says ". . . and not from November 2, 2013, and continuing through the date of the hearing," Conclusion of Law No. 6 and the Decision portion of the Decision and Order say ". . . and not from November 2, 2013, and continuing the date of the hearing."

SECTION 408.123 FINALITY

The hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on November 26, 2012, did not become final under Section 408.123 is supported by sufficient evidence and is affirmed.

MMI/IR

The hearing officer's determinations that the claimant has not reached MMI and that the claimant's IR cannot be determined at this time are supported by sufficient evidence and are affirmed.

DISABILITY

The hearing officer also determined that the claimant had disability during the period at issue only beginning on June 18, 2013, and continuing through November 1, 2013, but not from October 2, 2012, and continuing through June 17, 2013, and not from November 2, 2013, and continuing through the date of the hearing.

Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant had surgery on June 18, 2013. Sufficient evidence supports the portion of the hearing officer's determination that the claimant had disability beginning on June 18, 2013. Sufficient evidence also supports the portion of the hearing officer's determination that the claimant did not have disability from October 2, 2012, and continuing through June 17, 2013.

Regarding the last date of disability that the hearing officer found, in the Discussion section of the Decision and Order, the hearing officer stated that the "[c]laimant testified that [Dr. K] released him to return to work with restrictions in November, 2013." The hearing officer then found that the claimant only had disability through November 1, 2013. However, the claimant testified that he was released to return to work on November 20, 2013. The latest Work Status Report (DWC-73) in evidence has the claimant completely off work from October 2, 2013, through October 23, 2013. There is no evidence to support the hearing officer's determination that the claimant's disability ended on November 1, 2013. Accordingly, we remand the remaining portion of the issue of disability, whether the claimant had disability from June 19, 2013, through the date of the hearing, to the hearing officer for a determination consistent with this decision and the evidence.

SUMMARY

We affirm the hearing officer's determination that the first certification of MMI and IR assigned by Dr. B on November 26, 2012, did not become final under Section 408.123.

We affirm the hearing officer's determination that the claimant has not reached MMI and that the claimant's IR cannot be determined at this time.

We affirm the portions of the hearing officer's determination that the claimant did not have disability from October 2, 2012, and continuing through June 17, 2013, and that the claimant had disability during the period at issue beginning on June 18, 2013.

We reverse the portions of the hearing officer's determination that the claimant's disability ended on November 1, 2013, and that the claimant did not have disability from November 2, 2013, and continuing through the date of the hearing, and remand the issue of disability to the hearing officer to determine an ending date of disability that is supported by the evidence. There is to be no new evidence presented by the parties. The hearing officer is to determine disability during the period at issue consistent with this decision and 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 Appeals Panel Decision 060721, decided June 12, 2006.

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

**CT CORPORATION SYSTEM
350 NORTH SAINT PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201-4234.**

Tracey T. Guerra
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge