

APPEAL NO. 152096
FILING DECEMBER 17, 2015

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 July 27, 2015, and continued on September 29, 2015, with the record closing on October 5, 2015, in Austin, Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant (claimant) sustained a compensable injury on (date of injury). Also, the hearing officer determined that the claimant had disability for a portion of the disability period claimed; however, the hearing officer lists conflicting beginning dates of disability throughout her decision. The hearing officer determined that the ending date of disability was January 30, 2015.

The claimant appealed the hearing officer's disability determination and requested that the Appeals Panel render a new decision that the claimant had disability from December 17 through December 26, 2014, and from January 6, 2015, through the date of the CCH. The respondent (self-insured) filed a Motion to Correct Clerical Error regarding the beginning date of disability. Also, the self-insured responded to the claimant's appeal and urged affirmance of the hearing officer's disability determination and to correct the typographical error regarding the beginning date of disability.

The hearing officer's determination that the claimant sustained a compensable injury on (date of injury), was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The claimant, a bus driver, testified that she was pulling on a brake and felt a pop in her left elbow on (date of injury). The claimant testified that on December 17 and 18, 2014 (Wednesday and Thursday) she did not work because those were her normal days off. The claimant testified that she sought medical treatment for her injury on December 19, 2014. In evidence are Work Status Reports (DWC-73) dated December 19, 2014, and December 31, 2014, respectively, that show the claimant was released to work with restrictions due to her compensable injury, beginning December 19, 2014, through January 14, 2015. In evidence is a time sheet that shows that the claimant worked light duty on December 26 and 27, 2014, for eight hours each day. Also, in evidence is a Personnel Change Notice that shows: the last date the claimant worked was January 5, 2015; the claimant was paid through January 12, 2015; and the claimant was terminated from her employment on January 30, 2015.

We note that the claimant has claimed conflicting dates of disability. At the CCH held on September 29, 2015, the claimant claimed that she had disability from December 19 through December 25, 2014, and from January 7, 2015, to the present. On appeal the claimant is requesting that the Appeals Panel render a new decision that the claimant had disability from December 17 through December 26, 2014, and from January 6, 2015, through the date of the CCH. However, both at the CCH and on appeal the claimant contends that she does not have disability during the period she worked light duty.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury. Section 401.011(16). The claimant has the burden to prove that she 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 her disability; only that it was a producing cause. APD 042097, *supra*.

In her discussion of the evidence the hearing officer states:

With regard to disability, Claimant was assigned to a light-duty position from December 17, 2014 through December 31, 2014. Documents in evidence indicate that Claimant did not present to work on December 29, 2014, and December 30, 2014, and had no excuse. Claimant testified that she was absent due to appointments. Claimant was terminated from her employment on January 30, 2015 due to excessive absences, including those that predated this injury. [Self-insured] contends that Claimant was terminated for cause and there is no disability. The argument was persuasive.

The hearing officer's statement that the claimant was assigned to a light-duty position beginning December 17, 2014, is factually incorrect. A review of the record reflects that the claimant testified she returned to work light duty on December 26, 2014. Also, the employer's data analyst, (LH), testified that she supervised the light-duty work schedules and that the claimant's light-duty work assignment began on December 26, 2014, as reflected in the claimant's time sheet. The hearing officer erred regarding

material facts, that is, the testimony of both the claimant and the employer's data analyst, LH, and the claimant's time sheet that shows that the claimant worked light duty beginning on December 26, 2014. Also, the hearing officer made determinations with conflicting beginning dates of disability.

Accordingly, we reverse the hearing officer's disability determination and we remand the disability issue to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the claimant's disability began on December 17, 19, and 20, 2014, through January 30, 2015, and at no other times through the date of the CCH, and we remand the disability issue to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to correct her misstatement of material facts in evidence regarding the date the claimant worked light duty and to apply the correct legal standard in determining the issue of disability. The hearing officer shall consider all of the evidence, make consistent a finding of fact, conclusion of law, and decision on the disability issue.

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 **CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**LINDA WATSON, GENERAL MANAGER
2910 EAST 5TH STREET
AUSTIN, TEXAS 78702.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge