

APPEAL NO. 160131
FILED MARCH 30, 2016

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 December 15, 2015, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issue by deciding that the respondent/cross-appellant (claimant) had disability "only beginning on July 29, 2015, and continuing through August 15, 2015, and beginning on October 6, 2015, and continuing through October 27, 2015, and beginning on November 24, 2015, and continuing through the date of the hearing."

The appellant/cross-respondent (carrier) appealed the period of disability determined by the hearing officer in the claimant's favor based on sufficiency of the evidence, arguing that there was no credible evidence that the claimant sustained disability during the period at issue. The claimant also appealed, disputing the time periods that the hearing officer failed to find disability contending that it was error for the hearing officer to limit the period of disability determined to the periods supported by the Work Status Reports (DWC-73) and to start and stop periods of disability without evidence of changes in the claimant's physical condition.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that he sustained a crush injury to his right middle finger while working as an automotive mechanic when an engine fell on his right hand. The claimant further testified that he has been released to work with restrictions but is unable to perform the duties of an automobile mechanic within such restrictions and has been unable to obtain employment during the period in dispute.

The hearing officer's determination that the claimant had disability during the periods beginning on July 29, 2015, and continuing through August 15, 2015; and beginning on October 6, 2015, and continuing through October 27, 2015; and beginning on November 24, 2015, and continuing through December 15, 2015; the date of the CCH is supported by sufficient evidence and is affirmed.

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 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*.

In this case, the disability period in dispute is July 29, 2015, through the date of the CCH, December 15, 2015. In the Discussion portion of her decision, the hearing officer stated that "[the] [c]laimant presented [DWC-73s] from various doctors which released him to work with restrictions from May 27, 2015, through June 11, 2015, July 15, 2015, through August 15, 2015, October 6, 2015, through October 27, 2015, and from November 24, 2015, through December 22, 2015." The hearing officer then stated that "[b]ased upon the objective credible evidence, this hearing officer finds that [the] [c]laimant had disability only beginning on July 29, 2015, through August 15, 2015, October 6, 2015, through October 27, 2015, and from November 24, 2015, through the date of the hearing." We note that the periods of disability found by the hearing officer match the periods covered by the DWC-73s identified in her decision.

There is another DWC-73 in evidence which was not described or discussed by the hearing officer in her decision. This DWC-73 is dated October 27, 2015, and was issued and signed by (Dr. P) releasing the claimant to restricted duty from October 27, through November 17, 2015. The hearing officer determined that the claimant had no disability during the period covered by Dr. P's DWC-73. However, she failed to explain why she found the other DWC-73s in evidence to be "objective credible evidence" of disability but found Dr. P's October 27, 2015, DWC-73 not to be similarly persuasive. We note further that the hearing officer provides no rationale for her determination that the compensable injury was not a cause of the claimant's inability to obtain and retain employment for the time periods not covered by the DWC-73s mentioned in her decision.

We have often held that a claimant can move in and out of disability. See APD 031317, decided June 25, 2003. The claimant's uncontroverted testimony; however, was that he had been unable to perform the duties of an automotive mechanic since the date of injury and that he had completed "one round of therapy" but that additional treatment had been requested.

Because the hearing officer found that the evidence supported disability during the periods listed in the DWC-73s mentioned in her decision but failed to consider a DWC-73 in evidence, we reverse that portion of the hearing officer's determination that the claimant had disability "only beginning" and remand that portion of the disability issue in which the hearing officer found no disability (August 16 through October 5,

2015; and October 28 through November 23, 2015), to the hearing officer for further consideration.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability during the periods beginning on July 29, 2015, and continuing through August 15, 2015; and beginning on October 6, 2015, and continuing through October 27, 2015; and beginning on November 24, 2015, and continuing through December 15, 2015, the date of the CCH.

We reverse that portion of the hearing officer's determination that the claimant had disability "only beginning" and remand that portion of the disability issue in which the hearing officer found no disability (August 16 through October 5, 2015; and October 28 through November 23, 2015), to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

We remand that portion of the disability issue which the hearing officer found no disability to the hearing officer to determine after a consideration of all the evidence what remaining periods, if any, the claimant had disability. The hearing officer shall base her determination solely on the evidence currently in the record. No new evidence shall be admitted, and no rehearing shall be held on remand.

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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge