

APPEAL NO. 050120-s
FILED MARCH 14, 2005

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 10, 2004, with the record closing on December 21, 2004. The issues at the CCH were: (1) What is the date of maximum medical improvement (MMI) pursuant to Section 401.011(30)(B), the expiration of 104 weeks from the date on which income benefits began to accrue?; and (2) What is the average weekly wage (AWW)? The hearing officer resolved the disputed issues by deciding that: (1) the date of MMI pursuant to Section 401.011(30)(B), the expiration of 104 weeks from the date on which income benefits began to accrue, is August 16, 2004; and (2) the appellant's (claimant) AWW is \$221.90. The claimant appeals the hearing officer's determinations that income benefits began to accrue on August 21, 2002, and that the date of statutory MMI is August 16, 2004, contending that the hearing officer failed to correctly apply the law of res judicata because a prior CCH decision determined that the beginning date of the claimant's disability was January 14, 2004. The respondent (self-insured) requests affirmance of the hearing officer's determination on the date of statutory MMI. There is no appeal of the hearing officer's determination on the claimant's AWW.

DECISION

Reversed and a new decision is rendered that the date of statutory MMI will be January 19, 2006.

The claimant claimed that she injured her back while working on _____. In Texas Workers' Compensation Commission Appeal No. 040428, decided April 12, 2004, the Appeals Panel affirmed a CCH decision that the claimant's _____, compensable injury includes an aggravation of the preexisting pseudoarthrosis at the L4-5 level of her lumbar spine.

Another CCH was held on June 15, 2004 (June CCH). The transcript of the June CCH and the hearing officer's decision for that CCH are in evidence. The disputed issue stated on the record at the June CCH, which was agreed to by the parties and which is reflected in the June CCH decision, was "Did the claimant have disability resulting from an injury sustained on _____, and if so, for what periods?" In the opening statement at the June CCH the claimant's attorney stated "As the hearing officer previously indicated, the issue before you today is whether or not the claimant sustained disability from January 14, 2004 to the present." We note that the hearing officer had stated the issue to be "Did the claimant have disability resulting from an injury sustained on _____, and if so, for what periods?" No stipulations were made with regard to disability for the period from August 21, 2002, through January 13, 2004, or for any other period of time. In closing argument the claimant's attorney stated "We're only claiming or asking for disability from January 14, 2004, to the present time" and that "We specifically have not tried to overlap any claim for disability benefits during

a period of time when she was either working, seeking work or attempting to work or making whatever other arrangements she could to get income through the Texas WorkForce Commission." The self-insured's attorney stated in closing argument at the June 2004 CCH that " She was off work for back pain from August 21st for eight days thereafter, roughly September 2nd or so of 2002, acknowledge that" and that "But after that, your Honor, we have to ask ourselves, did any doctor take her off, No." The self-insured's attorney also stated in closing argument at the June CCH that "the period of time of disability was limited and cut down to January 04."

The hearing officer signed a CCH decision on June 17, 2004, in which he concluded that "Due to her _____, injury, Claimant has had disability beginning on January 14, 2004, and continuing through the date of the benefit contested case hearing, which is the only period in dispute." The self-insured appealed the June CCH decision to the Appeals Panel, and in its request for review, which was in evidence, asserted that "the claimant failed to establish that she suffered disability beginning 14 January 2004, and continuing through the date of the Benefit Contested Case Hearing" and requested that the Appeals Panel reverse the hearing officer's decision and render a decision that "the Appellant was not injured in the course and scope of employment and did not suffer disability as the result of the compensable injury." In Texas Workers' Compensation Commission Appeal No. 041652, decided August 23, 2004, the Appeals Panel affirmed the hearing officer's June CCH decision.

In a letter to the claimant dated July 2, 2004, which was after the June CCH decision was signed, the self-insured's third party administrator (TPA) wrote that the first payment of workers' compensation benefits for the period of August 21, 2002, to May 26, 2004, was being issued; that the benefit payment was temporary income benefits (TIBs); and that "TIBs began on 08-28-02 which was your eighth day of disability." The letter also stated that the TIBs weekly benefit amount was \$130.74, but the letter does not state what the total amount of TIBs were for the period indicated in the letter. In a letter to the claimant dated September 1, 2004, the self-insured's TPA notified the claimant that TIBs had been suspended because the claimant had reached statutory MMI on August 31, 2004; that it would be assessing an impairment rating (IR) and initiating impairment income benefits (IIBs); and that the claimant had the right to file a dispute with the Texas Workers' Compensation Commission (Commission) and request a benefit review conference. In another notice to the claimant dated September 1, 2004, the self-insured's TPA informed the claimant that based on a benefit accrual date of August 30, 2002, the claimant had reached statutory MMI, and that it had made a reasonable assessment of a 10% IR and would pay IIBs.

The current CCH was held on December 10, 2004 (December CCH), before the same hearing officer who presided at the June CCH. The issues were the date of MMI pursuant to Section 401.011(30)(B), and AWW. Since there is no appeal of the AWW determination, it will not be discussed. With regard to the statutory MMI date, the claimant's position was that she had not reached MMI, and that statutory MMI will not occur until January 17, 2006, based on the hearing officer's prior determination in the June CCH decision that the claimant had disability beginning on January 14, 2004. The

claimant's attorney argued that after the June CCH decision was issued, the self-insured paid the claimant TIBs for the last week of August 2002 and that the self-insured then contended that statutory MMI was in August 2004. The claimant's attorney argued that the beginning date of disability was res judicata based on the June CCH decision. The self-insured contended that res judicata was not an issue and is not applicable; that the claimant began to lose time from work on August 21, 2002, as the result of her compensable injury; and that she continued off work through August 30, 2002, which was the eighth day of disability. The evidence reflected that following her _____, compensable injury, the claimant was off work for various time periods, that she had reduced hours for various time periods, and that she obtained unemployment benefits for a period of time.

In his CCH decision signed on December 29, 2004, the hearing officer wrote that it did not appear that equity would allow the application of res judicata principles to the self-insured when it was the claimant that chose not to litigate the entire period of disability (at the June CCH). The hearing officer found in the December CCH decision that income benefits began to accrue on August 21, 2002, and that the date 104 weeks from the date benefits began to accrue is August 16, 2004. The hearing officer concluded that the date of MMI pursuant to Section 401.011(30)(B), the expiration of 104 weeks from the date on which income benefits began to accrue, is August 16, 2004. The claimant contends on appeal, as she did at the December CCH, that res judicata should apply to the beginning date of disability.

What is commonly referred to as statutory MMI occurs on the expiration of 104 weeks from the date on which income benefits begin to accrue. Section 401.011(30)(B). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.7(a) (Rule 124.7(a)) provides that "Accrual date" means the day an injured worker's income benefits begin to accrue, and Rule 124.7(b) provides that an injured worker's accrual date is the worker's eighth day of disability. In Texas Workers' Compensation Commission Appeal No. 93678, decided September 15, 1993, the Appeals Panel considered pertinent statutory and rule provisions and Commission Advisories and decided that income benefits begin to accrue on the eighth day of disability, even in cases where the claimant's disability continues for four weeks or longer, and that there is but one accrual date for income benefits, that being the eighth day of disability. The Appeals Panel noted in Appeal No. 93678 that its decision in regard to the accrual date for income benefits did not relieve the carrier from its obligation to compute compensation from the date disability begins where disability continues for four weeks or longer. Appeal No. 93678 also noted that Commission Advisory 93-01, dated January 11, 1993, relating to statutory MMI, provides in part that a claimant, by definition, reaches MMI on the day after the expiration of 104 weeks from the date income benefits began to accrue, and that Commission Advisory 93-03, dated March 9, 1993, provides in part that, as provided in Rule 124.7(b), an injured workers' accrual date is the worker's eighth day of disability. We note that in order to determine the date of statutory MMI, it is necessary to establish the date disability began so that the accrual date, the eighth day of disability, can be determined.

In Barr v. Resolution Trust Corp., 837 S.W.2d 627 (Tex. 1992), the Texas Supreme Court noted that, broadly speaking, res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments, and that within this general doctrine, there are two principal categories: (1) claim preclusion (also known as res judicata); and (2) issue preclusion (also known as collateral estoppel). The Supreme Court further noted that res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit, and that issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit. In Barr, the Supreme Court reaffirmed the "transactional" approach to res judicata, stating that a subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of due diligence, could have been litigated in a prior suit. The doctrine of res judicata has been applied to administrative action that has been characterized by the courts as adjudicatory, judicial, or quasi-judicial. Bryant v. L.H. Moore Canning Co., 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi, 1974), cert. denied 419 U.S. 845.

In the instant case, during closing argument at the June CCH, the self-insured's attorney acknowledged that the claimant was off work for back pain from August 21 through about September 2, 2002, but when the self-insured appealed the June CCH decision that the claimant had disability beginning on January 14, 2004, and continuing through the date of the CCH, the self-insured did not assert a different beginning date for disability, but instead contended that the claimant failed to establish that she suffered disability beginning January 14, 2004, and continuing through the date of the CCH, and that the claimant "did not suffer disability as the result of the compensable injury." The self-insured had the opportunity at the June CCH and in its appeal of the hearing officer's June CCH decision to contend that disability began sometime prior to January 14, 2004, the date the claimant asserted that disability began, because the issue was whether the claimant had disability resulting from an injury of _____, and if so, for what periods. In addition, as previously noted, the self-insured acknowledged in closing argument at the June CCH that the claimant was off work for back pain for at least a week immediately following her back injury, but did not contend at the June CCH that the hearing officer should find that the claimant had disability for that period of time. We conclude that the doctrine of res judicata is applicable to the facts of the instant case and that as a consequence of that doctrine the beginning date of disability is January 14, 2004, as was determined at the June CCH and as was affirmed by the Appeals Panel. To the extent that Texas Workers' Compensation Commission Appeal No. 981406, decided August 10, 1998, is inconsistent with our decision in this case it is overruled because Appeal No. 981406 allowed the litigation in a subsequent CCH of a period of disability (August 22 to October 15, 1996) that was within the scope of the disability issue that was before a hearing officer in a prior CCH held on October 15, 1996.

With a January 14, 2004, beginning date of disability, the eighth day of disability was January 21, 2004, which was the date income benefits began to accrue. The expiration of 104 weeks from the date on which income benefits began to accrue will be

January 18, 2006. Statutory MMI will be January 19, 2006. See Commission Advisory 93-01 and Appeal No. 93678, *supra*. The computation of the date of statutory MMI is not a decision on the date of MMI because the claimant may reach MMI at an earlier date under Section 401.011(30)(A).

We reverse the hearing officer's determinations that income benefits began to accrue on August 21, 2002, and that the date of MMI pursuant to Section 401.011(30)(B), the expiration of 104 weeks from the date on which income benefits began to accrue, is August 16, 2004. We render a decision that income benefits began to accrue on January 21, 2004, and that the date of statutory MMI pursuant to Section 401.011(30)(B) will be January 19, 2006.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Robert W. Potts
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge