

APPEAL NO. 051897
FILED SEPTEMBER 20, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 2, 2005. The disputed issues were: (1) whether the appellant (claimant) sustained a compensable injury on _____; and (2) whether the claimant had disability from March 22, 2005, through April 18, 2005, and from May 23, 2005, to the present resulting from an injury sustained on _____. The hearing officer resolved the disputed issues by deciding that: (1) the claimant sustained a compensable injury on _____; and (2) the claimant had disability beginning March 22, 2005, and continuing through April 18, 2005, but did not have disability beginning May 23, 2005, and continuing through the date of the CCH. The claimant appeals the hearing officer's determination that he did not have disability from May 23, 2005, through the date of the CCH. The respondent (carrier) requests affirmance. There is no appeal of the hearing officer's determinations that the claimant sustained a compensable injury on _____, and that he had disability from March 22, 2005, and continuing through April 18, 2005.

DECISION

Reversed and rendered on the issue of disability from May 23, 2005, through the date of the CCH.

The claimant's employer assigned him to work at a client company where he injured his back on _____, lifting bundles of cardboard boxes he estimated weighed 80 pounds. On March 22, 2005, a doctor diagnosed the claimant as having a lumbar strain and restricted the claimant to light-duty work with lifting, pulling, and pushing limited to 20 pounds. The work restrictions were continued in effect on March 29, 2005.

On March 30, 2005, the claimant began seeing a second doctor and that doctor diagnosed the claimant as having lumbar radiculitis, lumbar sprain/strain, and muscle spasm, and provided treatments. In a Texas Workers' Compensation Work Status Report (TWCC-73) dated March 31, 2005, the second doctor reported that the claimant's medical condition from his compensable injury would prevent the claimant from returning to work as of March 31, 2005, and that that work status was expected to continue through April 14, 2005. In a TWCC-73 dated April 14, 2005, the second doctor reported that the claimant's medical condition from the compensable injury will allow the claimant to return to work as of April 15, 2005, with restrictions identified in the report, and that the restrictions are expected to last through May 16, 2005. Various restrictions are noted in the TWCC-73 of April 14, 2005, including no kneeling, squatting, bending, stooping, pushing, pulling, twisting, stair/ladder climbing, reaching, or overhead reaching. Other restrictions are no carrying of objects of more than 15 pounds for more than 1 hour per day and sit/stretch breaks of one per hour. In a TWCC-73 dated May

16, 2005, the second doctor reported that the claimant's medical condition from the compensable injury will allow the claimant to return to work as of May 16, 2005, with the work restrictions identified in the report, and that the restrictions are expected to last through June 16, 2005. The work restrictions identified in the May 16, 2005, TWCC-73 are similar to those identified in the April 14, 2005, TWCC-73. The last treatment record in evidence is dated May 16, 2005, and the diagnoses are lumbar radiculitis, lumbar sprain/strain, and muscle spasm.

A letter reflects that on April 22, 2005, the employer offered the claimant a restricted duty position as a security guard and that the claimant accepted that position. Another letter reflects that on May 4, 2005, the employer continued the offer of the restricted duty position as a security guard and that the claimant again accepted the position. Both letters state the duration of the restricted work position to be "indefinitely."

There is no appeal of the hearing officer's determinations that the claimant sustained a compensable injury on _____, and that the claimant had disability from March 22, 2005, through April 18, 2005. The hearing officer found that the claimant sustained a lumbar sprain/strain. The claimant testified that he returned to work for the employer on April 19, 2005, sorting papers in an office, and that from April 22, 2005, through May 22, 2005, he worked as a security guard. The claimant said that the security job ended on May 22, 2005; that he was told that the client company no longer needed a security guard; that he returned to the employer, but was not assigned any job; that he is still under the same work restrictions; that he has kept in contact with the employer about a light-duty job; and that the employer has not offered him a job after the security guard assignment ended on May 22, 2005. The claimant testified that he has continued to have back problems, including pain and stiffness, and that he thinks he can perform office work.

The claimant had the burden to prove that he has had disability and the time periods of his disability. 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." In discussing the evidence in the Background Information section of the decision, the hearing officer states that the employer could no longer accommodate the light-duty work restrictions after May 22, 2005, but that the medical records fail to address the claimant's ability to work after May 22, 2005. The hearing officer further states that the evidence is insufficient to establish disability beginning May 23, 2005, and continuing through the date of the CCH. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. The claimant appeals the hearing officer's determination that he did not have disability from May 23, 2005, through the date of the CCH.

We conclude that the hearing officer's determination that the claimant did not have disability from May 23, 2005, through the date of the CCH is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The

second doctor's TWCC-73 of May 16, 2005, reflects that the claimant's work restrictions are expected to last through June 16, 2005. As of the date of the CCH, there is no medical record that reflects that the claimant is able to return to work without restrictions. The hearing officer noted that after May 22, 2005, the employer was not able to accommodate the light-duty restrictions. We reverse that portion of the hearing officer's decision that determines that the claimant did not have disability from May 23, 2005, through the date of the CCH, and we render a decision that the claimant had disability from May 23, 2005, through the date of the CCH.

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

**ROBERT C. SIDDONS
BUILDING 1, SUITE 200
11612 RM 2244 (BEE CAVES ROAD)
AUSTIN, TEXAS 78738.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge