

APPEAL NO. 071457
FILED OCTOBER 2, 2007

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 July 10, 2007. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) sustained disability from February 25, 2005, through May 27, 2005, and that he did not sustain disability from May 28, 2005, through May 16, 2006. The hearing officer applied the Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, LTD. (MDA) in determining the claimant's disability. The claimant appealed the hearing officer's determination that the claimant did not sustain disability from May 28, 2005, through May 16, 2006. The respondent (carrier) responded, urging affirmance. The hearing officer's determination that the claimant sustained disability from February 25, 2005, through May 27, 2005, has not been appealed and has become final.

DECISION

Reversed and rendered.

It is undisputed that the claimant sustained a compensable injury on _____, that the claimant underwent an arthroscopic meniscectomy to his right knee on February 25, 2005, and that the claimant reached maximum medical improvement on May 16, 2006, with a nine percent impairment rating for his compensable back and knee injury. The sole issue in dispute was whether the claimant sustained disability from February 25, 2005, through May 16, 2006. The hearing officer applied the MDA referenced in 28 TEX. ADMIN. CODE § 137.10 (Rule 137.10) in calculating 91 days after the February 25, 2005, right knee surgery to arrive at the May 27, 2005, end date of disability.

Rule 137.10(a) provides that insurance carriers, health care providers, and employers shall use the disability duration values in the current edition of the MDA ([Texas Department of Insurance, Division of Workers' Compensation (Division)] return to work guidelines), as guidelines for the evaluation of expected or average return to work time frames. Rule 137.10(c) provides that the Division return to work guidelines shall be presumed to be a reasonable length of disability duration and explains how health care providers, insurance carriers, employers, and injured employees are to use the guidelines. However, Rule 137.10(e) clarifies that the disability duration values in the guidelines are not absolute values and do not represent specific lengths or periods of time at which an injured employee must return to work. Rule 137.10(g) provides that Rule 137.10, which was adopted January 18, 2007, is effective on or after May 1, 2007. Rule 137.1(b) adopted January 18, 2007, provides in part that disability management tools, such as return to work guidelines, may be used by the Division to resolve income benefit disputes.

In this case, the MDA was not in evidence. The claimed period of disability was from February 25, 2005, through May 16, 2006. The hearing officer erred in applying the MDA because the entire period of disability at issue was prior to May 1, 2007, the effective date of Rule 137.10. Rule 137.10, which adopted the MDA as the Division's return to work guidelines, was not in effect during any of the claimed period of disability. See Appeals Panel Decision 071087-s, decided August 10, 2007.

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." There are several Work Status Reports (DWC-73) from the claimant's treating doctor, Dr. W, in which he takes the claimant off work for his compensable injury for the claimed period of disability. Although the hearing officer states in her decision that the DWC-73s do "not comport with the content of the narrative reports authored by" Dr. W and Dr. M, the medical reports indicate that the claimant complained of back and knee pain for the period of disability in dispute. Additionally, Dr. W states in progress notes dated January 16, 2006, and February 16, 2006, that the claimant may need an "[i]ntradiscal decompression." A medical report from Dr. M dated April 26, 2005, post knee surgery, indicates that the claimant complained of knee pain and recommended therapy. Also, the claimant testified that he was unable to work due to his compensable injury for the entire claimed period of disability. In this case, there is no medical evidence to the effect that the claimant did not have disability for the period claimed from February 25, 2005, through May 16, 2006. We conclude that the hearing officer's determination that the claimant did not sustain disability from May 28, 2005, through May 16, 2006, is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The evidence establishes a period of disability from February 25, 2005, through May 16, 2006. Accordingly, we reverse the hearing officer determination that the claimant did not sustain disability from May 28, 2005, through May 16, 2006. We note that the hearing officer's determination that the claimant sustained disability from February 25, 2005, through May 27, 2005, has not been appealed and became final.

We reverse the hearing officer's determination that the claimant did not sustain disability from May 28, 2005, through May 16, 2006, and we render a new decision that the claimant had disability from May 28, 2005, through May 16, 2006.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge