APPEAL NO. 100201
FILED APRIL 23, 2010

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 November 30, 2009, with the record closing on January 22, 2010. The hearing officer determined that: (1) the compensable injury of _____, extends to adhesive capsulitis to the left shoulder, a sprain of the left knee, a neck strain/sprain, a chest wall contusion, left hand edema, edema of the left fingers with numbness, and bursitis; (2) the compensable injury of _____, does not extend to complex regional pain syndrome (CRPS) II, brachial plexopathy, and supraspinatus tendinopathy of the left shoulder; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) did not abuse its discretion in failing to appoint a second designated doctor; (4) the appellant (claimant) has not yet reached maximum medical improvement (MMI); (5) because the claimant is not yet at MMI, an impairment rating (IR) cannot be determined; (6) the claimant's average weekly wage (AWW) is $427.08; and (7) the claimant sustained disability beginning March 16, 2009, and continuing through May 26, 2009, but at no other times.

The claimant appealed, disputing the hearing officer's determinations of MMI and IR and the beginning and ending dates of disability. The claimant also appealed both of the hearing officer's extent-of-injury determinations. Additionally, the claimant contends that the hearing officer failed to consider her timely response to the designated doctor's response to a letter of clarification (LOC) that was sent to the designated doctor after the CCH. The respondent (carrier) responded, urging affirmance.

The hearing officer's determinations that: (1) the Division did not abuse its discretion in failing to appoint a second designated doctor; (2) the claimant's AWW is $427.08; and (3) that portion of the hearing officer's disability determination that the claimant sustained disability March 16 through May 26, 2009, were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and remanded in part, reversed and rendered in part, and affirmed in part.

The parties stipulated that the carrier accepted a left shoulder sprain/strain and left knee contusion as part of the _____, compensable injury, and that (Dr. H) was appointed as the designated doctor for the issues of MMI and IR only.

CLAIMANT'S RESPONSE TO THE LOC

In the Background Information section of the decision, the hearing officer stated:

> [f]ollowing the conclusion of the November 30, 2009 [CCH], a[n] [LOC] was mailed to the [d]esignated [d]octor on December 3, 2009 regarding the issues of MMI and IR. The [designated doctor] replied that another examination of the claimant would be necessary, and that examination transpired on January 4, 2010. The [designated doctor]'s amended report was received by the Division on January 12, 2010, and the parties were given until January 22, 2010 to respond or request a reconvening of the CCH. As of January 22, 2010, no responses or requests from the parties were received, and the record closed as of that date.

The appeal file contains a letter dated January 22, 2010, from the claimant's attorney to the hearing officer responding to the designated doctor's response to the LOC. The claimant's response was sent via facsimile (fax) to 804-4001, a proper Division fax number and the same number listed on the hearing officer's notice for the parties to submit any responses. The claimant's response shows two separate Division date stamps, one dated January 22, 2010, and another dated January 26, 2010. The hearing officer noted on the response "Denied—Not Timely Received."

In her appeal the claimant contends she sent her response on January 22, 2010, to 804-4001, the fax number listed on the hearing officer's notice. The claimant attached a fax confirmation sheet proving her response was sent to the fax number provided by the hearing officer on his letter on that same date prior to 5:00 p.m. The claimant argues she timely submitted her response to the designated doctor's response to the LOC and that the hearing officer erred in failing to consider her response.

We have previously held that it is reversible error to solicit a response from a designated doctor and write an opinion based thereon without having afforded the parties the opportunity to comment on the additional evidence. Appeals Panel Decision (APD) 011128, decided June 25, 2001. *See also* APD 93323, decided June 9, 1993; and APD 010902, decided June 6, 2001. Although this case differs somewhat from APD 011128 in that the hearing officer did send the parties the designated doctor's response to his LOC and left the record open to afford them the opportunity to respond, the hearing officer did not consider the claimant's response. However, the claimant complied with the hearing officer's instructions for submitting a response to the designated doctor's response to the LOC: she sent her response to the number contained on the hearing officer's notice, which is a proper Division fax number, within the timeframe given by the hearing officer. We therefore reverse and remand this case to the hearing officer to consider the claimant's timely response to the designated doctor's response to the LOC. The hearing officer may choose to reconvene the CCH with the parties present.

MMI, IR, AND EXTENT OF INJURY

Given that the hearing officer did not consider the claimant's timely response to the designated doctor's response to the LOC, we reverse and remand the MMI/IR and

extent-of-injury issues to the hearing officer to make a determination after he has reviewed and considered the claimant's response.

DISABILITY

The claimant had the burden to prove that she has had disability and the time periods of her disability. APD 032579, decided November 19, 2003. Section 401.011(16) defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. The hearing officer determined that the claimant's disability began on March 16, 2009, and continued through May 26, 2009, but at no other times. The claimant contends she had disability beginning February 25, 2009, through the date of the CCH.

The claimant testified that she was taken to the emergency room immediately after her fall at work on the date of injury. The claimant testified she had such a high level of pain that EMS technicians administered a morphine drip en route to the hospital. Emergency room physicians dispensed Zofran, morphine, and Dilaudid to the claimant, and diagnosed her with shoulder sprain, shoulder contusion, and knee contusion. The emergency room physicians released the claimant to return to work full duty as of February 28, 2009, but also referred her to (Dr. B), an orthopedic doctor.

Dr. B attempted to examine the claimant on February 26, 2009, but was unable to complete his examination because the claimant was in too much pain. Dr. B told the claimant to go home and use "ice, anti-inflammatories, [and] gentle range of motions" and return to him in two weeks for her first evaluation. In evidence are records from the employer noting the claimant did not work on February 25 through February 27, 2009. The claimant returned to Dr. B on March 13, 2009, and upon examination Dr. B released the claimant for light duty "at a desk job" as of March 13, 2009. On that date the employer sent the claimant an offer of employment based on Dr. B's recommendations for the same hourly wage as the claimant earned prior to the injury. The claimant accepted the offer and began work on the agreed upon date of March 16, 2009. Although the claimant was paid her pre-injury hourly wage, she was unable to work the same number of hours as she had prior to her injury. Therefore, she did not earn her pre-injury wage.

Under the facts of this case, the hearing officer's determination that the claimant's disability began on March 16, 2009, is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. It is apparent from the evidence that the claimant was unable to return to work until Dr. B released her to light duty effective March 13, 2009, at which time she did return to work in a light duty position for fewer hours that she had worked prior to her injury. The evidence establishes a beginning date of disability of February 25, 2009. There is sufficient evidence to support the ending date of disability May 26, 2009, as found by the hearing officer. Accordingly, we reverse that portion of the hearing officer's determination that the claimant sustained disability beginning March 16, 2009, and render a new decision that the claimant had disability from her injury of _____, beginning February 25,

2009. We affirm the hearing officer's determination that the claimant's period of disability ended May 26, 2009.

SUMMARY

We reverse the hearing officer's determinations that the _____, compensable injury extends to adhesive capsulitis to the left shoulder, a sprain of the left knee, a neck strain/sprain, a chest wall contusion, left hand edema, edema of the left fingers with numbness, and bursitis; the _____, compensable injury does not extend to CRPS II, brachial plexopathy, and supraspinatus tendinopathy of the left shoulder; the claimant has not yet reached MMI; and because the claimant is not yet at MMI, an IR cannot be determined, and remand these issues for the hearing officer to consider the claimant's response to the designated doctor's response to the LOC.

We reverse the hearing officer's determination that the claimant sustained disability beginning March 16, 2009, and render a new decision that the claimant sustained disability beginning February 25, 2009.

We affirm the hearing officer's determination that the claimant's period of disability ended May 26, 2009.

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 Division, 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 **NEW HAMPSHIRE INSURANCE 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 78701-3232.

_____
Carisa Space-Beam
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge