APPEAL NO. 961729
FILED OCTOBER 18, 1996

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held, with the record closing on July 31, 1996. The following determinations of the hearing officer were not appealed and have become final pursuant to Section 410.169: (1) the appellant (claimant herein) sustained a compensable repetitive trauma injury to both arms; (2) the date of injury was _____; and (3) the employer had actual knowledge of the injury. The following determinations have been appealed by the claimant for the reason indicated: (1) the claimant did not sustain a compensable neck injury, because this was not an issue properly before the hearing officer and (2) the limited periods of disability, because of alleged legal error and factual insufficiency. The respondent (carrier herein) replies that the decision of the hearing officer is correct and should be affirmed.

DECISION

Reformed in part and reversed and remanded on the issue of disability.

The claimant sustained a compensable injury to both upper extremities on _____. The parties stipulated that the "INS work authorization card" and the "social security number" used by the claimant to obtain the employment in which she was injured were "fraudulent." The practical implication of these stipulations was that the claimant's residence in the United States was illegal and the hearing officer made an express finding of fact that she was "an illegal alien" at various pertinent times. The claimant appeals this finding as not supported by the stipulations or other evidence. We agree to the extent that, technically, the legal status of the claimant was not an issue to be resolved by the hearing officer. Nonetheless, as more fully discussed below, the claimant's work status in Texas was pertinent to the question of disability. The hearing officer's finding that the claimant was an "illegal alien" constitutes for purposes of his decision and order, as well as for this opinion, only a finding that the claimant could not legally work in Texas at all times pertinent to this claim. Thus, this finding is consistent with the stipulations of the parties and does not constitute error on the part of the hearing officer.

According to the testimony of Mr. K, the controller for the employer, and the claimant's work attendance records, the claimant was absent from work for the following periods: July 17-19, 1995; August 31-September 19, 1995; and after February 12, 1996, through the date of the CCH. Mr. K stated that her employment was terminated on May 3, 1996, upon discovery of the fraudulent work papers. It was his opinion, based on his conversations with U.S. Department of Justice personnel, that the employer had no choice but to terminate the claimant because once the employer was aware of her status, it would have been illegal for the employer to continue the employment relationship.

The claimant agreed she was off work these days and has not worked beginning February 13, 1996. Her position is that she was unable to work these days because of her

injury. She also stated that she was in Mexico for 20 days in April 1996 and for eight days in June 1996. Other medical evidence pertinent to the question of disability consisted of the reports of Dr. C, the claimant's current treating doctor. He first treated the claimant on February 13, 1996. His diagnoses were neck strain, lateral epicondylitis and wrist sprain. He placed her in an total off-work status as of the date of this first visit.

The hearing officer stated in his discussion of the evidence that "the primary question in this case is does the illegal alien status affect disability . . . ." We quote at length his rationale for his decision on this issue and the pertinent findings of fact and conclusions of law:

> I believe the status of being an illegal alien does not as a matter of law bar disability and the recovery of temporary income benefits [TIBS] . . . . However, it is a factor to consider depending on the specific facts of a claim. With the illegal alien status undisputed, the most critical factors must be whether the Claimant must because of the injury remain in Texas involuntarily, whether the Claimant voluntarily remains in Texas when medical treatment may be obtained in Mexico, and when the Claimant was in Texas or was in Mexico during any alleged periods of disability. In this case, though [Dr. C] takes the Claimant off of work, [Dr. C's] medical reports do not rise to a total inability to work or a physical incapacitation of the Claimant based on the Claimant's testimony. The claimant was not shown to be unable to ambulate and travel to and from Mexico during her earlier periods of being off of work and after February 12, 1996. For the periods that the Claimant was in Mexico because the Claimant could not physically do her former job duties and established the requirements of [Section] 401.011(16),[1] the Claimant is entitled to disability. For the periods that the Claimant was in Texas, apart from her benefit review conference [BRC], including allowing a reasonable time before and after days for travel, and the [CCH] with the before date for travel, the Claimant's status as an illegal alien is the overriding factor causing the Claimant to have failed to establish "disability" under Section 401.011(16) because the primary legal barrier to her employment is her alien status when she is in the [sic] Texas. The date of the [BRC] was May 3, 1996. The date of this [CCH] was July 2, 1996.
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> . . . Claimant has had the inability because of her compensable injury to obtain and retain employment at wages equivalent to the preinjury wage from July 17th through July 19th and August 31st through September 19th of 1995. See medical evidence and testimony. During these periods, the Claimant was kept off of work by doctors and treated. However, nothing was shown that the Claimant could not have returned to Mexico or been treated

[1]This section defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage."

in Mexico. Her alien status again overrides any period of alleged disability because the primary cause of the inability to obtain and retain employment at wages equivalent to the preinjury wage was her remaining in Texas as an illegal alien. The Claimant from February 13, 1996, to the present did not have disability except for the periods when she was in Mexico and required to attend Commission proceedings. The periods that the Claimant was in Mexico were 20 days in April and 8 days in June for which she is entitled to disability.

The following findings of fact and conclusions of law are pertinent to this appeal:

FINDINGS OF FACT

9. The Claimant was kept off of work by doctors . . . for the periods from July 17, 1995, through July 19, 1995, and from August 31, through September 19, 1995.

10. The Claimant continued to work after September 19, 1995, up through February 12, 1996.

11. The Claimant has not worked after February 12, 1996.

12. Prior to the date of this hearing and after February 12, 1996, the Claimant was in Mexico 20 days in April and 8 days in June.

13. The claimant has had the inability because of her compensable injury on _____ to return to her regular job duties from July 17, 1995, through July 19, 1995, and from August 31, 1995, through September 19, 1995.

14. From July 17, 1995, through July 2, 1996, the Claimant was able to ambulate and travel and was not hospitalized or physically incapacitated to bedrest.

15. May 3, 1996, was the date of the [BRC] and the date of the [CCH], and the Claimant is required to attend Texas Workers' Compensation Commission proceedings.

16. Travel from Mexico to Houston . . . would be reasonable to set aside one day for each direction of travel for required Texas Workers' Compensation Commission proceedings.

17. The Claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage from July 17, 1995, through July 2, 1996, the date of this hearing, was because of her illegal alien status

for all the time that she remained in Texas unrelated to involuntarily [sic] requirements to attend Commission proceedings.

CONCLUSIONS OF LAW

4. The Claimant did not suffer a work-related neck injury.

6. The Claimant has had disability . . . from the _____, compensable injury only for the periods of 20 days in April of 1996; from May 1st through May 3, 1996; 8 days in June; and for July 1, 1996, and July 2, 1996.

Whether disability exists is a question of fact and can be established by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We have described disability as an "economic concept." Texas Workers' Compensation Commission Appeal No. 941689, decided February 1, 1995. In resolving an issue of disability, the first consideration is whether a claimant has earned his or her preinjury wages and if, as in this case, the claimant did not earn the preinjury wage the question then to be resolved is why the claimant did not earn the preinjury wage. In Texas Workers' Compensation Commission Appeal No. 94211, decided April 6, 1994, the Appeals Panel pointed out that "alienage" does not in and of itself preclude a finding of disability under the 1989 Act, but that the question of whether an injured worker claiming disability was prohibited by federal immigration law from working at all was relevant in the determination of why a claimant did not work. Depending on the evidence, a hearing officer could find that a claimant did not have disability because the reason he or she was not able to work was not the compensable injury, but the legal barrier to obtaining employment. The hearing officer discussed Appeal No. 94211 in his decision and order.

The question of disability is also to be determined in terms of whether the claimant is able to work for wages, not in terms of the ability to return to the preinjury job. Texas Workers' Compensation Commission Appeal No. 92083, decide April 16, 1992. A claimant terminated for cause can still have disability if other employment is available considering the claimant's training and physical limitations. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Normally, an unconditional excuse from work because of a compensable injury issued by a treating doctor, if found credible by a hearing officer, is conclusive evidence that disability exists or continues. But the burden remains on the claimant to prove the unemployment "emanates from the compensable injury." Texas Workers' Compensation Commission Appeal No. 941689, *supra*. That proof need only establish that the compensable injury is a producing cause, not the exclusive cause, of the disability and a carrier may defend against a claim of disability by asserting and proving that the sole cause of the inability to earn the preinjury wage was something other than the compensable injury. Texas Workers' Compensation Commission Appeal No. 961357, decided August 16, 1996. *See also* Texas Workers' Compensation Commission Appeal No. 950800, decided June 30, 1995. Whether a sole

cause defense is raised or not, the claimant still must establish that the compensable injury was a producing cause of the disability. *See* Texas Workers' Compensation Commission Appeal No. 961390, decided August 30, 1996.[2]

In the case we now consider, it is unclear whether the hearing officer properly applied the law to the facts in evidence for the following reasons:

(1) The hearing officer expressly questioned the credibility of the medical evidence of Dr. C on the issue of disability. He still found that during the claimed periods of disability in 1995, the claimant was unable because of her compensable injury to return to her regular job, but ultimately awarded no disability for these periods in 1995. Though apparently finding the claimant credible on the numerous other issues not appealed as well as on periods of disability in 1996, the hearing officer apparently did not consider the claimant credible with regard to disability in 1995. He also appears to have judged disability for 1995 on the basis of the claimant's ability to return to her preinjury job, not on her ability to earn wages. On remand, the hearing officer should clarify whether he finds the claimant and Dr. C credible on the issue of disability in 1995 and, for the periods of disability claimed in 1995, whether she does or does not have the ability to earn her preinjury wage. *See* Texas Workers' Compensation Commission Appeal No. 91045, *supra.*

(2) The hearing officer awards disability for travel time to and from the BRC and to the CCH based on travel from Mexico. The claimant testified that she was in Mexico in April and June 1996. The BRC was in May and the CCH was in July 1996. Thus, there was no evidence, nor did the claimant even assert, that she had to travel from Mexico (not further specified as to where in Mexico) to the BRC or CCH. Her mailing address at all relevant times was in (City), Texas. In any case and much more fundamentally, the 1989 Act does not define disability in terms of travel time to a BRC or CCH. Thus, time spent in such travel cannot, as a matter of law, be a basis for a finding of disability. Disability exists on travel dates at all only if on those same dates the claimant independently meets the statutory definition of disability contained in Section 401.011(16). In other words, does the claimant have the inability because of her compensable injury to earn her preinjury wage.

(3) As noted in our lengthy quote from the decision and order, the hearing officer construed Dr. C's reports as "somewhat lacking in credibility" on the issue of disability because the reports "do not rise to a total inability to work or a physical incapacitation." He also refers in a finding of fact to the claimant's ability "to ambulate and travel" and her not being "hospitalized or physically incapacitated to bedrest." These comments may be based on a general discounting of Dr. C's credibility. In any case, total inability to work is pertinent in the context of an award of supplemental income benefits (SIBS), *see, e.g.*,

[2]For this reason, we find no merit in the claimant's contention that the hearing officer improperly added a sole cause defense issue. The carrier did not assert such a defense, but relied on the inability of the claimant to meet her burden of proving she had disability for the periods claimed.

Texas Workers' Compensation Commission Appeal No. 94398, decided May 19, 1994, but is not the standard for a finding of disability which may be based on a partial or limited or conditional release to return to work. *See* Appeal No. 91045, *supra*. The award of temporary income benefits (TIBS) is, of course, dependent on actual earnings during the period of disability, but disability itself can, as a matter of law, exist short of "incapacitation."

(4) The hearing officer recognized that the legal status of the claimant in Texas and prohibitions imposed by federal immigration law on her obtaining employment were relevant to the question of disability. He, however, found no disability while she remained in Texas, seemingly only for the reason that she was prohibited by federal law from working here, and yet found disability while she was in Mexico because she obviously was not prohibited from working there. This analysis ignores the one critical question: what causative role, if any, did her physical condition as a result of her compensable injury have in her failure to earn her preinjury wage. There was no evidence to suggest that this condition changed in terms of physical ability to work simply by crossing an international boundary. We can only assume that by finding disability while in Mexico, but not while in Texas, the hearing officer based his findings of disability solely on her immigration status. This is contrary to the 1989 Act and our decision is Appeal No. 94211, *supra*.

For the foregoing reasons, we reverse the decision of the hearing officer with regard to disability and remand this issue for further consideration, based on the evidence already submitted, in light of the applicable law as discussed above.

One final comment is in order. The disputed issue of a compensable injury was defined only in terms of an upper extremity injury. The parties agreed to this formulation of the issue. Although the medical records in evidence, particularly those of Dr. C, also discuss a neck injury, our review of the record of the CCH discloses that an injury to the neck was never conceded by the carrier; nor was it ever made an issue by the parties; nor did the hearing officer takes steps to add it as an issue. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 142.7 (Rule 142.7). We, therefore, reform the decision and order of the hearing officer by striking Conclusion of Law No. 6. On remand, the compensability of a neck injury is not an issue.

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 Commission's division of hearings pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Judy L. Stephens
Appeals Judge