

APPEAL NO. 990389

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 January 28, 1999. The (hearing officer) determined that the Texas Workers' Compensation Commission did not abuse its discretion in denying the appellant's (claimant) request to change treating doctors; that the employer did not tender the claimant a bona fide offer of employment; and that the claimant had disability from his compensable back injury of _____, from (a day after date of injury), through August 9, 1998. The claimant, through his attorney, appealed the finding which ended disability on August 9, 1998, arguing that the claimant was "totally disabled" and requesting an extension of time for an additional 60 days to "prepare an effective appeal." The respondent (carrier) replies that the appeal is inadequate as a matter of law for failing, presumably, to "clearly and concisely rebut each issue" on which review is sought. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(2) (Rule 143.3(a)(2)). Otherwise, the carrier replies that the decision is correct, supported by sufficient evidence and should be affirmed. The determinations regarding change of treating doctors and bona fide offer of employment have not been appealed and have become final. Section 410.169.

DECISION

Reversed and remanded as to the disability issue.

Section 410.202 provides that an appeal must be filed within 15 days after receipt of the decision and order. No exceptions are authorized. For this reason, we have no authority to grant the requested extension of time to appeal. The document timely received will be considered an appeal of the disability determination. Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992.

The claimant compensably injured his back when the chair he was sitting on at work collapsed. He returned to work the next day doing various jobs described as light duty. On (a day after date of injury), while operating a scrubber, the claimant again experienced back pain and was taken off work by his doctor until July 24, 1998. On July 27, 1998, the employer wrote the claimant advising him that the employer wished to discuss a return to light duty. This offer was found not to constitute an offer of light-duty employment, a finding not appealed. The claimant said he tried repeatedly to contact the employer in response to this letter, but was unsuccessful. On August 9, 1998, the claimant finally contacted the employer, but by this time the employer had terminated him "for failure to contact Employer to discuss a return to work," as stated in unappealed Finding of Fact No. 12. The hearing officer then found with regard to disability, that the claimant, beginning August 9, 1998, was unable to earn his preinjury wage "as a result of the termination for failure to call to discuss a light duty assignment and not because of the compensable injury of _____." He therefore found disability from (a day after date of injury), through August 9, 1998.

The claimant testified that he applied for and received unemployment benefits and in so doing asserted that he was able to work. He said he did this because he had to in order to have some income. He also testified that he was "still disabled" as of the date of the CCH. See Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992.

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." Because the finding of no bona fide offer of employment was not appealed, we need not address the question of the effect on disability of rejecting such an offer. See Section 408.103(e). In this case, it was essentially undisputed that the claimant as of (a day after date of injury), had a light or modified duty release, and not a return to full duty by his treating doctor. Indeed, the whole issue of bona fide offer of employment makes sense only in this context. In an early decision, Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel observed that a claimant released to light duty is not required to look for work in order to establish disability. See also Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994. In Texas Workers' Compensation Commission Appeal No. 941261, decided November 2, 1994, we further observed that "an employee under a conditional medical release [does] not have to show that work was not available."

We are concerned that the hearing officer may not have properly applied the law of disability as outlined above to the facts of this case where the claimant was released to return to light duty. Of particular concern is Finding of Fact No. 14 in which the hearing officer found that the claimant did not seek employment "commensurate with his light duty release" since his termination. The use of the quoted language raises an inference that the hearing officer impermissibly applied concepts of entitlement to supplemental income benefits under Section 408.142(a)(4) to an issue of disability. In addition, we are unable to tell whether the hearing officer improperly placed on the claimant the responsibility to look for work. Finally, we question whether despite the finding of no bona fide job offer, the hearing officer, nonetheless, implicitly allowed the notion of a bona fide job offer to control the result in this case. For these reasons, the determination that disability ended on August 9, 1998, is reversed and the issue remanded for further consideration of the facts in light of the applicable law. In so doing, we note that the starting date for disability was not appealed and the mere fact of termination does not necessarily end disability if there remain "lingering effects" of the injury. See Appeal No. 91045, *supra*, and Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991.

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 Texas Workers' Compensation 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:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge