

APPEAL NO. 012125
FILED OCTOBER 25, 2001

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 August 2, 2001. He determined that the appellant (claimant) sustained a compensable injury on _____, and had disability on _____, and also from December 5, 2000, through February 8, 2001. The hearing officer further found that because the claimant had been paid his normal wages¹ during the period of disability, through his accrued leave and vacation benefits, and because these benefits were not vested at the time the claimant's employment was terminated in May 2001, the respondent (carrier) is not liable for benefits for the period of disability. On appeal, the claimant expresses disagreement with the determinations relating to disability and the carrier's liability for benefits resulting from disability. The appeals file contains no response from the carrier.

DECISION

We reverse and remand.

We note that the claimant has attached documents to his appeal which were not admitted at the CCH. In deciding whether the hearing officer's decision is sufficiently supported by the evidence we will only consider the evidence admitted at the CCH. We note that we will not generally consider evidence, not submitted into the record and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the documents that the claimant included with his request for review; consequently, they will not be considered on appeal.

The hearing officer made the following findings:

FINDINGS OF FACT

5. On _____ and from December 5, 2000 through February 8, 2001, the Claimant was unable, due to his right knee injury, to obtain and retain employment at wages equivalent to his pre-injury wage.

¹ The hearing officer's reference to "normal wages" is confusing. We presume he means average weekly wage.

6. The Claimant was paid his normal wages from December 5, 2000 through February 8, 2001, through accrued sick leave and vacation time. The Claimant did not have a vested interest in accrued sick leave and vacation time when the Employer terminated his employment for cause in May 2001.

With respect to the time period of disability, the hearing officer determined that the disability period ended on February 8, 2001. At the CCH, the claimant testified that he believed he returned to work on February 8, 2001, but added that the date could be determined from the documentary records in evidence. An examination note dated March 13, 2001, indicates that the claimant was released to return to work on March 8, 2001, which was the date of the previous office visit. We remand for the hearing officer to clarify the ending date of disability, as it is not clear whether the decision reflects a typographical error or if there is indeed a basis for the determination that the ending date of disability is February 8, 2001.

We also remand for the hearing officer to indicate what support, if any, exists in the record for determining that the claimant was paid "normal wages" throughout the period of disability. The testimony of the witnesses is void of any information relating to earned wages during the period that the claimant was unable to return to work. The claimant's written statement in evidence, claimant's Exhibit No. 3, reflects that he used his "personal and sick leave time for the pay period ending on 12-17-2000 in order to receive a pay check and no check for the last period." Because we are unable to find any other evidence indicating that the claimant was paid normal wages for the entire period of disability, on remand the hearing officer should clarify the basis for this determination.

With regard to the claimant's assertion on appeal that his benefits were vested at the time his employment ended, the hearing officer points out in his decision that the claimant did not prove that his employment benefits were vested at the time his employment was terminated. As a result, the hearing officer found that the carrier is not liable for benefits that accrued during the disability period because the claimant had been paid normal wages by using his sick leave and vacation time and these benefits had not vested when the claimant's employment ended. We find that portion of the decision relating to "vested" benefits to be irrelevant on the issue of leave time used due to a work-related injury. (We further observe that this aspect of the decision was neither raised nor litigated by the parties.)

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 129.2 (Rule 129.2), as amended December 26, 1999, which concerns entitlement to temporary income benefits, is instructive on the issue before us. Rule 129.2(c)(4) states that post-injury earnings (PIE) shall include "the value of any full days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury." Conversely, Rule 129.2(d)(2) provides that PIE shall not include "any sick leave or accrued annual leave that the employee did not voluntarily elect to use." Because the hearing officer's decision does

not indicate that Rule 129.2 was considered, and assuming that the hearing officer determines on remand that the claimant did in fact receive normal wages for any portion of the disability period, we remand for the hearing officer to further develop the record in order to determine if the claimant did or did not voluntarily elect to use his sick and annual leave. In the event that it is determined that the claimant did not voluntarily elect to use the time, the claimant will be entitled to benefits for the determined period of disability. Should the hearing officer determine that the claimant voluntarily elected to use the time, the hearing officer should additionally determine the amount of wages received by the claimant by using his leave time and, if that amount is less than the amount of regular wages that he would have earned for the same period, the claimant will be entitled to benefits reflecting the difference of the two amounts. In developing the record, it would be helpful for the hearing officer to outline the following dates: when the claimant gave notice of injury to the employer; when the employer notified the carrier of the injury; when the claim was denied by the carrier; and when the claimant used sick and annual leave time due to his injury.

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 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993. Saturdays and Sundays and holidays listed in Section 662.003 of the Government Code are not included in the computation of the time.

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

**STEVE ROPER
1616 S. CHESTNUT
LUFKIN, TEXAS 75901.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge