APPEAL NO. 022689
FILED NOVEMBER 25, 2002

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 September 11, 2002. The hearing officer determined that the appellant (claimant) had disability beginning _____, until February 19, 2002, and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving the claimant's request to change treating doctors. The claimant appeals the disability determination. The respondent (carrier) urges affirmance of the disability determination. The determination relating to the claimant's change of treating doctor has not been appealed and has become final. Section 410.169.

DECISION

Reversed and remanded.

The evidence reflects that the claimant sustained a compensable injury on _____, which included a fractured right wrist. The claimant's wrist was placed in a cast, he was restricted from working and referred to an orthopedist. The claimant was examined by Dr. B, an orthopedist, on January 15, 2002, and was returned to work with the restriction that he must wear the cast while working. The employer was unable to accommodate this restriction and the claimant remained off work. The claimant followed up with Dr. B on February 19, 2002, at which time the cast was removed and the claimant was released to return to work with a 20-pound lifting restriction. According to the witnesses testifying on behalf of the employer, the claimant could have begun working on February 19, 2002, in accordance with the 20-pound restriction, however, in the time period between the date of the injury, and February 19, the employer had learned that the resident alien documentation and social security card provided by the claimant were fraudulent. According to the employer's witnesses, but for the documentation problem, the claimant could have returned to work on February 19, 2002, earning his preinjury wage and in accordance with the lifting restriction.

The hearing officer determined the following:

FINDINGS OF FACT

6. Claimant's Employer would have employed Claimant as of February 19, 2002 at the same rate of pay as before _____, and within the restrictions imposed by [Dr. B] except that Claimant had a legal incapacity to be employed.

13. Claimant's _____, injury caused him to be unable to earn pre-injury wages from _____, until February 19, 2002. As of February 19, 2002 to the date of the hearing, Claimant's inability to

earn [the wages] he earned before _____ was from a legal incapacity to be employed.

CONCLUSIONS OF LAW

4. Because Claimant has shown by a preponderance of the evidence that his _____ injury caused him to be unable to obtain and retain employment at wages he earned before _____ from _____ and until February 19, 2002, he has disability and is entitled to [temporary income benefits] for such period.

In making his decision, the hearing officer relied on Texas Workers' Compensation Commission Appeal No. 94211, decided April 6, 1994, wherein we held that under Section 406.092(a), the fact that an employee's status as an alien whose entry into the United States may have been contrary to immigration laws does not in itself preclude the receipt of benefits under the 1989 Act for which the alien would otherwise be qualified. In that case, we determined that "the overwhelming weight of the evidence, including the claimant's own testimony, compels the conclusion that she did not seek work after June 24, 1993, solely because she did not have the correct documentation, not because she was unable to work due to her injury." Appeal No. 94211, *supra*. However, in the present case, the claimant testified that he was unable to work after February 19, 2002, due to his compensable injury, not solely due to his legal incapacity, and there is medical evidence to support the claimant's testimony. For this reason, we do not find our decision in Appeal No. 94211 to be controlling in the case now before us.

Section 401.011(16) defines disability as "the inability <u>because of a compensable injury</u> to obtain and retain employment at wages equivalent to the pre-injury wage." (Emphasis added.) A claimant need not prove that the injury was the sole cause, as opposed to a cause, of the disability. Texas Workers' Compensation Commission Appeal No. 931134, decided January 28, 1994. We find it necessary to reverse this case because the hearing officer based his determination of the ending date of disability on the testimony of the employer's witness that but for his legal incapacity, the claimant could have returned to work in accordance with his medical restrictions on February 19, 2002. The work release dated February 19, 2002, indicates that Dr. B released the claimant to return to work with a lifting restriction. As the claimant was not given a full duty release, it was necessary for the hearing officer to additionally analyze whether the employer had tendered a bona fide offer of employment (BFOE) in order to resolve the disability issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)) provides:

(c) An employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the [Texas Workers' Compensation] Commission. A copy of the Work Status Report on which the offer is being based shall be included with the offer as well as the following information:

(1) the location at which the employee will be working;

(2) the schedule the employee will be working;

(3) the wages that the employee will be paid;

(4) a description of the physical and time requirements that the position will entail; and

(5) a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary.

In Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001, the Appeals Panel noted that the language in Rule 129.6 is "clear and unambiguous" and that the rule "contains no exceptions for failing to strictly comply with its requirements." In the present case, the employer's human resource manager testified that she considered her letter dated February 19, 2002 (Carrier's Exhibit No. 6), to be a BFOE, but that she did not attach a copy of the work status report to the letter. Failing to attach a copy of the work status report, in and of itself, renders the purported BFOE invalid. However, we also note that the letter fails to comply with the following additional requirements of Rule 129.6(c): it does not disclose the location at which the claimant would be working; the days the claimant is scheduled to work (the hours are noted); a description of the physical and time requirements of the position; and a statement that the employer will only assign tasks consistent with the claimant's restrictions. Consequently, the employer did not tender a BFOE complying with the requirements of Rule 129.6(c) and the hearing officer's determination that the claimant's disability ended on February 19, 2002, is reversed.

Since we have determined that, as a matter of law, the hearing officer erred in determining that the ending date of disability was February 19, 2002, it is necessary to remand this case for the sole purpose that the hearing officer is to determine, based on the evidence, what date, if any, the claimant's compensable injury ceased to be the cause of his inability to earn his preinjury wage.

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, 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.

The true corporate name of the insurance carrier is **FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

CORPORATE SERVICES COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge