APPEAL NO. 033233
FILED FEBRUARY 5, 2004

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 November 18, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not have disability resulting from the injury sustained on _____, and that the claimant is not entitled to change treating doctors to Dr. B pursuant to Section 408.022. The claimant appealed, disputing both determinations. The claimant argues that Dr. B was his first selection of a treating doctor, and that he never saw Dr. M, but was rather treated by a physician's assistant. The claimant additionally argues with respect to the disability claim that whether or not the employer provided a bona fide offer of employment (BFOE) was not an issue and further there was no evidence that the employer met the requirements under the applicable rules.

DECISION

Affirmed in part, and reversed and remanded in part

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that his job duties for the employer included lifting luggage eight hours a day and that he injured his left shoulder on _____.

CHANGE OF TREATING DOCTOR

The hearing officer did not err in determining that the claimant is not entitled to change treating doctors. Section 408.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(e) (Rule 126.9(e)) establish the criteria for selecting and changing a treating doctor. The carrier contended that the claimant changed doctors to get a doctor who would take him off work. The claimant sought a change of treating doctor on an Employee's Request to Change Treating Doctors (TWCC-53) dated July 10, 2003. The hearing officer found that the claimant failed to submit sufficient reasons why Dr. M was an unacceptable doctor. In view of the evidence presented, we cannot agree that the hearing officer erred in determining that the claimant is not entitled to change treating doctors.

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Section 401.011(16). We have said that a light-duty or conditional work release is evidence that disability continues. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

It was undisputed that the claimant's preinjury position required lifting luggage throughout the workday. The claimant testified that he was released to return to work with lifting restrictions after initially seeking medical treatment. He then began working in the lobby area for the employer. The claimant testified that working in the lobby did not require lifting. However, the claimant testified that he was asked by a supervisor to help out when the baggage counter was busy. The claimant's supervisor testified that she never asked the claimant to help out in this manner. We note that whether or not the employer presented the claimant with a BFOE was not in issue.

In this case, in finding no disability the hearing officer in the Statement of the Evidence commented:

> If [cl]aimant had stayed with his two original choices of doctor, he would have been treated and been able to work at a position that required no lifting.

The hearing officer did not apply the correct standard for determining disability. We have held that a claimant under a light-duty release does not have an obligation to look for work or show that work was not available within his restrictions. *See* Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997, and cases cited therein.

From the quoted language above, it is clear that the hearing officer believes that the claimant was capable of performing only light-duty work, at least for some period. The decision as written appears to require the claimant to show that no work was available within his work restrictions, or that the employer was not accommodating his work restrictions. This was error. Texas Workers' Compensation Commission Appeal No. 031188, decided June 25, 2003. However, we also note that the hearing officer is free to reject the medical evidence offered by the claimant and to decide what facts were established by the evidence before him. Texas Workers' Compensation Commission Appeal No. 001042, decided June 21, 2000.

We reverse the hearing officer's determination that the claimant did not have disability resulting from an injury sustained on _____, and remand the case for the hearing officer to reconsider the existing record and determine the dates of disability, if any, based on the correct standard.

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 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge