APPEAL NO. 030027-s
FILED FEBRUARY 19, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 022689, decided November 25, 2002. In Appeal No. 022689, we reversed the decision of the hearing officer that the appellant/cross-respondent's (claimant herein) disability ended on February 19, 2002, and remanded for the hearing officer to determine the ending date of disability, if any, in light of our decision in the case. A contested case hearing (CCH) on remand was held on December 12, 2002. After this CCH, the hearing officer issued a decision on remand determining that the claimant had disability and was entitled to temporary income benefits (TIBs) for the period from _____________, continuing through the date of the original CCH on September 11, 2002. The claimant appeals one of the fact findings made by the hearing officer, arguing that it is contrary to the evidence, is superfluous, and is inconsistent with the decision of the hearing officer. The respondent/cross-appellant (carrier herein) replies that there is sufficient evidence to support the challenged finding of fact. The carrier appeals the determination of the hearing officer that the claimant had disability and was entitled to TIBs after February 19, 2002. The carrier contends that this decision is legally incorrect, arguing that it is contrary to the definition of disability found in Section 401.011(16), and that it provides more protection to an injured worker who is not legally in Texas than a worker who is. The claimant responds that there is ample evidence in the record supporting the fact that he had disability from _____________, continuing through September 11, 2002, and that the carrier has failed to establish any reason that the claimant was not entitled to TIBs during this period.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

We summarized the relevant evidence as follows in our decision in Appeal No. 022689, *supra*:

> 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.

At the CCH on remand very little additional testimony was taken. There was testimony on remand from the claimant's supervisor that the claimant's preinjury work required lifting more than 20 pounds, but there was equipment the claimant could use to assist with lifting.

The hearing officer determined the following on remand:

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.

10. Claimant's _____________ injury caused him to be unable to earn pre-injury wages from _____________ and continuing until the date of the hearing on September 11, 2002.

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 continuing until September 11, 2002, he has disability and is entitled to TIBS for such period.

The claimant strongly challenges Finding of Fact No. 6. The claimant argues that this finding of fact is contrary to the evidence, pointing to evidence in the record showing that the claimant was not able to work at all after February 19, 2002, even with restrictions. The claimant also contends that Dr. B's opinion that the claimant was able to return to work with restrictions on February 19, 2002, was not based upon an evaluation of the claimant's entire injury. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is

equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). This is so even though, were we fact finders, we might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Applying this standard, we will not overturn Finding of Fact No. 6 as being against the great weight and preponderance of the evidence.

The claimant argues that Finding of Fact No. 6 is inconsistent with the decision of the hearing officer, particularly with Finding of Fact No. 10. We do not find this to be the case. It is well established that there can be more than one producing cause of disability. If the compensable injury is a producing cause of disability then the fact that there may be another producing cause of disability does not necessarily preclude a claimant from entitlement to TIBs. Thus, Finding of Fact No. 6 is not inconsistent with Finding of Fact No. 10 or with the hearing officer determination that the claimant is entitled to TIBs.

The claimant argues that Finding of Fact No. 6 is superfluous in that it would only have legal consequences if there had been a bona fide offer of employment. The claimant argues that the carrier admitted at the CCH that the employer did not make a bona fide offer and that the Appeals Panel held in Appeal No. 022689, *supra*, that no bona fide offer was made. Absent an issue of bona fide offer of employment or sole cause, we cannot see that Find of Fact No. 6 is relevant to the decision of the hearing officer in the present case. We, therefore, consider this finding to be surplusage.

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." (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. Disability is a question of fact. There is sufficient evidence in the record to support the hearing officer’s finding of disability.

Finally, the carrier posits that the decision that the claimant is entitled to TIBs is unfair because it “gives more protection to illegal aliens than the law gives to legal workers.” Section 406.092 specifically provides that a resident or nonresident alien employee is entitled to compensation under the 1989 Act. In Texas Workers'

Compensation Commission Appeal No. 022258-s, decided September 12, 2002, we rejected an argument by a carrier that an illegal alien was not entitled to workers' compensation benefits because an illegal alien could not legally enter into an employment contract. Our decision was based on Section 406.092 and established appellate precedent. *See for example* Commercial Standard Fire and Marine Company v. Galindo, 484 S.W.2d 635 (Tex. Civ. App.-El Paso 1972, writ ref'd n.r.e.).

We fail to appreciate how applying the same statute and rules the same way to all workers regardless of immigration status favors any group over another. In any case, the duty of the Appeals Panel is to apply the 1989 Act and the rules of the Texas Workers' Compensation Commission, not to make or to amend rules. *See* Rodriquez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). This is exactly what the carrier seeks in the present case and is something it would need to seek in another forum.

The decision and order of the hearing officer are affirmed.

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

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

____
Gary L. Kilgore
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Michael B. McShane
Appeals Panel
Manager/Judge