APPEAL NO. 001502

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 June 2, 2000, with a hearing officer. She (hearing officer) determined that the employer extended two bona fide offers of employment to the appellant (claimant). In so holding, she negated the effect of the much earlier shift that was offered to the claimant, finding instead that such would be of consequence only if the claimant relied on public transportation or car pooling.

The claimant appeals and argues that a bona fide job offer was not made in accordance with the administrative rule in effect on the date of either asserted offer, which, unlike the old rule, allows for consideration of factors such as the availability of care for a minor child within a shift that was different than the one regularly worked by the injured worker. The respondent (carrier) responds that analysis of geographic accessibility of an offered position depends solely upon the commuting distance and that the offered shift is relevant only for purposes of public transportation. The carrier argues that the burden was on the claimant to prove that the location was geographically inaccessible.

DECISION

Reversed and rendered.

The claimant injured her back on _____, apparently when she fell through some flooring. She was employed by the (employer) and worked a 2:00 p.m. to 10:00 p.m. shift. She had been employed since April 5, 1999. Of significance is the fact that her workplace was located 45 to 60 minutes from the claimant's residence. The claimant was the parent of a three-year-old child and had access to daycare provided by a charitable church organization that began at 11:00 a.m. The claimant said that the particular daycare where her daughter went opened at 8:00 a.m. The claimant said that she was not aware of any daycare opening before 6:30 a.m. from the approved list she was given by the church charity. According to the wage statement in evidence, the claimant worked a 40-hour week at the time of her injury. There was no evidence that she was required to work on Saturdays.

The claimant said that her husband was a student at a local university. She said that he had to be at school at 8:00 a.m. but left around 7:30 a.m. or 7:45 a.m. to arrive in time. The claimant said that she did not believe that her husband would be able to drop her daughter off before he went to school because they lived on the other side of town from the daycare and his transportation was not reliable and could break down at any minute.

The claimant initially testified as part of the carrier's case. At this time, the claimant said that she received an offer of light duty about a week after her treating doctor, (Dr. W),

released her without her knowledge. She said that she did not accept the offer because she did not know at the time that Dr. W had released her. She said that this was the only reason she did not show up to work on February 10. The claimant testified as to some difficulty in communications between her employer and her doctor about whether she was or was not released.

The claimant said that another offer was made later but she did not accept it on advice of her attorney because the offer did not comply with her previous work hours. The claimant said she worked the 2:00 p.m. to 10:00 p.m. shift throughout her employment because of child care considerations. The offered position ran from 7:00 a.m. until 3:30 p.m., with the additional apparent provision that she work Saturdays from 6:00 a.m. to 2:00 p.m. The claimant said that she attempted to work something out with her employer that would more nearly accommodate the daycare schedule and offered to work at another facility of the employer that was closer. The employer's response was that she had to work at the same facility where she was injured.

Asked about whether she was terminated, the claimant said that she was contacted by the employer and told she had a "check" to pick up if she would turn in all her state property. The claimant said that she asked several times if she was being terminated and was told that she was not. The claimant denied that she was ever told, orally or in writing, that the light-duty shift offered to her was the only period when light duty was available. The claimant said she had not asked for another daycare shift because she had been approved through the Texas Workforce Commission and the church charity for the particular shift of daycare allotted to her. Asked why she had not gone to seek another daycare shift, she said that she did not believe they needed to know about the job offer.

According to the records in evidence, the claimant was restricted on January 27, 2000, to be unable to lift or carry more than 15 pounds and could not crawl, twist, kneel, push, and stoop. On February 9, 2000, the claimant was given these restrictions again by Dr. W, in addition to prohibitions on climbing stairs or ladders, pulling hand over hand, repeated bending, or reaching above her shoulder. Dr. W signed another undated statement saying that the claimant would be able to return to work on February 14, 2000, and that there was to be "no work until cleared." There is a prescription slip in evidence that was signed by a nurse practitioner at Dr. W's office (but not by Dr. W) stating that the claimant was able to return to work on February 8 on "light duty" with no lifting of over 10 pounds. There is a statement on this form which is only partially legible and indicates that the claimant "needs" something to do with "muscle."

On February 3, 2000, the risk management coordinator for the employer wrote that he had received a "return to work or school notice" from Dr. W which said that the claimant could return to work on February 8, 2000, with "a lifting restriction." The letter informed the claimant that her refusal to accept the position could result in termination from the employer. The risk manager enclosed a form in which an offer was made for the claimant

to work in the mail room. The attached offer of employment noted that the duration of the position was from February 8, 2000, until May 2, 2000, or until given a full release would run from the doctor, from 7:00 a.m. until 3:30 p.m. (and from 6:00 a.m. to 2:00 p.m. on Saturdays), and that she would perform moderately complex duties relating to incoming and outgoing inmate correspondence. She is generally informed that her salary will be the same. The days of the week she was expected to work (if less than six days a week) were not made clear.

An interoffice memo of the employer from (Mr. R) noted that he received a release from the claimant's doctor on February 9. Mr. R noted that he spoke to the claimant about the release and was told by her that her doctor did not release her until February 14. Mr. R stated that the claimant did not report for work on February 10 and he subsequently received another medical release taking the claimant off work from February 10 through 14.

The claimant requested a change in treating doctor to (Dr. WB), which was granted in mid-February 2000 (the date appears to say February 17). On March 2, 2000, Dr. WB put the claimant on light duty with a 10-pound lifting restriction. He diagnosed lumbar strain/sprain. Dr. WB wrote on March 8, 2000, that the claimant would need treatment three times a week.

On April 5, 2000, the employer's risk manager extended another job offer, but based upon the restrictions of Dr. W (not Dr. WB). The first portion of this letter appears to simply repeat the previous letter without revision; the second portion requests the claimant to report for work on April 10 at 7:00 a.m. This letter does not threaten the claimant with termination if she does not accept the position and advises her to dress appropriately. The job is stated to be of a duration from April 10 through July 3, 2000; however, the offer expires on April 11, 2000. The work hours are the same as the previous offer. Although Dr. W was no longer the claimant's treating doctor, this offer spells out all elements of his previous release, including a lifting limit to 15 pounds. The offer does not indicate what the employer's intentions would be with respect to the medical treatment recommended three times a week, or what days the claimant was expected to work. A letter from an assistant general counsel for the employer dated April 5, 2000, stated that the employer had no light-duty positions available from 2:00 to 10:00 p.m.

The claimant's response was to point out that the applicable rules of the Texas Workers' Compensation Commission (Commission) require that the shift offered be similar. Although the hearing officer characterized the correspondence as "vituperative," the claimant's attorney, in fact, agreed to accept a light-duty position within the claimant's previous shift.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(e) (Rule 129.6(e)) requires that the carrier consider "at minimum" (in determining the geographic accessibility of a job) the distance an employee will have to travel and whether the offered work schedule is similar to

the employee's work schedule prior to the injury. The availability of transportation is listed as yet another factor as is the impact of the employee's physical limitations on the ability to travel. A carrier may only deem an offer of modified duty to be bona fide if it meets these criteria, as well as consistency with the doctor's certification of work ability.

When the rule was proposed and comments received, the Commission noted that Rule 129.6(e) provides that geographic accessibility is "partially based on the availability of transportation." 24 Tex. Reg. 11436. While the hearing officer's decision stated that there is no requirement that light duty be "temporally convenient" to the injured worker, we are hard pressed to determine another reason why such "shift" language would have been included in the rule if not for some measure of work shift convenience as an essential part of the geographical accessibility factor. The previous rule on bona fide offers, Rule 129.5 (repealed), had no such provision. The rule underscores the obligation of the employer, when a credit for offered wages is sought, to have offered a position that will likely be accepted, not to make an offer likely to be rejected in order to reduce temporary income benefits (TIBs). When travel to the offered location cannot be begun at an earlier hour required to provide for timely reporting to work, then this is a matter of "geographic accessibility." When the work hours and days under a light-duty offer appear to increase in number, we cannot agree that the offered work schedule is "similar."

This is a case where neither side appeared willing to come toward the middle to reach an accommodation. The employer does not appear to have considered anything other than a 7:00 a.m. starting time for the sorting of mail or considered one of its locations closer to the claimant. We note also that the injured worker was threatened with termination if she refused the first offer. Moreover, the length of the one-way commute could render difficult, if not impossible, compliance with Dr. WB's recommended course of treatment.

However, there was an indication in this record that the child care situation was, to some extent, the excuse for the claimant's refusal of the first job offer. The claimant initially testified as to reasons other than the child care situation as underlying her refusal to accept the first offered position. It appeared that the claimant did not investigate alternatives that would not necessarily require her to locate a day care facility opening at 6:00 am, and she made no attempt to see if the church charity could work with her in some respect so she could avail herself of the light duty opportunity. While this failure to explore whether she could try to meet the offer may have frustrated the hearing officer, the burden of proving the bona fide offer is on the carrier, not on the recently injured worker.

We cannot agree that Rule 129.6 requires the employee to adapt to a <u>significantly</u> different schedule than the one on which she was employed at the time of her injury merely because she is not dependent upon others for transportation, and as the hearing officer appeared to accord no weight whatever to the shift change, as we believe Rule 129.6(e)

requires, we reverse and render the decision that a bona fide offer in either letter was not made in accordance with Rule 129.6.

In addition, we also observe that the offer made on April 5, 2000, was not made pursuant to the recommendations of the claimant's then treating doctor, and the recited lifting restriction in the offer exceeded that of Dr. WB, who was at that time the treating doctor. Rule 129.6(f)(2) accords preference to the treating doctor's opinion as opposed to the status that Dr. W would have at that time held: "any other doctor." There was no indication that the employer communicated with or was even aware of the existence of Dr. WB, or his restriction, at the time the April 5, 2000, offer was made. Dr. WB's more restricted lifting limitation stands as a disagreement in part with the restrictions of Dr. W.

For these reasons, we reverse the determination that the employer's February and April 2000 offers were bona fide job offers under Rule 129.6. We render the decision that any TIBs due may not be adjusted. Because the issue of disability was not before the hearing officer, and is not before the Appeals Panel, we can only order that TIBs be paid in accordance with the 1989 Act for any period during which the claimant had disability as defined by Section 401.011(16).

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge