APPEAL NO. 011604
FILED AUGUST 14, 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 was held on June 20, 2001. With respect to the issues before her, the hearing officer determined that the respondent's (claimant) compensable injury sustained on _____, does not extend to and include an injury to the bilateral knees; that the employer did not tender a bona fide offer of employment to the claimant; that the claimant had disability from his injury beginning on _____, and continuing through the date of the hearing; and that Dr. M is the claimant's initial choice of treating physician. The appellant (carrier) appeals. The claimant responds, urging affirmance.

DECISION

Affirmed.

The determination that the claimant's injury does not extend to and include an injury to the bilateral knees has not been appealed and has become final. Section 410.169.

On appeal, the carrier asserts that it is totally illogical to invalidate the employer's job offer to the claimant simply because it did not parrot the exact language of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)), and because it did not have a copy of the Work Status Report (TWCC-73), upon which the offer was based, included with it. As we stated in Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001, we disagree with this assertion. Rule 129.6 deals with bona fide offers of employment. Rule 129.6(c) sets out the requirements for a bona fide offer of employment. In Appeal No. 010110-S, *supra*, we stated that Rule 129.6(d) provides that a carrier may deem an offer to be bona fide if it, among other requirements, included *all* the information required in Rule 129.6(c). We also noted that Rule 129.6 indicates that the Texas Workers' Compensation Commission "will" find an offer to be bona fide if it conforms to the doctor's restrictions, *is communicated to the employee in writing, and meets the requirements of Rule 129.6(c).* In the present case, we find no error in the hearing officer's finding that there was no bona fide offer of employment extended to the claimant because the offer did not contain the statements required in Rule 129.6(c)(5), and the TWCC-73 upon which the offer was based was not attached. We believe the language of Rule 129.6 is clear and unambiguous. The rule contains no exceptions for failing to strictly comply with its requirements.[1]

[1] *See*, Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). (Rodriguez held that Rule 130.5(e) does not contain any exceptions and that the Appeals Panel is not free to create ad hoc exceptions.)

The carrier also contends that the hearing officer's determination of disability is against the great weight and preponderance of the evidence. "Disability" is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. It is undisputed that the claimant sustained a compensable injury on _____. No doctor has released the claimant to return to anything but sedentary work. Dr. M placed the claimant back on unable-to-work status, immediately following his January 5, 2001, appointment, through the time of the hearing. The claimant has not worked since the date of the injury, and has not been extended a bona fide offer of employment. There was no error in finding that the claimant had disability.

The carrier also complains that Dr. S was not a "company doctor," as determined by the hearing officer. Rule 126.9(c)(2) provides that the first doctor that provides health care to a claimant is the claimant's treating doctor. The first physician to treat a claimant is not the treating doctor if it is "a doctor recommended by the . . . employer, unless the injured employee continues . . . to receive treatment from the doctor for a period of more than 60 days . . . ." There was conflicting evidence offered on whether the employer sent the claimant to Dr. S. The claimant only saw Dr. S once. The claimant testified that someone in the personnel department sent him to see Dr. S, whose medical records note that he examined the claimant on a referral, although those records do not state from whom the referral was received.

Applying our standard of review, we conclude that the hearing officer's factual determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge