APPEAL NO. 012088
FILED OCTOBER 17, 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 July 30, 2001. He held that the appellant's (claimant) injury did not include her low back, although it did include her neck, shoulder, knee, and wrist. The hearing officer held that the claimant did not have disability after July 25, 2000, and that the employer made a bona fide offer of employment (BFOE) and could therefore adjust the claimant's postinjury weekly earnings. He further found that the claimant reached maximum medical improvement (MMI) on May 7, 2001, with a one percent impairment rating (IR) in accordance with the report of the designated doctor, after deducting the portion he allowed for a low back impairment.

The claimant has appealed. She argues that her lumbar spine problem is part of her compensable injury and challenges the findings that a BFOE was made consistent with her restrictions and that she did not have disability after July 25, 2000. She appeals the adoption of the designated doctor's MMI certification and IR and argues that another doctor's IR is more accurate. The respondent (self-insured) responds by seeking affirmance of the decision.

DECISION

We affirm in part, reverse and render in part.

On _____, the claimant slipped and fell in some water while employed by (employer). Later medical records recite a history of falling to the ground, although earlier ones indicate that the claimant's left shoulder, arm, and knee were impacted when her feet slid out from under her. The claimant stated that she was treated in the emergency room (ER) for these conditions, and then went to a medical doctor, Dr. B, who told her he could only treat extremities, so she then sought treatment from a chiropractor, Dr. M, for her back. It is not clear from the record who the Texas Workers' Compensation Commission (Commission) considered the treating doctor to be in this case. The evidence indicated that there was a question as to when evidence of an abrasion on the claimant's left cheek, as well as her back pain, arose, as neither condition was reported to or, apparently, detected at the ER right after the accident. The day before the claimant returned to the ER to complain of her back pain, she was interviewed by the adjuster and did not identify her back as part of her injury.

The claimant testified about a return to work with the employer in late July 2000, and the fact that she left her job on July 25, 2000, after one day of work. The claimant explained that although she had returned to work to demonstrate cooking various food items for shoppers to taste, she was instead asked to clean out a freezer compartment, which entailed lifting and was against her restrictions. This was directly disputed by two managers for her store, one of whom said that he showed her how to demonstrate cooking

pizza the day she returned to work. Both supervisors denied any knowledge of the claimant being asked to reorganize a freezer compartment.

EXTENT OF INJURY

The hearing officer did not err in finding that the claimant's fall did not include an injury to her back. While the evidence was conflicting, and different inferences could be drawn from the evidence, this alone will not compel a reversal of the hearing officer's decision where the evidence also sufficiently lends itself to the interpretation given to it by the finder of fact. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). With respect to the claimed back injury, that is not the case here, and we affirm this part of the decision.

MMI AND IR

We likewise affirm the hearing officer's decision to adopt the IR assigned by the designated doctor with the lumbar impairment portion omitted. While the report of the designated doctor has presumptive weight for achievement of MMI and IR (Sections 408.122(c) and 408.125(e)), it is not given presumptive weight on the extent or nature of the compensable injury. Texas Workers' Compensation Commission Appeal No. 93784, decided October 18, 1993 (Unpublished). Therefore, it was proper for the hearing officer, under the facts of this case and given the clear division of discrete IRs in the designated doctor's report, to accord presumptive weight to the report of the designated doctor's opinion relating only to the compensable injury. We affirm this portion of the decision.

BONA FIDE JOB OFFER

We agree that the hearing officer erred in finding that the employer made a BFOE and that the self-insured could adjust earnings after the injury due to such offer. Whether an employer has made such a bona fide offer is a legal determination, and the claimant has challenged the conclusion of law. Although the claimant makes the primary argument (supported by the evidence) that the employer did not live up to the terms of the offered position, reviewing this point is especially hard in light of the fact that the written offer in evidence fails to comply with the requisites of a bona fide offer as set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6), effective December 26, 1999.

The Appeals Panel, mindful of the admonition in the case of Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), has held that all of the elements set forth in Rule 129.6(c) must be present for the offer to be considered a BFOE. Texas Workers' Compensation Commission Appeal No. 011878-S, decided September 28, 2001; Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001. Rule 129.6(c) states:

(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 Commission. A copy of the Work Status Report [TWCC-73] 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.

The job offer in evidence, dated July 15, 2000, does not include a copy of the TWCC-73 on which it is based; does not describe the location where work is to be performed; does not describe the physical requirements that the position will entail; and does not contain the statement set forth in Rule 129.6(c)(5), directing instead that the burden is on the employee to notify the employer if restrictions are exceeded. The job also indicates that it is to be for 30 hours a week, from 1:00 to 7:00 p.m. on the days worked; however, if the offer was based upon a July 5, 2000, TWCC-73 of Dr. M, the restrictions are for sedentary work only, limited to four hours on all listed postures. An earlier TWCC-73 from Dr. B has less extensive restrictions.

For these reasons, we agree that the hearing officer erred in crediting the offer as a BFOE, and we reverse his determination that the employer made a BFOE, and render a decision that the employer did not make a BFOE as set out in Rule 126.9, and the self-insured therefore may not adjust weekly earnings after the injury for purposes of computing temporary income benefits (TIBs) as allowed in Section 408.103(e).

DISABILITY

Section 408.103(e) essentially provides that a BFOE can be used as an offset against a carrier's liability for TIBs; however, we have held that a BFOE and disability are distinct, albeit related, issues. Texas Workers' Compensation Commission Appeal No. 92293, decided August 17, 1992. We have held that a finding that disability has ended does not require proof of a bona fide offer; likewise, a BFOE would not preclude a finding that disability continues. Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. In this case, the hearing officer ended disability on the day he determined that the claimant received the bona fide job offer, and his discussion equates

the two as well. However, he also indicated that he disbelieved the claimant's chiropractor's assessments of her inability to work after July 25, 2000, and it further appeared that this assessment was done in light of the asserted back injury. Once again, although different inferences could be drawn, we are not prepared to say that the decision of the hearing officer on disability is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

For the reasons set out above, we reverse and render a decision that the employer did not make a BFOE in accordance with the rules of the Commission, but affirm the decision of the hearing officer in all other respects.

The true corporate name of the insurance carrier is **(SELF-INSURED), a certified self-insured**, and the name and address of its registered agent for service of process is

C. T. CORPORATION SYSTEM
350 NORTH ST. PAUL ST.
DALLAS, TEXAS 75201.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge