

APPEAL NO. 020198
FILED MARCH 12, 2002

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 January 7, 2002. The hearing officer determined that (1) the appellant/cross-respondent (claimant) had disability beginning _____, and continuing through January 28, 2001; and (2) the claimant's employer did not tender a bona fide offer of employment (BFOE) to the claimant. The claimant appeals the hearing officer's disability determination on sufficiency grounds, asserting that disability continued from February 7, 2001, through October 31, 2001. The respondent/cross-appellant (carrier) urges affirmance of the disability determination but appeals the BFOE determination on legal and factual grounds. There is no response to the carrier's cross-appeal from the claimant.

DECISION

Affirmed.

DISABILITY

The hearing officer did not err in determining that the claimant had disability from _____, through January 28, 2001. This was a question of fact for the hearing officer to decide. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, the hearing officer could determine that the claimant's inability to obtain and retain employment at wages equivalent to her preinjury wage after January 28, 2001, was not a result of the compensable injury. The hearing officer's determination is 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 (Tex. 1986).

BONA FIDE OFFER OF EMPLOYMENT

The carrier asserts legal error in the hearing officer's application of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)) to determine whether the employer made a bona fide offer of employment to the claimant. Rule 129.6(c) provides:

- (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 [Texas Workers' Compensation Commission]. A copy of the Work Status Report on which the offer is being made 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 carrier argues that Rule 129.6(c) was intended to govern when a *carrier* may reduce temporary income benefits (TIBs) without a benefit review conference (BRC) and was not intended to limit the *Commission* from determining that an offer of employment is bona fide when an element of Rule 129.6(c) is not satisfied. The carrier cites the following language in the preamble to the rule in support of its position:

The new §129.6 does not govern how the Commission evaluates an offer of employment to determine whether it is bona fide. The new rule sets out the conditions under which a carrier may evaluate a modified duty offer to determine whether it is bona fide. Nothing in the rule prevents or prohibits either the carrier or the employee from disputing the outcome of the operation of the rule. The rule was designed to permit carriers to suspend benefits without requesting dispute resolution under some circumstances, which the prior rule did not explicitly permit (although carriers did so anyway).

The carrier contends that the Commission must review offers of employment in accordance with the standards set out in Section 408.103(e), regarding TIBs and bona fide offers of employment, and the Commission errs when it reviews offers of employment for compliance with the rule. We disagree.

Rule 129.6(h) makes clear that the "Commission will find an offer to be bona fide if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c) of this section." The language cited by the carrier from the preamble, when read in a broader context, is not inconsistent with Rule 129.6(h). The preamble attempts to explain that under the new rule the carrier, not the Commission, has the initial responsibility to determine if an offer meets the requirements for a BFOE. Once a determination has been made, either party may dispute the outcome of the operation of the rule and go to a BRC. Pursuant to Rule 129.6(h), the hearing officer, then, examines the offer of employment to determine "if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c) of [Rule 129.6]." Thus, the hearing officer did not err in doing so in this case.

Next, the carrier asserts error in the hearing officer's finding that the offer of employment failed to comply with the requirements of Rule 129.6(c). Upon our review, the employer's written offer of employment fails to include the claimant's work schedule (Rule 129.6(c)(2)) and a description of the physical and time requirements that the position would

entail (Rule 129.6(c)(4)). The carrier contends that the claimant understood her work schedule and physical and time requirements, as these were outlined to her by her team manager. We have held that all of the information required by Rule 129.6(c) shall be present in a written offer of employment, and that Rule 129.6 "contains no exceptions for failing to strictly comply with its requirements." Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001. Accordingly, the hearing officer correctly determined that the employer did not make a BFOE to the claimant.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **ST. PAUL MERCURY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Edward Vilano
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge