APPEAL NO. 021013
FILED JUNE 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 March 18, 2002, with (hearing officer) presiding as hearing officer, to determine whether the respondent/cross-appellant (claimant) had disability resulting from an injury sustained on _____, and, if so, for what period; whether the employer tendered a bona fide offer of employment (BFOE) to the claimant; and the identity of the claimant's treating doctor. The hearing officer, following numerous "findings of fact" which, essentially, are recitations of evidence, concluded that the claimant had disability from _____, through March 18, 2002; and that the employer made a BFOE to the claimant and thus the claimant's weekly earnings after September 24, 2001, are equal to the wages for the position offered. No legal conclusion was stated concerning the identity of the treating doctor issue. The appellant/cross-respondent (carrier) filed a conditional appeal (conditioned on the claimant's filing an appeal) which challenges the sufficiency of the evidence to support the hearing officer's disability determination. The file does not contain a response from the claimant. The claimant filed an appeal challenging the sufficiency of the evidence to support the hearing officer's determination of the BFOE issue. The claimant also asserts error in the hearing officer's failure to resolve the disputed issue of the identity of the claimant's treating doctor. The carrier filed a response to the claimant's appeal contending that, given one of the findings of fact, the failure of the hearing officer to reach a legal conclusion on the treating doctor issue is harmless error. The carrier further urges that the "onerous" requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) concerning the requirements of a bona fide offer of employment do not bind the Texas Workers' Compensation Commission (Commission) in its evaluation of the employer's employment offer; that the requirements of Rule 129.6 for a BFOE can be satisfied, in part, with testimony; and that the provisions of Section 408.103(e) concerning a bona fide offer of employment were met in this case, notwithstanding any omissions of Rule 129.6 requirements.

DECISION

Affirmed in part; reversed and rendered in part; reversed and remanded in part.

The parties stipulated that the carrier accepted liability for the claimant's _____, injury. The claimant, who was employed by a temporary personnel agency which, apparently, assigned him to work at an ice company, testified that on _____, while working with a dry ice machine, the long finger on his left hand was nearly completely severed. He said that his injury was treated at an emergency room (ER) with reattachment surgery, apparently by Dr. F, a plastic surgeon; that he was treated with physical therapy, pain medication, and a TENS unit; and that he continued to see Dr. F for several follow-up visits following the surgery. On September 17, 2001, Dr. F issued a Work Status Report (TWCC-73) stating that the claimant's injury will allow his return to work as of

"9/22/01" with certain specifically stated restrictions. There is no evidence indicating whether or not Dr. F issued the TWCC-73 in response to a request from the employer or carrier (*see* Rule 129.6(a)), but Dr. F's records reflect his understanding that the claimant was required to be returned to work. The claimant testified that the day after he was informed by Dr. F's nurse that he had to be released for light duty, he commenced treatment with Dr. R because Dr. F's physical therapist disagreed with the claimant's being returned to work. Dr. R's report of September 19, 2001, states the reasons why he feels the claimant should not return to work and his report of December 14, 2001, reflects that the claimant is still not working because of sleep deprivation in that he is up every two hours for TENS therapy.

Disability is defined in Section 401.011(16). 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)). We are satisfied that the hearing officer's determination of the disability issue is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Whether or not Dr. F or Dr. R was the treating doctor at any particular time, the reports of Dr. R provide sufficient evidence to support the hearing officer's resolution of the disability issue.

Mr. W, the employer's assistant manager, testified that he both mailed and delivered by hand to the claimant a preprinted "standard form" used by the employer to inform employees of light duty offers of employment. He conceded that a copy of the TWCC-73 was not attached to either copy provided to the claimant. The employer's form stated only one of a number of restrictions listed on Dr. F's TWCC-73; failed to state the schedule the claimant would be working; failed to describe the physical and time requirements that the offered position would entail; and failed to state that the employer would assign only tasks consistent with the claimant's abilities, knowledge, and skills, and would provide training if necessary. Mr. W testified that the claimant lived across the street from the employer's office and that the claimant came to the office and he, Mr. W, discussed some of these matters concerning the offer of light duty with the claimant but that the claimant did not accept the offer.

The carrier contended below, and continues to maintain on appeal, that the employer's form, together with Mr. W's testimony about his conversation with the claimant, satisfied the requirements of Section 408.103(e) for a BFOE. That statute provides that "if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee." The carrier further maintains that it is Section 408.103(e), not Rule 126.9, which controls the Commission's evaluation of an employer's offer of modified duty as bona fide or not. The carrier asserts that the Commission cannot impose additional requirements for the bona

fides of an employer's employment offer beyond those contemplated by the Texas Legislature and cites the following from the preamble to Rule 129.6: "[t]he new section 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 conditions under which a carrier may evaluate a modified duty offer to determine whether it is bona fide." The hearing officer's discussion indicates that he accepted the carrier's position. The hearing officer cites the first sentence in the above-quoted preamble material concerning Rule 126.9 and goes on to state the following:

> Subsection (h) makes it clear that the commission will find a bona fide offer if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c). The rule clearly allows the commission to find a [BFOE] based on oral evidence of [sic] that would amount to a contract for hire that is geographically accessible, and that the injured worker is reasonably physically capable of performing.

As the hearing officer states, Rule 126.9(h) provides, in part, that "the commission will find a bona fide offer if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c)." Subsection (c) of the rule provides as follows:

> 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 [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.

In Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001, the Appeals Panel affirmed the determination of a hearing officer that the employer's offer of employment did not constitute a bona fide offer under Rule 129.6(c) because the written offer did not contain the statement required in Rule 129.6(c)(5) and because the TWCC-73, upon which the offer was based, was not attached. Our decision observed that the language in Rule 129.6 is clear and unambiguous and that the rule

contains no exceptions for failing to strictly comply with its requirements. *See also,* Texas Workers' Compensation Commission Appeal No. 010301, decided March 20, 2001; Texas Workers' Compensation Commission Appeal No. 011604, decided August 14, 2001; and Texas Workers' Compensation Commission Appeal No. 011878-S, decided September 28, 2001. In Texas Workers' Compensation Commission Appeal No. 012088, decided October 17, 2001, the Appeals Panel reversed and rendered a new decision that the employer had not made a bona fide offer of modified employment because the written offer failed to include all the requirements of Rule 126.9(c). The defects in the offer in that case are similar to those in the case we here review and the decision in that case stated that A[t]he 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]. Accordingly, we reverse the determination of the hearing officer that the employer made a BFOE and render a new decision that the employer did not make a bona fide offer of modified employment to the claimant.

The remaining appealed issue was framed as follows in the benefit review conference report: Who is the claimant's treating doctor? Section 408.022 contains provisions for the selection of doctors by employees. Rule 126.9(c) provides that the first doctor who provides health care to an injured employee shall be known as the injured employee's initial choice of treating doctor. Rules 126.9(c)(1) - (3) specify three circumstances in which the first doctor providing health care does not constitute the initial choice of treating doctor, with Rule 126.9(c)(3) specifying any doctor providing emergency care unless the injured employee receives treatment from the doctor for other than follow-up care related to the emergency treatment. It was the claimant's position that Dr. F was the doctor who attended to him at the ER and for follow-up after the surgery and that he selected Dr. R as his treating doctor on September 18, 2001. Dr. F's records reflect that he was the on-call plastic surgeon called to the ER to care for the claimant and that he followed the claimant's postoperative recovery until on or about September 17, 2001, when he was advised by the claimant that Dr. R was taking over his treatment. It was the carrier's position that Dr. F was the claimant's emergency surgeon but that the claimant's continued treatment with Dr. F following his emergency treatment amounted to his selection of Dr. F as his first treating doctor; that no Employee's Request to Change Treating Doctors (TWCC-53) was filed; and that Dr. F remains the treating doctor. We can only speculate as to why this matter became, and remained, a disputed issue. Dr. R's records sufficiently support the disability determination, whether or not he became the treating doctor. We do note that Rule 129.6(f) contains an order of preference of doctors' opinions to be used by carriers in evaluating an offer of employment. In any event, the claimant complains that the hearing officer failed to state a conclusion of law on this disputed issue and thus failed to resolve it. The carrier responds that the hearing officer's Finding of Fact No. 4 resolves this issue, notwithstanding the absence of a legal conclusion. That finding states as follows:

> [Dr. F] treated Claimant from _____ until approximately September 16, 2001 for the _____ injury and its rehabilitation.

> [Dr. F] is not salaried by Employer, and was not recommended by Employer. [Dr. F] provided treatment that was beyond mere follow up for emergency treatment.

This finding addresses the three circumstances set out in Rule 126.9(c) which would prevent the first doctor providing health care from constituting the claimant's initial choice of treating doctor. However, our review of Dr. F's records reflects that all of the claimant's postoperative treatment from Dr. F were postoperative follow-up visits related to the surgically repaired left long finger. Because neither the hearing officer's findings nor his discussion of the evidence indicate why these postoperative visits by the claimant to Dr. F are other than treatment from the doctor for other than follow-up care related to the emergency treatment, and because the hearing officer has failed to resolve the disputed issue with a conclusion of law based on adequate findings of fact supported by the evidence, as required by Section 410.168(a)(1) and Rule 142.16(a), we reverse Finding of Fact No. 4 and remand the case for such further consideration of this issue and findings of fact and conclusions of law as may be appropriate, based on the evidence of record.

We affirm the hearing officer's determination of the disability issue; we reverse the hearing officer's determination of the BFOE issue and render a new decision that the employer did not make a bona fide offer of modified employment; and we reverse Finding of Fact No. 4 and remand the case for further consideration, findings, and a conclusion on the identity of the treating doctor issue.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Susan M. Kelley
Appeals Judge