APPEAL NO. 022474
FILED NOVEMBER 19, 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 (CCH) was held on April 19, 2002. The hearing officer determined that the Texas Worker's Compensation Commission (Commission) did not abuse its discretion in appointing Dr. M as the designated doctor; that on November 30, 2001, the employer did not make a bona fide offer of employment (BFOE) to the respondent (claimant); that on December 19, 2001, the employer did not make a BFOE to claimant; and that from September 10, 2001, until March 11, 2002, the claimant had disability.

In Texas Workers' Compensation Commission Appeal No. 021303, decided July 11, 2002, the Appeals Panel reversed the hearing officer's determination that the Commission did not abuse its discretion in appointment of Dr. M as the designated doctor and rendered a new decision that the Commission did abuse its discretion. We also remanded the case to the hearing officer for determination of whether the claimant sustained a compensable injury and resolution of BFOE and disability issues in light of the injury determination. The Appeals Panel noted that, with respect to the hearing officer's determinations that the employer did not make a BFOE and that the claimant had disability from September 10, 2001, until March 11, 2002, those issues were not ripe for adjudication because the threshold determination of whether there was a compensable injury needed to be made first.

On remand another CCH was held on September 3, 2002, with the same hearing officer presiding. The hearing officer determined that on _____, the claimant sustained a compensable injury; that the appellant (self-insured) waived its right to contest compensability of the claim; that the employer did not make a BFOE, either on November 30, 2001, or December 19, 2001, and that the claimant had disability from September 10, 2001, until March 11, 2002. The self-insured appeals the adverse determinations of the hearing officer. There is no response in our file from the claimant.

DECISION

Affirmed.

WAIVER

The self-insured appeals the hearing officer's decision to add the issue, at the request of the claimant, of whether the self-insured waived the right to contest the compensability of the claim because the self-insured "did not have proper notice that the issue of waiver would be determined at the hearing." Upon review of the audiotape of the remand CCH proceeding, we note that the hearing officer indicated that she would remand the case for a benefit review conference (BRC) to develop the issue if both parties agreed; the self-insured refused and, in doing so, waived any right to a BRC.

Furthermore, after review of the record and the complained-of determinations, we have concluded that the hearing officer sufficiently articulated on the record her findings concerning good cause to add the issue. We do not find an abuse of discretion in her ruling to add the issue. *See generally*, Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Having determined that the hearing officer did not abuse her discretion in adding the issue of waiver, we turn to whether there is support for the hearing officer's determination that the self-insured waived the right to dispute the compensability of the claim. Section 409.021(c) of the 1989 Act provides that the self-insured must dispute the claim within 60 days of written notice or it waives the right to dispute compensability. The facts regarding whether the self-insured disputed the claim within 60 days are undisputed. The self-insured had written notice of the claim on July 12, 2001, and did not dispute the claim until March 14, 2002. We find no error in the hearing officer's determination that the self-insured waived the right to dispute compensability of the claim. We note that the final decision in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) dictates the same result, as the carrier did not comply with the Section 409.021(a) "pay or dispute" within seven days provision. In addition, we note that the hearing officer determined that the claimant was in fact injured in the course and scope of his employment, which determination we are also affirming.

NEWLY DISCOVERED EVIDENCE

The carrier also complains that the hearing officer erred in her determination that a videotape of March 11, 2002, does not constitute newly discovered evidence that could not have been discovered at an earlier time that would warrant a reopening of the compensability issue. The videotape was taken eight months after the date of injury and depicts the claimant playing basketball. The claimant testified that when the videotape was taken he had just finished an eight-week work hardening program. In her "Statement of the Evidence" the hearing officer astutely states in regard to the videotape, "[a]t best it goes to the issue of disability, not compensability." We agree and note that the hearing officer, in apparent reliance on the videotape, ended the claimant's disability on the date the videotape was taken, March 11, 2002.

INJURY AND DISABILITY

With respect to the determinations that the claimant sustained a compensable injury and had disability from September 10, 2001, until March 11, 2002, the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer reviewed the record and resolved what facts were established. We conclude that the hearing officer's determinations are sufficiently supported by the record and 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).

BFOE

Finally, the self-insured contends that the hearing officer erred in her determination that the employer did not make a BFOE to the claimant. In Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001, we held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(d) (Rule 129.6(d)) provides that a carrier may deem an offer to be bona fide if it, among other requirements, included all of the information required in Rule 129.6(c). We also noted that Rule 129.6 indicates that the 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, there was no BFOE extended that met the requirements of Rule 129.6(c). Further, we find no error in the hearing officer's finding that there was no BFOE extended to the claimant because at the time the alleged BFOE was extended, the claimant was not released to light duty by his treating doctor. We believe the language of Rule 129.6 is clear and unambiguous; the hearing officer did not err.

We affirm the decision and order of the hearing officer.

The true corporate name of the self-insured employer is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

JW
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

_____
Robert W. Potts
Appeals Judge