

APPEAL NO. 023020
FILED JANUARY 16, 2003

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 November 12, 2002. The hearing officer resolved the disputed issues by deciding that the employer tendered a bona fide offer of employment (BFOE) to the appellant (claimant) and that the claimant did not have disability resulting from an injury sustained on _____. The claimant appealed the disability determination on sufficiency of the evidence grounds and asserted that the BFOE did not meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

FACTUAL STATEMENT

The parties stipulated that the claimant sustained a compensable injury on _____, when the claimant struck his forehead during a fall and received treatment for his head and neck. The claimant testified that after his injury he continued to work until October 14, 2001, when he sought medical treatment from Dr. ST. The claimant testified that he received a Work Status Report (TWCC-73) dated October 15, 2001, from Dr. ST that released him to work sedentary duty, for the period of October 15 to December 1, 2001, but that he did not deliver the TWCC-73 to the employer until October 23, 2001. The claimant's supervisor testified that upon receipt of the TWCC-73 from the claimant on October 23, 2001, the supervisor faxed the TWCC-73 to the human resource office in (city 1) and that the (city 1) office e-mailed what it believed to be a BFOE to the supervisor at the employer's premises that same day. The e-mail states that a copy of Dr. ST's report "is enclosed with this letter." The supervisor testified that he was not certain whether the TWCC-73 was attached to or included with the BFOE when he handed it to the claimant. The claimant testified that he did not read English and relied on the supervisor's explanation of the BFOE. The claimant signed and accepted the BFOE and began working on October 24, 2001, as a gate attendant checking people's names and vehicles' license plates upon entry and exit from the employer's premises. The claimant testified that he only worked the sedentary job for three days, from October 24 to October 26, 2001, because his head and neck pain did not allow him to continue working. The supervisor testified that the claimant only worked three days because he wanted to be paid for hours for which he was not at work and that the claimant walked off the employer's premises.

BONA FIDE OFFER OF EMPLOYMENT

The hearing officer did not err in determining that the employer tendered a BFOE 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 [Texas Workers' Compensation Commission] Commission. A copy of the Work Status Report 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 hearing officer's Finding Of Fact No. 8 infers that the employer tendered a BFOE that complied with the requirements of Rule 129.6(c). The hearing officer determined that "[b]ased upon the Claimant's hand delivery of [Dr. ST's] TWCC-73 on October 23, 2001, the employer hand delivered, explained and interpreted a written offer of employment to the Claimant on that same day." The evidence sufficiently supports the hearing officer's BFOE determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

DISABILITY

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 hearing officer's Finding Of Fact No. 11 states that "[d]ue to the claimed injury, the Claimant was not unable to obtain or retain employment at wages equivalent to the Claimant's pre-injury wages." We are unable to discern from the hearing officer's Decision and Order whether the hearing officer is finding that the claimant's compensable injury does not make him unable to obtain and retain employment at wages equivalent to the preinjury wage, or whether the hearing officer believes that the BFOE precludes a finding of disability.

Section 408.103(e) states:

For purposes of Subsection (a), if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing..., the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee.

Although disability is a different issue than a bona fide job offer, the two can be related if the offered and then imputed weekly earnings after the injury equal the preinjury average weekly wage (AWW). There might be a situation where the imputed wages are "wages equivalent" such that disability would not exist. However, the mere fact of a bona fide offer will not serve to end disability where the wages are not equivalent to the preinjury AWW. In this case, the evidence was not clearly developed on either the offered wages vis à vis the AWW, nor was the duration of the offer fully developed. Therefore, we remand for reconsideration of the disability issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

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

**MARCUS CHARLES MERRITT
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200
IRVING, TEXAS 75063.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Terri Kay Oliver
Appeals Judge