APPEAL NO. 030484
FILED APRIL 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 January 31, 2003. The hearing officer determined that the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on April 17, 2001; that her impairment rating (IR) is 9%; that the employer did not make a bona fide offer of employment (BFOE); and that the claimant's disability extended from September 26, 2000, through the date of the hearing. The claimant appealed the date of MMI and the IR, arguing that MMI should be October 5, 2002, the date of statutory MMI, and that a valid IR needs to be ascertained. The claimant urges affirmance of the disability determination and the lack of a BFOE. The respondent/cross-appellant (carrier) appealed, arguing that the hearing officer's disability determination from February 11, 2001, through the date of the hearing is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The carrier argues that the employer's BFOE (part-time) to the claimant was not invalidated by the exclusion of the treating doctor's work-release report in the offer of employment. The carrier urges affirmance of the MMI date of April 17, 2001, and the IR of 9%. The carrier argues that it was error for the Texas Workers' Compensation Commission (Commission) on August 20, 2002, to ask the designated doctor whether he wanted to reevaluate his position regarding MMI and IR in view of the claimant undergoing spinal surgery on July 3, 2002. The carrier argues that the hearing officer was correct in completely ignoring the designated doctor's October 7, 2002, opinion that the claimant was not at MMI and would not be until August 8, 2003, because the designated doctor's amendment was not made for the proper purpose.

DECISION

Affirmed in part, reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on _____; that her period of disability began on September 26, 2000, and extended through at least February 11, 2001; and that the claimant reached the statutory date of MMI on October 5, 2002. The parties stipulated that Dr. G was the claimant's treating doctor during 2001 and 2002; that Dr. W was the carrier-selected doctor for a required medical examination (RME); and that Dr. PW was the Commission-selected designated doctor in this case.

The claimant sustained a lumbar spine injury when she fell while working as a housekeeper for her employer. She began treating with Dr. S. An MRI done in November 2000, revealed a mild bulging of the discs at the L3-4, L4-5, and L5-S1 intervertebral levels of her lumbar spine. She attended eight weeks of therapy. On December 26, 2000, Dr. S opined that the claimant might be released for modified duty on February 2, 2001. That did not occur, and on February 8, 2001, Dr. S revised the

plan toward the claimant working light duty during a four-hour shift by February 12, 2001. The claimant began treating with Dr. G for her ankle. Although Dr. G would not begin treating the claimant for her lower back until July 2001, he filled out a carrier requested questionnaire in February 2001, regarding the claimant's medical condition, treatment, and prognosis. Dr. G was of the opinion that the claimant would be at MMI by late February 2001, and she could return to work with restrictions and physical limitations. A carrier-requested RME was performed by Dr. W on February 22, 2001. Dr. W certified MMI on this date. He assigned a 5% IR from Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association and 2% for lateral lumbar flexion range of motion (ROM) to arrive at a 7% whole body IR. He determined that the claimant invalidated her flexion and extension ROM by her straight leg raising (SLR).

The claimant disputed her MMI date and the IR of 7%. Dr. PW was appointed as the designated doctor by the Commission. Dr. PW examined the claimant on April 17, 2001, and gave her a total IR of 16%. Dr. PW assigned the claimant 4% for loss of forward flexion ROM, 5% for loss of backward extension, and 3% for loss of lateral flexion, as well as 5% from Table 49. The carrier challenged these percentages, arguing that the SLR had invalidated ROM. Dr. PW agreed to retest the claimant's ROM on October 23, 2001. On this examination, Dr. PW found that the claimant invalidated her sacral ROM by the same margin found by Dr. W in February. He assigned 3% for loss of lumbar right lateral flexion, 2% for loss of left lateral flexion, and 5% from table 49, combined for a 9% total IR, and kept the MMI date at April 17, 2001. The claimant underwent spinal surgery on July 3, 2002. Dr. G performed a L3-4, L4-5, L5-S1 laminectomy and diskectomy with posterior interbody fusion, posterolateral fusion, segmental instrumentation, and harvesting of the iliac crest bone.

The Commission informed Dr. PW of the claimant's spinal operation and asked Dr. PW on August 21, 2002, if this changed his opinion as to the claimant's MMI and IR. Dr. PW stated that he needed to reevaluate the claimant. This was done on October 7, 2002, and Dr. PW stated that the claimant was not currently at MMI and would not be until approximately August 8, 2003. Dr. PW did not assign an IR. We agree with the claimant that under the circumstances of this case it is necessary to remand the case for a determination of the correct MMI date and IR.

AMENDED DESIGNATED DOCTOR'S REPORT

The carrier contends that Dr. PW should not have been asked to consider whether the claimant's spinal surgery affected his determination of MMI and IR and argues that the designated doctor did not amend his report for a proper purpose. First, we note that the claimant's spinal surgery occurred prior to statutory MMI, and see no prohibition of a request for clarification. Second, in Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, we held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) "does not permit the analysis of whether an amendment was made for a proper purpose or within a reasonable time." Rule 130.6(i) provides that a designated doctor's response to a

Commission request for clarification is considered to have presumptive weight, as it is part of the designated doctor's opinion. The hearing officer failed to apply Rule 130.6(i) in that he completely ignored Dr. PW's October 7, 2002, report stating that the claimant was not at MMI but gave presumptive weight to Dr. PW's earlier report that the claimant was at MMI as of April 17, 2001. There is no explanation as to why the hearing officer ignored the October 7, 2002, designated doctor's clarification report that the claimant was not at MMI. We reverse the hearing officer's determination of MMI and IR, and remand for further action as outlined below.

STATUTORY MMI AND IR

We note that October 5, 2002, was stipulated as the statutory date of MMI and that Dr. PW's amended report estimates the date of MMI to be approximately August 8, 2003. Statutory MMI, as defined in Section 401.011(30)(B), is the latest date of MMI that may be certified (there is no evidence that an extension under Section 408.104 was requested or granted). On remand, the hearing officer should advise Dr. PW that the statutory MMI date is October 5, 2002, and tell Dr. PW that he is to find the MMI date (which can be no later than the statutory date) and determine the IR.

BONA FIDE OFFER OF EMPLOYMENT

The carrier contends that the hearing officer erred in making the determination that the employer's offer of employment did not constitute a BFOE under Rule 129.6(c), and that Rule 129.6 does not correctly implement Section 408.103(e). The employer offered the claimant a part-time position as a worker in the administrative office, but failed to include Dr. S's work-release letter of February 5, 2001, in the offer of employment. The claimant testified that she never received the letter offering her the light-duty position, was unaware of Dr. S's work-release letter, and was unable to work The carrier asserts that the job offer to the claimant complied with Section 408.103(e) and that it is error to invalidate the employer's job offer to the claimant simply because it did not have a copy of the Work Status Report (TWCC-73), upon which the offer was based, included with it. We disagree. Rule 129.6 deals with Bona Fide Offers of Employment. Rule 129.6(c) sets out the requirements for a BFOE. This portion of the rule is clear and unambiguous, and 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. ***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. [Emphasis added.]

Rule 129.6(d) provides that a carrier may deem an offer to be bona fide if it, among other requirements, included all the information required in Rule 129.6(c). 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, we find that there was no BFOE extended to the claimant because the offer did not contain the TWCC-73 upon which the offer was based. We believe the language of Rule 129.6(c) is clear and unambiguous. The rule contains no exceptions for failing to strictly comply with its requirements.

With regard to the carrier's challenge to the Commission's rule-making authority and to Rule 129.6, the Appeals Panel has previously held that it does not have the authority to decide the validity of Commission rules, that administrative rules are presumed to be valid, and that the courts are the proper forums for deciding the validity of agency rules. Texas Workers' Compensation Commission Appeal No. 010160, decided March 8, 2001.

We affirm the hearing officer's decision that there was no BFOE from the employer to the claimant.

DISABILITY DETERMINATION

The parties stipulated that the claimant had disability from September 26, 2001, through at least February 11, 2001. The hearing officer determined that from February 12, 2000 (sic 2001) through the time of the hearing that the claimant was unable due to her compensable injury to her lumbar spine and the resulting surgery thereto, to obtain and retain employment at wages equivalent to her preinjury wage. The carrier asserts that there is insufficient evidence to find that the claimant was disabled after February 12, 2001, since in Dr. W's opinion she could perform light and medium work under certain restrictions. The carrier goes on to argue that the claimant's treating doctors did not properly complete the TWCC-73 as required by Rule 129.5 and their opinions as to the claimant's work status should be ignored or discounted.

We disagree. 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). We have said on numerous occasions that a claimant under a

light-duty release does not have an obligation to look for work or show that work was not available within his or her restrictions. Texas Workers' Compensation Commission Appeal No. 022908, decided January 8, 2003. Absent a BFOE, a release to light or medium work does not stop disability.

The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. It is undisputed that the claimant sustained a compensable injury on _____, and has not worked since September 26, 2000. The evidence reflects that Dr. G has had the claimant on non-work status from July 2001 through August 2002, and that the employer never extended to the claimant a BFOE. It is clear from the evidence presented that the hearing officer could find that the claimant has disability through the date of the hearing.

We agree that a statement explaining how a claimant's workers' compensation injury prevents the claimant from returning to work is required on a TWCC-73 and under Rule 129.5. Such a statement is helpful in determining whether or not there was a BFOE, which there was not in this case, but it is not necessary to establish disability. The hearing officer may take into consideration the records of the treating doctor, even in the absence of a TWCC-73 or other conforming documents, when making a decision as to disability.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order as to the period of disability and lack of a BFOE from the employer to the claimant is affirmed. Pending resolution of the remand concerning the date of MMI and correct IR, 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. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge