

APPEAL NO. 031628  
FILED AUGUST 11, 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 May 19, 2003. The hearing officer determined that the employer made a bona fide offer of employment (BFOE) to the appellant (claimant) on November 25, 2002; that the respondent (carrier) is entitled to adjust the claimant's post-injury earnings by the amount of \$320.00 per week beginning on December 7, 2002, until March 12, 2003; and that the claimant had disability from March 23, 2002, through the date of the hearing. The claimant appealed the hearing officer's determinations that the employer made a BFOE and that the carrier is entitled to adjust post-injury earnings. The carrier responded, urging affirmance. The hearing officer's determination regarding disability has not been appealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

We agree that the hearing officer erred in finding that the employer made a BFOE and that the carrier could adjust earnings after the injury due to such offer. Whether an employer has made such a bona fide offer is a legal determination, and the claimant has challenged the conclusion of law. The November 25, 2002, written offer in evidence fails to comply with the requisites of a bona fide offer as set out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6), effective December 26, 1999.

The 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. Texas Workers' Compensation Commission Appeal No. 011878-s, decided September 28, 2001; Texas Workers' Compensation Commission Appeal No. 010110-s, decided February 28, 2001. Rule 129.6(c) states:

(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]. A copy of the Work Status Report [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.

The job offer in evidence, dated November 25, 2002, does include a copy of a TWCC-73 issued by a referral doctor. The TWCC-73, dated October 7, 2002, contains a 10-pound lifting restriction, yet the job offer states there would be no lifting over 20 pounds. The carrier asserted that the offer was actually based upon a TWCC-73 dated sometime in November of 2002, which contained a lifting restriction of 20 pounds. We note that no such TWCC-73 was in evidence. Alternatively, the carrier argued that the employer would have honored the 10-pound restriction. The hearing officer determined that a handwritten slip from the claimant's treating doctor dated October 29, 2002, which stated that the claimant was released to "light duty, no heavy lifting" was sufficient to overcome the 10-pound restriction set out by the referral doctor in his TWCC-73. There is no evidence that the treating doctor actually issued a TWCC-73 on or after October 29, 2002, and there is no evidence as to what the treating doctor considers "heavy lifting."

For these reasons, we agree that the hearing officer erred in crediting the offer as a BFOE, and we reverse his determination that the employer made a BFOE, and render a decision that the employer did not make a BFOE as set out in Rule 126.9, and the carrier therefore may not adjust weekly earnings after the injury for purposes of computing temporary income benefits as allowed in Section 408.103(e).

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

**MR. RUSSELL R. OLIVER, PRESIDENT  
221 WEST 6TH STREET  
AUSTIN, TEXAS 78701.**

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Chris Cowan  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Michael B. McShane  
Appeals Panel  
Manager/Judge