APPEAL NO. 042765
FILED DECEMBER 8, 2004

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 September 23, 2004. With regard to the disputed issues the hearing officer determined that the employer did not make a bona fide offer of employment (BFOE) to the appellant/cross-respondent (claimant), that the respondent/cross-appellant (carrier) is not entitled to adjust post injury weekly earnings; and that the claimant did not have disability for the period from May 7, 2004, through the date of the CCH.

The claimant appeals the disability determination, contending that there is "no evidence that her compensable injury of _____, failed to contribute in some way to her inability to be gainfully employed." The carrier appeals the BFOE determination asserting that a physician's assistant (PA) signature on a Work Status Report (TWCC-73) form is sufficient to satisfy the requirement that a TWCC-73 be attached to an offer of employment to comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). The carrier responds to the claimant's appeal, urging affirmance on the disability issue. The file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

Although there is no stipulation, it appears undisputed that the claimant sustained a compensable low back injury on _____, lifting a box. The hearing officer commented in the Background Information section of his decision that the claimant has had prior back surgery (in 1983) and has received periodic medical treatment for her back for several years prior to the _____, injury.

DISABILITY

The hearing officer commented and found that the compensable injury was not a cause of the claimant's inability to obtain and retain employment at the preinjury wage. (*See* Section 401.011(16)). There was conflicting evidence whether the compensable injury caused or contributed to the claimant's inability to obtain and retain employment from May 7, 2004, through the date of the CCH and the hearing officer's determination on this issue is supported by sufficient evidence.

BFOE

The claimant's treating doctor was Dr. C, and Dr. C referred the claimant to Dr. D for pain management. At issue is a TWCC-73 dated April 29, 2004, releasing the claimant to work with certain restrictions. In block 5 on the TWCC-73, which calls for

the "Doctor's Name and Degree," the name of Mr. P "PA-C" is written and the form is signed by Mr. P. The evidence indicates that Mr. P is a PA in the office of Dr. D. Upon receipt of this TWCC-73, the employer prepared an offer of employment, attached the TWCC-73 and sent it to the claimant. The hearing officer determined that the offer of light duty employment was based on a release to return to work not signed or issued by a doctor and therefore, was not a BFOE.

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 [Texas Workers' Compensation Commission (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.

The rule contains no exceptions for failing to strictly comply with its requirements. *See* Texas Workers' Compensation Commission Appeal No. 030484, decided April 16, 2003.

At issue here is whether the TWCC-73 from Mr. P meets the requirement of Rule 129.6(c). We would first note that Section 408.0041(e) (pertaining to designated doctor's examinations) provides that an "employer may make a [BFOE] . . . based on the designated doctor's report." That provision is inapplicable in this case as Dr. D was not the designated doctor and the report of the doctor who was the designated doctor was not attached to the offer of employment. Rule 129.5, pertaining to work status reports, defines the term "doctor" to mean either the treating doctor or a referral doctor. Rule 129.6(a) deals with a treating doctor providing a TWCC-73. Rule 129.6(b) provides that in the absence of a TWCC-73 by the treating doctor an offer of employment may be made based on another doctor's assessment of the employee's work status provided that the doctor made the assessment based on an actual physical examination of the employee performed by that doctor and provided that the treating doctor has not indicated disagreement with the restrictions identified by the other doctor.

The hearing officer notes that Dr. D's name does not appear any where on the TWCC-73. The hearing officer further notes that Dr. D's answers to interrogatories on August 27, 2004, that Mr. P had Dr. D's "full authority to issue the [TWCC-73]" and that he adopts and approves that report "is not sufficient to revive this document" (the TWCC-73). We agree.

The carrier cites to the general definition of doctor in Section 401.011(17) and the TEX. OCCUP. CODE ANN. scope of practice provisions of what a PA may do and specifically cites the occupation code Section 204.202(c) that a PA's signature attesting to the provision of a service the PA is legally authorized to provide "satisfies any documentation requirement for that service established by a state agency." That may very well be for general scope of practice, however Rule 129.5 specifically defines doctor in terms of preparing a TWCC-73 as "either the treating doctor or a referral doctor." Section 408.0041(e) and Rule 129.6(f) may expand the Rule 129.5 definition of doctor to also include a designated doctor or a doctor selected by the Commission to evaluate the employee's work status. Neither of those provisions would apply to a PA, regardless of what the PA scope of practice may permit him to do.

The carrier also cites Section 408.103(e) however that is the statutory provision that Rule 129.6 implements. We read Rule 129.6 as administrative implementation of Section 408.103(e) defining what "bona fide" means and requires. As the preamble to Rule 129.6 states, the "reason that the rule lists the items that must be in the offer is that the carriers will be allowed to reduce or suspend temporary income benefits if the employee rejects a bona fide offer." 24 Tex. Reg. 11423 (1999). The preamble goes on to state that it is necessary to provide some structure to the offers to ensure that there is some confidence that the offer is legitimate.

We have reviewed the complained-of determinations and conclude that the hearing officer did not err in his interpretation of the law and that the hearing officer's determinations 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 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **HARTFORD INSURANCE COMPANY OF THE MIDWEST** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge