APPEAL NO. 042864
FILED JANUARY 3, 2005

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 October 4, 2004. The hearing officer determined that the appellant's (claimant) compensable (low back) injury of _____, does not include injuries to the cervical or thoracic spine, that the claimant had disability from November 18, 2003, through the date of the CCH, that the claimant was "entitled to change" treating doctors to Dr. P because Dr. P was her first choice of treating doctors and that the employer tendered the claimant a bona fide offer of employment (BFOE) whereby respondent 1 (carrier) was entitled to consider half of the claimant's preinjury wages to be post-injury wages effective February 4, 2004, the seventh day after the offer was received by the claimant. The change of treating doctor and disability determinations have not been appealed and have become final pursuant to Section 410.169.

The claimant appeals the extent-of-injury determination on a sufficiency of the evidence basis and contends that the hearing officer erred in adding the BFOE, erred in finding the "carrier" (employer) tendered a BFOE and "that carrier was entitled to consider the wages offered as post-injury earnings." The carrier responded, urging affirmance. The file does not contain a response from respondent 2 (subclaimant).

DECISION

Affirmed in part and reversed and a new decision rendered in part.

It is undisputed that the claimant, a school custodian, slipped and fell down two stairs on her buttocks on _____. Although there was conflicting evidence, the hearing officer believed that the initial medical records only indicate complaints of low back and buttock pain. A November 25, 2003, medical report from a clinic has a diagnosis of lumbar strain, sciatica and sacral contusion. The claimant began seeing Dr. P sometime in January 2004 and in a report dated February 3, 2004, Dr. P included a diagnosis of lumber diskitis, sacral contusion and cervical and thoracic segmental dysfunction.

**EXTENT OF INJURY**

The claimant, at the CCH, demonstrated the body parts she injured in her fall. The hearing officer, in the discussion portion of his decision, comments on the lack of early complaints of mid back and cervical pain, contrary to the claimant's testimony. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. This is equally true of medical evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th

Dist.] 1984, no writ). The hearing officer was acting within his province as the fact finder in resolving the conflicts and inconsistencies in the evidence against the claimant. The hearing officer's determination on this issue is affirmed.

## ADDING THE BFOE ISSUE

Three issues, extent of injury, disability and change of treating doctor were reported out of the benefit review conference (BRC). The carrier responded to the benefit review officer's report asserting that although discussed "for reasons unknown" the BFOE issue "was not included in this report." Whether the issue was discussed at the BRC was also discussed at the CCH with the carrier offering additional documentation that the issue had been brought up at the CCH. The hearing officer concluded that the BFOE issue had been presented at the BRC as a disputed and unresolved issue and added the BFOE issue. We review the hearing officer's ruling to add an issue on an abuse-of-discretion standard, that is, whether the hearing officer acted without reference to any guiding principles. Texas Workers' Compensation Commission Appeal No. 031630, decided August 7, 2003; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We are satisfied that the hearing officer's ruling was not an abuse of discretion.

## BFOE

The doctor at the clinic where the claimant was first treated issued a Work Status Report (TWCC-73) dated December 29, (or another copy has December 30), 2003, releasing the claimant to work with restrictions of no kneeling, bending, squatting or stooping, no lifting over 10-pound four hours a day. Apparently based on this TWCC-73 the employer sent the claimant a letter dated January 26, 2004, offering light duty within the prescribed restrictions 20 hours per week. Initially, we note no TWCC-73 is attached to the letter in evidence (Carrier Exhibit I) however the letter does say that a "copy of Dr. R report is enclosed." Elsewhere in the letter it states enclosed is "a copy of a medical release dated December 30, 2003, from your treating doctor [the clinic doctor]." The claimant then returned to work for (apparently for four hours a day) either one or two days at which time the claimant said she was unable to work any longer because of pain. Dr. P subsequently took claimant off work entirely on February 4, 2004. The claimant was seen by a carrier independent medical examination doctor on April 13, 2004, and that doctor stated that the claimant does not have an ability to work. The carrier contends that the employer's offer of employment of January 26, 2004, constitutes a BFOE pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) effective December 26, 1999.

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 (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;
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> (2) the schedule the employee will be working;
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> (3) the wages that the employee will be paid;
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> (4) a description of the physical and time requirements that the position will entail; and
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> (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 in the discussion portion of his decision states: [l]ittle point is served by a hyper-technical reading of this rule or the statute." As previously mentioned, although the letter offer of employment in evidence does not have a TWCC-73 attached we can infer that one was sent to the claimant and that it was the report of December 29 or 30, 2003. However, the job offer letter of January 26, 2004, also does not state the wages that the employee will be paid and does not include the required statement of Rule 129.6(c)(5). We are mindful of the admonition in Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248, 255 (Tex. 1999) that the Commission must "follow the clear, unambiguous language of its own regulation." In Texas Workers' Compensation Commission Appeal No. 010110-s, decided February 28, 2001, the Appeals Panel affirmed the determination of a hearing officer that the employer's offer of employment did not constitute a bona fide offer under Rule 129.6(c) because the written offer did not contain the statement required in Rule 129.6(c)(5) and because the TWCC-73, upon which the offer was based, was not attached. Our decision observed that the language in Rule 129.6 is "clear and unambiguous" and that the rule "contains no exception for failing to strictly comply with its requirements." *See also*, Texas Workers' Compensation Commission Appeal No. 010301, decided March 20, 2001; Texas Workers' Compensation Commission Appeal No. 011604, decided August 14, 2001; and Texas Workers' Compensation Commission Appeal No. 011878-s, decided September 28, 2001. In Texas Workers' Compensation Commission Appeal No. 012088, decided October 17, 2001, the Appeals Panel reversed and rendered a new decision that the employer had not made a bona fide offer of modified employment because the written offer failed to include all the requirements of Rule 129.6(c). We cannot agree that failing to include the "clear and unambiguous" provisions of Rule 129.6(c) amounts to a "hyper-technical reading" of this rule. Accordingly, we reverse the hearing officer's decision on this issue.

We affirm the hearing officer's determination on the extent-of-injury issue and the hearing officer's ruling on addition of the BFOE issue. We reverse the hearing officer's

decision that the employer tendered the claimant a BFOE pursuant to which the carrier was entitled to reduce temporary income benefits (TIBs) by 50% and render a new decision that the employer's offer of employment did not comply with the requirements of a BFOE pursuant to Rule 129.6 and therefore the carrier is not permitted to reduce TIBs.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE COMPANY** 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