APPEAL NO. 051731
FILED SEPTEMBER 12, 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 was held on June 23, 2005, with the record closing on June 30, 2005. The issues before the hearing officer were:

1. Did the [respondent/cross-appellant (claimant)] have disability for the period from September 18, 2004 through January 16, 2005?

2. Did the employer tender a bona fide offer of employment [BFOE] to the claimant entitling the [appellant/cross-respondent (carrier)] to adjust the post injury weekly earnings, and if so, for what periods?

3. Did the claimant have good cause for failing to submit to the required medical examination [RME] on November 24, 2004, and if not, for what period was claimant not entitled to temporary income benefits [TIBs]?

The hearing officer determined that the claimant had disability from September 18 through November 29, 2004, but that the claimant "abandoned treatment by November 29, 2004 and therefore did not have disability after that date," that the employer did not make a BFOE to the claimant and that the claimant had good cause for failing to attend the RME appointment (because the claimant "did not receive the RME appointment letter from Carrier").

The carrier appeals the disability and BFOE issues on the basis that the employer had made an offer of employment which the claimant had read and rejected and that the claimant did not have good cause for failure to attend the RME. The carrier asserts that generally the claimant was not credible in his testimony about the offer of employment and reason why he had failed to attend the RME. The claimant appeals the disability issue, contending that the issue of abandonment of treatment was not an issue before the hearing officer, that "abandonment is not a basis for the suspension of [TIBs]," that failure to attend an RME does not constitute "'abandonment' of medical treatment" and that he had disability through January 16, 2005. The claimant filed a response to the carrier's Request for Review urging affirmance on the issues on which he prevailed, and the carrier filed a response to the claimant's cross appeal urging affirmance on the issues on which it prevailed.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant, an electrical apprentice, sustained a compensable injury on _____. The testimony was that the claimant sustained neck

and back injuries when he fell about four feet to the floor. The claimant reported the injury and was taken by the employer to (Clinic C) where he was seen by (Dr. W). Dr. W diagnosed a cervical strain and back contusion, x-rays were taken, medication prescribed and the claimant was released to restricted duty from September 14 through September 17, 2004. The restrictions were "no reaching above shoulder and unable to drive company vehicle."

In evidence is an offer of employment which acknowledges Dr. W's restrictions, appears to attach a Work Status Report (TWCC-73), indicates where the employment is to be, the hours and the claimant's preinjury wage. The last paragraph gives the claimant until September 20, 2004, to respond to the offer, and that the offer is to be accepted or rejected by calling a certain individual. The letter concludes asking the claimant to "[p]lease sign and return this letter to the main office." The carrier contends that two people witnessed that the claimant was given the letter and refused to sign it. In one of the copies of the offer letter has a written notation "(Claimant's Name) has read but refuses to sign 9-17-04" followed by a signature and set of initials. The claimant disputes the letter was given to him. In evidence is a copy of a certified mail receipt with a notation that "offer of lite duty mailed Certified & receipt requested & regular mail 9/16/04." The claimant testified that he did not receive the letter, although the claimant concedes that it was sent to the correct address. A United States Postal Service (USPS) "Track & Confirm" form indicates that the item "was delivered on September 27, 2004 at 12:10 pm." The claimant subsequently sought treatment at a chiropractic clinic where a doctor took the claimant off work on September 18, 2004.

THE BFOE ISSUE

There was disputed evidence whether the claimant ever received the employer's offer of employment and the claimant contends that the offer did not state the physical and time requirements, was not geographically accessible (due to the claimant's restriction against driving (the company vehicle)) and that the claimant had been "taken off work by his treating doctor before the offer of employment had expired." 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) sets out the requirements for a BFOE. The hearing officer determined that the employer did not make a BFOE to the claimant finding that the claimant's treating doctor had taken the claimant "off work on September 18, 2004, two days before the offer of employment was to expire." Regarding the claimant's credibility, we only note that Section 410.165(a) makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Although there may be other reasons why the offer of employment was not a BFOE (*See* Appeals Panel Decision (APD) No. 001502, decided August 10, 2000), the hearing officer's determination on this issue is supported by the evidence.

GOOD CAUSE FOR FAILING TO ATTEND THE RME

In evidence is a letter dated October 22, 2004, from the RME doctor to the claimant, at the claimant's address, "confirming" an RME appointment on November 24, 2004. The claimant testified that he never received the letter. The letter was sent by

certified mail and indicates it was "Returned to Sender." Another box on the USPS form checked "Return Receipt for Merchandise." The claimant contends that he never received that letter, although conceding it was properly addressed, that the appointment fell outside of the 30 days that the carrier had for setting the appointment under Rule 126.6(b), that his attorney was not notified of the appointment and that he was not given at least 10 days notice as required by Rule 126.6(b).

Rule 126.6(b) provides that all "examinations ordered must be scheduled to occur within 30 days after receipt of the order, with at least 10 days notice to the employee and the employee's representative (if any)." Rule 126.6(a) provides, in pertinent part that when a request is made for a medical examination the Texas Department of Insurance, Division of Workers' Compensation (Division) shall determine if an examination should be ordered and if so shall issue an order granting or denying the request with a copy of the order to be sent to the employee, the employee's representative (if any), and the carrier. That order is not in evidence. Although the hearing officer comments, regarding the RME appointment, that the "Commission Order was approved on October 13, 2004" there is no evidence of that and the carrier concedes that "there is nothing in the records to show when the order was received by the carrier." We note similarly the order was apparently also not received by the claimant or claimant's attorney. Without evidence when the order was sent by the Division we are unable to apply a deemed date of receipt and without evidence when the order was received by the carrier, claimant or claimant's attorney the evidence fails to establish a time line for the claimant's RME appointment.

DISABILITY

Section 401.011(16) defines disability as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The hearing officer determined that the claimant "abandoned treatment by November 29, 2004 and therefore did not have disability after that date." The hearing officer's determination is both legally and factually incorrect. There is no provision in the 1989 Act or Division rules for disability to be terminated for this claimant based on abandonment of medical treatment. Further Rule 130.4 allows for a presumption of maximum medical improvement (MMI), under certain circumstances if the employee has failed to attend certain scheduled health care appointments and for other reasons. Reaching MMI may mean that the claimant is not entitled to TIBs pursuant to Section 408.101 but does not necessarily effect disability as defined in Section 401.011(16). In other words a claimant can have disability even after reaching MMI. Neither the abandonment of medical treatment nor the presumption of MMI pursuant to Rule 130.4 were issues before the hearing officer.

Although the claimant did miss an RME appointment and there was evidence that he failed to attend "Rehab 2112" appointments for five dates in November (November 22, 23, 24, 26 and 29, 2004) and the form indicates that the claimant was released back to the treating doctor, this does not constitute abandonment of medical care. The claimant explained why he did not attend Rehab 2112, an explanation which

the hearing officer was free to accept or reject. However, even if the hearing officer rejected the claimant's explanation why he missed those appointments, the medical records showed continued medical care on November 30, 2004, and appointments with the treating doctor in December 2004 and January 2005. The claimant testified, and it is uncontradicted, that he returned to work on January 17 or 18, 2005, with another employer, at wages greater than his preinjury wage. We hold that the hearing officer erred in ending disability on November 29, 2004, because the claimant "abandoned treatment."

We reverse the hearing officer's determination that the claimant's disability ended on November 29, 2004, and render a new decision that the claimant had disability for the period from September 18, 2004, through January 16, 2005.

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

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge