

APPEAL NO. 071650  
FILED NOVEMBER 12, 2007

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 July 31, 2007. The hearing officer resolved the disputed issues by deciding that the employer made a bona fide offer of employment (BFOE) at wages equal to the appellant's (claimant) pre-injury wages, which the claimant did not accept on or before April 18, 2007, and the claimant only had disability beginning on March 30, 2007, and continuing through April 18, 2007, but at no other times. The claimant appeals, disputing both the BFOE and disability determinations. The claimant attached to his appeal a report dated August 6, 2007, from the designated doctor along with a Report of Medical Evaluation (DWC-69) and Work Status Reports (DWC-73) from the designated doctor, contending those documents constitute newly discovered evidence. The appeal file does not contain a response from the respondent (carrier).

DECISION

Reversed and rendered.

**FACTUAL SUMMARY**

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_.<sup>1</sup> The claimant testified that he slipped and fell down some stairs and injured his left leg and left hand. The evidence reflected that the claimant worked as a waiter for employer. In evidence was a written offer of employment to the claimant from the employer, dated April 10, 2007. The claimant acknowledged he received the written offer of employment. The offer stated that it was good for a period of seven days. Further, the offer was based on a DWC-73 dated April 3, 2007, from Dr. S, a referral doctor who had examined the claimant's left upper extremity at the request of the claimant's treating doctor, Dr. D. Dr. S released the claimant to return to work with restrictions, but the restrictions were limited to the claimant's left hand and wrist. There is no indication that Dr. S even examined the claimant's left lower extremity. Dr. D had previously released the claimant on April 2, 2007, to light duty with limitations of both his left lower extremity and left upper extremity. The claimant subsequently sought treatment with another doctor, Dr. P who took the claimant completely off work beginning on May 3, 2007, citing various diagnoses for both the claimant's left lower extremity and left upper extremity. There was no evidence that Dr. P had released the claimant to return to work by the date of the CCH.

**BONA FIDE OFFER OF EMPLOYMENT**

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<sup>1</sup> We note that the hearing officer omitted this stipulation in his Decision and Order but that the record reveals the parties stipulated to the date and existence of the compensable injury. Also, the evidence reflects that the employer is in a Workers' Compensation Health Care Network. See Insurance Code, Chapter 1305.

28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) sets out the requirements for a BFOE. Rule 129.6(b) provides that an employer may offer an employee a modified duty position, which has restricted duties that are within the employee's work abilities as determined by the employee's treating doctor. Rule 129.6(b) further provides that, in the absence of a DWC-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. See Appeals Panel Decision (APD) 051731, decided September 12, 2005; APD 041337, decided July 20, 2004; and APD 040468, decided April 22, 2004.

In the instant case the evidence reflects that Dr. D was the claimant's initial treating doctor and had issued a DWC-73 prior to Dr. S, which included more restrictions which applied to both the claimant's left lower extremity and left upper extremity. However, the offer of employment from the employer was made based on the DWC-73 of Dr. S.<sup>2</sup>

Because there was not an absence of a DWC-73 from the claimant's treating doctor, and the offer of employment was based on a DWC-73 from a referral doctor who did not consider the entire compensable injury, the hearing officer's determination that the employer made a BFOE to the claimant is reversed and a new determination rendered that the employer did not make a BFOE to the claimant.

## 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 Appeals Panel has stated on numerous occasions that the issues of BFOE and disability are distinct. APD 001143, decided July 3, 2000. As stated in APD 012077, decided October 23, 2001, disability concerns whether a claimant is unable to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury, while a BFOE is used to determine the amount of temporary income benefits (TIBs) due, if any. Additionally, APD 001143 *supra*, stated that the existence of a BFOE does not automatically result in the end of disability but only a determination of post-injury earnings for purposes of entitlement to TIBs. See *also* Section 408.103(e) and APD 000035, decided February 18, 2000. APD 023020, decided January 16, 2003, held that the mere fact of a BFOE will not serve to end disability where the wages are not equivalent to the preinjury average weekly wage.

The claimant has the burden of proof to show that disability exists. APD 032579, decided November 19, 2003. A doctor's report that restricts the claimant's activities and prevents him or her from doing the job that he or she did at the time of the injury is evidence of disability. See APD 030927, decided May 28, 2003. If the claimant has

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<sup>2</sup> We note that this case does not involve a BFOE based on a designated doctor's report. See Section 408.0041(e).

been returned to work with restrictions, he does not have to prove that there is no work available which would fit his or her restrictions in order to establish disability. See APD 941249, decided October 26, 1994. A claimant under a restricted duty release does not have to look for work for purposes of establishing disability. See APD 020417, decided April 10, 2002.

It is evident that in this case the hearing officer ended disability based on his finding of a BFOE. The BFOE determination was reversed for reasons stated herein. The hearing officer's determination that the claimant had disability from March 30 through April 18, 2007, but at no other times is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. There is no evidence that the claimant has been returned to work full duty by any doctor. Both Dr. D and Dr. S released the claimant to return to work with modified duties and Dr. P took the claimant completely off work. The hearing officer's disability determination is reversed and a new determination rendered that the claimant had disability from March 30, 2007, through the date of the CCH.

In view of the basis for our reversal based on the evidence in the record, it is not necessary to consider whether documents submitted with the claimant's appeal is newly discovered evidence.

### **SUMMARY**

The hearing officer's determination that the employer made a BFOE to the claimant is reversed and a new determination rendered that the employer did not make a BFOE to the claimant. The hearing officer's determination that the claimant had disability from March 30 through April 18, 2007, but at no other times, is reversed and a new determination rendered that the claimant had disability from March 30, 2007, through the date of the CCH.

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 RAY OLIVER, PRESIDENT  
6210 HIGHWAY 290 EAST  
AUSTIN, TEXAS 78723.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge