APPEAL NO. 080924
FILED AUGUST 8, 2008

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 May 19, 2008. The disputed issues were: (1) Does the appellant/cross-respondent (claimant) have disability as a result of the _____, injury from October 19, 2007, to the present and continuing; and (2) Did the employer make a bona fide offer of employment (BFOE) to the claimant entitling the respondent/cross-appellant (self-insured) to adjust the post-injury weekly earnings, and if so, for what periods. The hearing officer resolved the disputed issues by deciding that: (1) the claimant had disability beginning on October 19, 2007, and continuing through May 19, 2008, the date of the CCH; and (2) the June 28, 2007, offer of a temporary modified duty position was a bona fide job offer under 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6), but was preceded by the treating doctor restricting the claimant from any work, and therefore there are no wages that the self-insured can treat as post-injury earnings for any period of disability. Both parties appeal. The claimant appeals, contending that the offer of employment failed to meet the requirements set forth in Rule 129.6, rendering it invalid. The self-insured responded, arguing that the offer of employment met each of the required elements of the rule. The self-insured also appealed, disputing the hearing officer's disability determination and arguing that the hearing officer erred in giving deference to the treating doctor's Work Status Report (DWC-73), which took the claimant off work rather than the work restrictions given to the claimant by the designated doctor. The claimant responded, urging affirmance of the disability determination as well as that portion of the hearing officer's determination that the self-insured is not entitled to adjust the post-injury earnings.

DECISION

Affirmed in part and reversed and rendered in part.

BONA FIDE OFFER OF EMPLOYMENT

The parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that the claimant received the employer's June 28, 2007, offer of employment and that the DWC-73 on which it was based (from the designated doctor) was attached. The designated doctor's report reflects that he was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine, among other things, the claimant's ability to return to work. The designated doctor's DWC-73 of May 22, 2007, allowed the claimant to return to work with specified restrictions due to her compensable back injury. At issue was whether the offer met the requirements of Rule 129.6. 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 Division. A copy

of the [DWC-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 hearing officer found that the June 28, 2007, offer of a temporary modified duty position was a bona fide job offer under Rule 129.6, but was preceded by the treating doctor restricting claimant from any work, and therefore there are no wages that the self-insured can treat as post-injury earnings for any period of disability. However, the June 28, 2007, offer of employment in evidence failed to state the location at which the claimant would be working as required by Rule 129.6(c)(1). The language in Rule 129.6 is "clear and unambiguous" and the rule "contains no exception for failing to strictly comply with its requirements." *See* Appeals Panel Decision (APD) 010301, decided March 20, 2001; APD 011604, decided August 14, 2001; and APD 011878-s, decided September 28, 2001. In APD 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). In the instant case, because the offer of employment failed to include the location at which the claimant would be working, the hearing officer erred in that portion of his determination that the June 28, 2007, offer of a temporary modified duty position was a bona fide job offer under Rule 129.6.

We note that Rule 129.6(b) provides in part that in the absence of a work status report 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. In the instant case, there was a work status report from the treating doctor taking the claimant off work. However, Section 408.0041(a) provides in part that at the request of an insurance carrier or an employee, or on the Commissioner's own order, the Commissioner may order a medical examination to resolve any question about the ability of the employee to return to work. Section 408.0041(e) provides in part that an employer may make a BFOE subject to Sections 408.103(e) and 408.144(c) based on the designated doctor's report. Section 408.103(e) provides that for purposes of determining the amount of temporary income

benefits, if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee. Section 408.144(c) provides that for purposes of computing supplemental income benefits, if an employee is offered a bona fide position of employment that the employee is capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly wages are considered to be equal to the weekly wages for the position offered to the employee. Rule 129.6(f) provides that the following is the order of preference that shall be used by carriers evaluating an offer of employment: (1) the opinion of a doctor selected by the Division to evaluate the employee's work status; (2) the opinion of the treating doctor; (3) opinion of a doctor who is providing regular treatment as a referral doctor based on the treating doctor's referral; (4) opinion of a doctor who evaluated the employee as a consulting doctor based on the treating doctor's request; and (5) the opinion of any other doctor based on an actual physical examination of the employee performed by that doctor. In the instant case, the Division appointed the designated doctor to evaluate the claimant's ability to return to work; however, the offer of employment that was based on the designated doctor's report failed to meet all of the requirements of Rule 129.6(c), therefore the June 28, 2007, offer of employment was not a BFOE.

DISABILITY

The hearing officer's decision that the claimant had disability beginning on October 19, 2007, and continuing through May 19, 2008, is supported by sufficient evidence and is affirmed.

SUMMARY

We reverse that portion of the hearing officer's decision that the June 28, 2007, offer of a temporary modified duty position was a bona fide job offer under Rule 129.6 and render a new decision that the June 28, 2007, offer of a temporary modified duty position was not a bona fide job offer under Rule 129.6.

We affirm that portion of the hearing officer's decision that there are no wages that the self-insured can treat as post-injury earnings based on the June 28, 2007, offer of employment. We affirm the hearing officer's decision that the claimant had disability beginning on October 19, 2007, and continuing through May 19, 2008.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

JG
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge