APPEAL NO. 090416
FILED MAY 29, 2009

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 2, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of _____, includes bilateral lumbar IVD, discitis of the thoracic region and 4-5 mm left paracentral discal protrusions at L4-5 and L5-S1 but does not include lumbar radiculopathy; (2) the employer did not make a bona fide offer of employment (BFOE) to the respondent (claimant) entitling the appellant (carrier) to adjust to the post-injury weekly earnings; and (3) the claimant had disability resulting from the compensable injury sustained on _____, from _____, through the date of the CCH.

The carrier appealed the hearing officer's determinations that were adverse to the carrier on the issues of extent of injury, disability and BFOE. The carrier contended that there was a BFOE dated _____, because it complied with all the criteria of 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). The carrier argued that the description of the physical and time requirements of the offered position, "the associate will be seated or standing" is sufficient to comply with Rule 129.6(c)(4). The carrier further argued that the claimant failed to establish disability because Dr. K's off-work slips are inconsistent with previous examinations by Dr. I, with a functional capacity evaluation (FCE), and with the claimant's testimony. The claimant responded, urging affirmance. That portion of the hearing officer's extent-of-injury determination that the compensable injury of _____, does not include lumbar radiculopathy was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

FACTUAL SUMMARY

The parties stipulated that the claimant sustained a compensable injury on _____. It is undisputed that the claimant was examined by the company doctor, Dr. I, on October 14 and on October 17, 2008. In his initial examination, Dr. I diagnosed the work injury as bilateral lumbar IVD and discitis of the thoracic region and prescribed medication and physical therapy. In a Work Status Report (DWC-73) dated _____, Dr. I released the claimant to return to work with restrictions. The restrictions included, in part: (1) that the claimant may not lift or carry objects more than 10 pounds for more than eight hours per day; and (2) that the claimant may not stand or walk more than four hours per day. No restrictions were given to the claimant regarding the length of time he could sit or the maximum hours of work per day. The claimant returned to his employer on _____, and accepted a written offer of employment that was based on Dr. I's initial DWC-73. The claimant's modified duty was to begin

October 15, 2008. The claimant failed to report to work on October 15, 2008, and has never returned to work. The claimant testified that he could not get out of bed that day. In evidence is another DWC-73 from Dr. I dated October 17, 2008, in which Dr. I modified, in part, the claimant's restrictions of standing and walking to a maximum of one hour per day.

The claimant testified that on October 17, 2008, he met with Dr. K, who completed a DWC-73 that took the claimant completely off work beginning October 15, 2008. The claimant testified that he had told Dr. K on October 17, 2008, about the "light job" offer from the employer and that Dr. K wanted him off work until he got an MRI so that the claimant would not hurt himself. The claimant testified that Dr. K, his treating doctor, never released him to return to work in any capacity. In evidence is an October 22, 2008, FCE showing an ability to do sedentary work.

EXTENT OF INJURY

The hearing officer's extent-of-injury determination that the compensable injury of _____, includes bilateral lumbar IVD, discitis of the thoracic region, and 4-5 mm left paracentral discal protrusions at L4-5 and L5-S1 is supported by sufficient evidence and is affirmed.

BFOE

The hearing officer found that the written offer of modified duty work made by the employer to the claimant on _____, "failed to meet the requirements of [Texas Department of Insurance, Division of Workers' Compensation (Division)] Rule 129.6(c)(4)." Therefore, the hearing officer concluded that the employer did not make a BFOE to the claimant entitling the carrier to adjust post-injury weekly earnings.

Rule 129.6 sets out the requirements for a BFOE and provides in part:

> (b) An employer may offer an employee a modified duty position which has restricted duties which are within the employee's work abilities as determined by the employee's treating doctor. 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.
>
> (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:

* * * *

(4) a description of the physical and time requirements that the position will entail;

* * * *

In the Background Information section of the decision, the hearing officer stated that "[t]here was an attempt in the written offer to describe the physical and time requirements the offered position would entail, as required by Division Rule 129.6(c)(4), but 'associate will be seated or standing' was insufficient, especially in view of [Dr. I]'s restriction to a maximum of four hours standing per day in the DWC-73. If this offer of modified duty work were seen as a BFOE, it effectively expired on October 17, 2008, when [Dr. I] provided a new DWC-73 with tighter restrictions." Rule 129.6(h) makes clear that the Division will find an offer to be bona fide if it is reasonable, geographically accessible, and meets the requirements of Subsections (b) and (c). The written offer of employment complied with the requirements of Rule 129.6(c)(4) because Dr. I's DWC-73's dated October 14 and October 17, 2008, did not restrict the maximum number of hours that the claimant could work per day and did not restrict the number of hours per day that the claimant could sit. The hearing officer's finding that the written offer of employment failed to meet Rule 129.6(c)(4) is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's decision that the employer did not make a BFOE to the claimant entitling the carrier to adjust the post-injury weekly earnings and remand for the hearing officer to resolve whether the written offer of employment complied with all of the requirements of Rule 129.6(b) and (c), entitling the carrier to adjust the post-injury weekly earnings, and if so, for what period.

DISABILITY

Disability is defined as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. Section 401.011(16). Given that we are reversing the BFOE determination, we likewise reverse the hearing officer's decision on disability and we remand for the hearing officer to consider the offer of employment letter in the context of disability as defined in Section 401.011(16).

SUMMARY

We affirm the hearing officer's decision that the compensable injury of _____, includes bilateral lumbar IVD, discitis of the thoracic region, and 4-5 mm left paracentral discal protrusions at L4-5 and L5-S1. We reverse the hearing officer's decision on BFOE and disability, and we remand for the hearing officer to resolve the disputed issues of BFOE in accordance with Rule 129.6(b) and (c) and of disability in accordance with Section 401.011(16).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

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

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701-3232.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge