

APPEAL NO. 090529
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 was held on February 10, 2009. The issues before the hearing officer were:

- (1) Did the appellant (claimant) have disability from May 13, 2008, through October 28, 2008, resulting from the _____, compensable injury?
- (2) Did the employer make a bona fide offer of employment (BFOE) to the claimant, thereby entitling the respondent (carrier) to adjust post-injury weekly earnings, and if so, for what period(s)?

The hearing officer determined that the employer made a BFOE to the claimant on May 1, 2008, entitling the carrier to adjust the post-injury weekly earnings from May 13, 2008, through October 28, 2008, and that the claimant did not have disability from May 13, 2008, through October 28, 2008, as a result of the injury sustained on _____. The claimant appealed the hearing officer's determinations on the issues of BFOE and disability. The carrier responded, urging affirmance.

DECISION

Reversed and rendered.

BFOE

The parties stipulated that the claimant sustained a compensable injury on _____. In evidence is the employer's offer of employment dated May 1, 2008, which was based on the treating doctor's, (Dr. A), Work Status Report (DWC-73) dated April 30, 2008. The employer's offer of employment states in part that:

The job duties meet the work restrictions sanctioned by [Dr. A] (see enclosed [DWC-73]).

Job Title: Light Assembly

Work Setting: Sitting on table packaging merchandise.

The claimant argues on appeal that the offer of employment fails to describe the physical and time requirements that the assembly job will entail pursuant to 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). Rule 129.6(b) states in part that an employer may offer an employee a modified duty position which has restricted duties which are within the employer's work abilities as determined by the employee's treating doctor. 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 Department of Insurance, Division of Workers' Compensation]. 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.

In the instant case, the employer's offer of employment is based on Dr. A's DWC-73 dated April 30, 2008, which states that the claimant was released to work with restrictions of sitting and standing for a maximum of four hours per day respectively, and reaching and overreaching for a maximum of one hour per day respectively. The employer's offer of employment does not comply with the physical and time requirements pursuant to Rule 129.6(c)(4), because it does not describe the physical duties or limit the number of hours of sitting as an assembly worker per Dr. A's DWC-73. We note that the physical requirement description contained in the employer's offer of employment does not indicate that the claimant would be able to perform his duties other than sitting.

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, the employer's offer of employment failed to provide a description of the physical and time requirements for the light assembly position offered pursuant to Rule 129.6(c)(4), given the work restrictions in Dr. A's DWC-73. Accordingly, we reverse the hearing officer's determination that the employer made a BFOE to the claimant on May 1, 2008, entitling the carrier to adjust the post-injury weekly earnings from May 13, 2008, through October 28, 2008, and we render a new decision that the employer did not make a BFOE to the claimant on May 1, 2008, entitling the carrier to adjust the post-injury weekly earnings from May 13, 2008, through October 28, 2008.

DISABILITY

The claimant has the burden of proof to show that disability exists. APD 032579, decided November 19, 2003. Section 401.011(16) defines “[d]isability” as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury 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 pre-injury 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 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 pre-injury average weekly wage.

In the Background Information section of the hearing officer’s decision, the hearing officer states that the claimant did not have disability from May 13, 2008, to October 28, 2008, “because the temporary modified duty job assignment offered by the employer would have paid the claimant the same as his pre-injury wage.” It is evident that in this case, the hearing officer ended disability based on her finding of a BFOE. The BFOE determination was reversed for reasons stated herein.

The evidence shows that (Dr. N) was appointed as the designated doctor to opine on whether the claimant’s disability is a direct result of the claimant’s compensable injury. In a report dated July 18, 2008, Dr. N states that based on the medical records and examination of the claimant, the claimant’s “low back strain is a direct result of the work-related injury of _____.” Additionally, DWC-73s from the claimant’s treating doctor, (Dr. T), show that the claimant was taken off work completely from May 28, 2008, through November 19, 2008. There is no evidence that the claimant has been returned to work full duty by any doctor during the disability period in dispute.

The hearing officer’s determination that the claimant did not have disability from May 13, 2008, through October 28, 2008, 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 disability determination that the claimant did not have disability from May 13, 2008, through October 28, 2008, as a result of the injury sustained on _____, and we render a new decision that the claimant had disability from May 13, 2008, through October 28, 2008, as a result of the injury sustained on _____.

SUMMARY

We reverse the hearing officer's determination that the employer made a BFOE to the claimant on May 1, 2008, entitling the carrier to adjust the post-injury weekly earnings from May 13, 2008, through October 28, 2008, and we render a new decision that the employer did not make a BFOE to the claimant on May 1, 2008, entitling the carrier to adjust the post-injury weekly earnings from May 13, 2008, through October 28, 2008.

We reverse the hearing officer's disability determination that the claimant did not have disability from May 13, 2008, through October 28, 2008, as a result of the injury sustained on _____, and we render a new decision that the claimant had disability from May 13, 2008, through October 28, 2008, as a result of the injury sustained on _____.

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.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge