

APPEAL NO. 100765
FILED JULY 30, 2010

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 11, 2010. The issues before the hearing officer were:

- (1) Did the appellant (claimant) sustain a compensable injury on _____?
- (2) Did the claimant have disability resulting from an injury sustained on _____, for the period of December 8, 2009, through the present?
- (3) Did the employer tender a bona fide offer of employment (BFOE) to the claimant?

The hearing officer determined that: (1) the claimant sustained a compensable injury on _____; (2) the claimant had disability from December 8, 2009, through the present (May 11, 2010, the date of the CCH); (3) the employer did tender a BFOE to the claimant on December 9, 2009, but it can only be used by the respondent (carrier) to adjust the claimant's post-injury earnings (PIE) from December 9, 2009, through December 13, 2009; and (4) the employer did tender a BFOE to the claimant on December 16, 2009, it can be used by the carrier to adjust the claimant's PIE from December 16, 2009, through the present.

The claimant appealed the hearing officer's BFOE determinations. The carrier responded, urging affirmance. The hearing officer's compensable injury and disability determinations were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that he was employed as a driver/warehouse worker for the employer when he sustained a low back injury at work on _____. The employer referred the claimant for medical treatment with (Dr. T) on December 9, 2009. In evidence is a Work Status Report (DWC-73) dated December 9, 2009, from Dr. T which shows the claimant was released to work from December 9, 2009, through December 11, 2009, with the following restrictions: bending/stooping for a maximum of two hours; pushing/pulling for a maximum of four hours; and no lifting more than 20 lbs for more than eight hours per day. On December 9, 2009, the claimant hand-delivered to the employer Dr. T's DWC-73. Based on Dr. T's DWC-73 dated December 9, 2009, the employer offered the claimant a job with a start date of December 17, 2009. The claimant refused to sign the job offer, however, the claimant showed up for work on

December 14, 2009. Given that the claimant had shown up for work a few days earlier than expected or required by the employer, the claimant was asked to perform light office duties of highlighting signature lines on paperwork and putting together packets of documents with paperclips. The claimant complained about both office jobs and the employer sent him home after four hours of work and asked him to return to work the following day. The claimant testified that he got paid for four hours of work on December 14, 2009.

In evidence is a DWC-73 dated December 10, 2009, from the treating doctor, (Dr. D), which shows that the claimant was released to work with restrictions beginning December 14, 2009, through January 10, 2010. The treating doctor's DWC-73 shows that the claimant was released to work with the following restrictions: standing, sitting, walking for a maximum of two hours; no kneeling/squatting, bending/stooping, pushing/pulling, twisting, or climbing stairs/ladders; no lifting more than 5 lbs for more than two hours per day; and four hours maximum of work per day.

On December 16, 2009, the claimant hand-delivered to the employer Dr. D's DWC-73 dated December 10, 2009, which had more restrictions than the prior DWC-73 from Dr. T. Based on Dr. D's DWC-73, the employer offered the claimant a part-time job with a start date of December 29, 2009. The claimant began to work on December 16, 2009, prior to the start date of December 29, 2009. Again, the claimant complained about the job offered by the employer, and refused to work and the employer sent him home after four hours of work. The claimant testified that he got paid for four hours of work on December 16, 2009.

At issue in this case, was whether the employer tendered a BFOE to the claimant. In evidence were two job offers dated December 9, 2009, and December 16, 2009. The hearing officer in findings of fact determined that the employer's job offers dated December 9, 2009, and December 16, 2009, respectively, "met all of the requirements of [28 TEX. ADMIN. CODE § 129.6 (Rule 129.6)]." That portion of the hearing officer's determinations that "[t]he employer did tender a [BFOE] to the claimant on December 9, 2009," and "[t]he employer did tender a [BFOE] to the claimant on December 16, 2009," are supported by sufficient evidence and are affirmed.

Also, the hearing officer in conclusions of law and the decision determined that the BFOE of December 9, 2009, "can only be used by the carrier to adjust the claimant's [PIE] from December 9, 2009, through December 13, 2009," and that the BFOE of December 16, 2009, "can be used by the carrier to adjust the claimant's [PIE] from December 16, 2009, through the present." Rule 129.6(g) provides that a carrier may deem the wages offered by an employer through a BFOE to be PIE, as outlined by Rule 129.2, on the earlier of the date the employee rejects the offer or the seventh day after the employee receives the offer of modified duty unless the employee's treating doctor notifies the carrier that the offer made by the employer is not consistent with the employee's work restrictions. Review of the record shows that the issue of whether the carrier is entitled to adjust PIE (from December 9, 2009, through the date of the CCH) was not actually litigated by the parties. Additionally, under the facts of this case, the

claimant accepted the job offers by the employer dated December 9, 2009, and December 16, 2009. The hearing officer exceeded the scope of the BFOE issue by determining the dates that the carrier is entitled to adjust the claimant's PIE.

Accordingly, we reverse so much of the hearing officer's Conclusion of Law No. 5 and the decision that determined "but [the BFOE dated December 9, 2009] can only be used by the carrier to adjust the claimant's [PIE] from December 9, 2009, through December 13, 2009." We render a new decision by striking "but it can only be used by the carrier to adjust the claimant's [PIE] from December 9, 2009, through December 13, 2009."

Also, we reverse so much of the hearing officer's Conclusion of Law No. 6 and the decision "[the BFOE dated December 16, 2009] can be used by the carrier to adjust the claimant's [PIE] from December 16, 2009, through the present." We render a new decision by striking "[i]t can be used by the carrier to adjust the claimant's [PIE] from December 16, 2009, through the present."

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SUMMARY

We affirm that portion of the hearing officer's determinations that "[t]he employer did tender a [BFOE] to the claimant on December 9, 2009," and "[t]he employer did tender a [BFOE] to the claimant on December 16, 2009, through the present."

We reverse so much of the hearing officer's Conclusion of Law No. 5 and the decision that determined "but [the BFOE dated December 9, 2009] can only be used by the carrier to adjust the claimant's [PIE] from December 9, 2009, through December 13, 2009," and we render a new decision by striking "but it can only be used by the carrier to adjust the claimant's [PIE] from December 9, 2009, through December 13, 2009."

We reverse so much of the hearing officer's Conclusion of Law No. 6 and the decision that determined "[the BFOE dated December 16, 2009] can be used by the carrier to adjust the claimant's [PIE] from December 16, 2009, through the present" and we render a new decision by striking "[i]t can be used by the carrier to adjust the claimant's [PIE] from December 16, 2009, through the present."

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
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge