APPEAL NO. 140926
FILED JULY 1, 2014

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 March 28, 2014, in Houston, Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent's (claimant) average weekly wage (AWW) is $744.61; (2) the employer made a bona fide offer of employment (BFOE) to the claimant on August 5, 2013, thus entitling the appellant (carrier) to adjust the post-injury earnings (PIE) for the period beginning on August 19, 2013, and continuing through February 28, 2014, only; and (3) the claimant had disability resulting from the compensable injury of [date of injury], beginning on August 20, 2013, and continuing through the date of the March 28, 2014, CCH.

The carrier appealed that portion of the hearing officer's BFOE determination that ended the carrier's entitlement to adjust PIE after February 28, 2014, as well as the hearing officer's disability determination. The appeal file does not contain a response from the claimant to the carrier's appeal. The hearing officer's determinations that the claimant's AWW is $744.61, and that portion of the hearing officer's determination that the employer made a BFOE entitling the carrier to adjust PIE beginning on August 19, 2013, were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on [date of injury]. The claimant testified that a sheet of metal he was welding slipped and crushed his left index finger.

DISABILITY

The hearing officer's determination that the claimant had disability resulting from the compensable injury of [date of injury], beginning on August 20, 2013, and continuing through the date of the CCH is supported by sufficient evidence and is affirmed.

CARRIER'S ENTITLEMENT TO ADJUST PIE

The hearing officer stated in the Discussion portion of the decision that:

> There is no [W]ork [S]tatus [R]eports (DWC-73) in evidence dated after February 28, 2014. Thus, it is unknown if [the] [c]laimant's restrictions

were changed after that date or if he was taken off work by his doctor. Therefore, [the] [c]arrier is only allowed to take credit for [PIE] . . . through February 28, 2014.

The carrier contends that the hearing officer's determination ending entitlement to adjust PIE on February 28, 2014, based on a lack of DWC-73 after that date is in error.

Section 408.103(e) provides in part that if an employee is offered a BFOE 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 in part that if an employee is offered a BFOE 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.

28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) provides:

An employer or insurance carrier may request the treating doctor provide a [DWC-73] by providing the treating doctor a set of functional job descriptions which list modified duty positions which the employer has available for the injured employee to work. The functional job descriptions must include descriptions of the physical and time requirements of the positions.
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.
A carrier may deem an offer of modified duty to be a [BFOE] if:

(1) it has written copies of the [DWC-73] and the offer; and
(2) the offer:

(A) is for a job at a location which is geographically accessible as provided in subsection (e) of this section;
(B) is consistent with the doctor's certification of the employee's work abilities, as provided in subsection (f) of this section;

(C) and was communicated to the employee in writing, in the form and manner prescribed by the [Texas Department of Insurance, Division of Workers' Compensation (Division)] and included all the information required by subsection (c) of this section.

(e) In evaluating whether a work location is geographically accessible the carrier shall at minimum consider:

(1) the affect that the employee's physical limitations have on the employee's ability to travel;
(2) the distance that the employee will have to travel;
(3) the availability of transportation; and
(4) whether the offered work schedule is similar to the employee's work schedule prior to the injury.

(f) 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.

(g) A carrier may deem the wages offered by an employer through a [BFOE] to be [PIE], as outlined in [Rule] 129.2 of this title (relating to Entitlement to Temporary Income Benefits), 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. For the purposes of this section, if the offer of modified duty was made by mail, an employee is deemed to have received the offer from the employer five days after it was mailed. The wages the carrier may deem to be PIE are those that would have been paid on or after the date the carrier is permitted to deem the offered wages as PIE.

(h) Nothing in this section should be interpreted as limiting the right of an employee or a carrier to request a benefit review conference relating to an offer of employment. 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) of this section.

Rule 129.5(d) provides that the doctor shall file the DWC-73:

> (1) after the initial examination of the employee, regardless of the employee's work status;
> (2) when the employee experiences a change in work status or a substantial change in activity restrictions; and
> (3) on the schedule requested by the [carrier], its agent, or the employer requesting the report through its carrier, which shall not to exceed one report every two weeks and which shall be based upon the doctor's scheduled appointments with the employee.

As previously discussed, the hearing officer's determination that the employer made a BFOE to the claimant entitling the carrier to adjust PIE beginning on August 19, 2013, was not appealed and has become final. The hearing officer ended the carrier's entitlement to adjust PIE after February 28, 2014, because there were no DWC-73s in evidence dated later than February 28, 2014, and therefore it was unknown if the claimant's restrictions were changed after that date or if the claimant had been taken off work by the doctor. However, nothing in the Act or Rule 129.6 provides for such a requirement. All of the DWC-73s in evidence[1] restrict the claimant from using his left hand. There was nothing in evidence to indicate a change or worsening in the claimant's condition to establish that the BFOE was no longer valid. Accordingly, we reverse that portion of the hearing officer's determination ending the carrier's entitlement to adjust PIE after February 28, 2014, and we render a new decision that the carrier is entitled to adjust PIE for the period beginning on August 19, 2013, and continuing through the date of the March 28, 2014, CCH.

[1] We note that (Dr. P), the claimant's treating doctor, has a typo in his DWC-73 dated June 10, 2013. Dr. P mistakenly restricted the use of the claimant's right hand rather than his left.

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

RICHARD GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge