APPEAL NO. 031290
FILED JULY 7, 2003

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 April 23, 2003. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) injury sustained on _____, does extend to and include an injury to the lumbar spine and left ankle, but does not extend to and include thoracic outlet syndrome, an injury to the cervical spine, thoracic spine, and both shoulders; that the employer tendered a bona fide offer of employment (BFOE) to the claimant, entitling the respondent (carrier) to adjust the post-injury earnings (PIE) from December 12, 2002, through the date of the CCH; and that the claimant had disability from December 12, 2002, through the date of the CCH. The claimant appeals the BFOE determination and the extent of injury determination that is unfavorable to the claimant. The carrier responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The hearing officer did not err in reaching the complained-of extent-of-injury determination. The issue of extent of injury involves a question of fact for the hearing officer to resolve. The evidence before the hearing officer was conflicting. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex.App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determination on extent of injury is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We note that to the extent the claimant's appeal can be construed to appeal the determination that the claimant's compensable injury did not extend to the cervical spine and right shoulder, the parties stipulated that the compensable injury sustained on _____, does not extend to include the right shoulder and cervical spine.

The claimant was released to modified duty (four hours per day and can only have a sitting position, greeting position recommended) by Dr. D, her treating doctor at the time. There was a BFOE tendered to the claimant on November 8, 2002, which was accepted by the claimant on November 13, 2002. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)) sets out the requirements for a BFOE. There was testimony that a copy of the Work Status Report (TWCC-73), upon which the offer was based was attached. In Texas Workers' Compensation Commission Appeal No. 010110-s decided February 28, 2001, we held that Rule 129.6(d) provides that a carrier may deem an offer to be bona fide if it, among other requirements, included all of the information required in Rule 129.6(c). We also noted that Rule 129.6 indicates that the

Texas Workers' Compensation Commission (Commission) "will" find an offer to be bona fide if it conforms to the doctor's restrictions, is communicated to the employee in writing, and meets the requirements of Rule 129.6(c). In the present case, we find no error in the hearing officer's finding that there was a BFOE extended to the claimant.

The claimant testified that she worked light duty as a phone operator from September 2002, through an unspecified date in November of 2002. The claimant testified that her last day of work was November 13, 2002. The hearing officer noted that the claimant's testimony that she was unable to perform light-duty work because her "pain was growing much higher" was not persuasive or credible. The hearing officer further noted that the medical records were insufficient to explain why the claimant could not answer phones, four hours per day and what aspect of that job would aggravate her condition. The claimant testified that Dr. D took her off work completely in December 2002, and a TWCC-73 is in evidence reflecting that the claimant was taken off work on December 9, 2002, by Dr. D. The disability determination was not appealed and has become final. Section 410.169.

The fact that the claimant was taken off work completely does not automatically void the BFOE. Texas Workers' Compensation Commission Appeal No. 022989, decided January 8, 2003. Since the hearing officer was not persuaded that the claimant could not perform the work provided under the light-duty restrictions of the BFOE, the hearing officer could conclude that the BFOE remained valid and that the carrier was entitled to reduce the claimant's temporary income benefits (TIBs) by the amount deemed to be PIE in accordance with Rule 129.6(g). We perceive no error in this finding that the carrier is entitled to adjust the claimant's TIBs by the amount deemed to be post-injury weekly earnings offered by the employer through a BFOE. Cain, *supra*. However, we reverse that portion of the finding that determined the carrier was entitled to make such adjustment from December 12, 2002, through the date of the CCH. 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. We reverse the determination of the time period during which the carrier is entitled to adjust the claimant's TIBs by the amount deemed to be post-injury weekly earnings offered by the employer through a BFOE and remand back to the hearing officer for an explanation of why the carrier is entitled to make such adjustment beginning December 12, 2002, or to determine a new time period based on the evidence in the record.

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 Commission's Division of Hearings, 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* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBERT PARNELL
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231-4813.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

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Gary L. Kilgore
Appeals Judge