APPEAL NO. 140498
FILED MAY 5, 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 January 29, 2014, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of [date of injury], extends to a partial tear of the left rotator cuff; and (2) the employer did not make a bona fide offer of employment (BFOE) to the respondent (claimant), entitling the appellant (carrier) to adjust the post-injury weekly earnings for the period from July 16, 2013, through the present.

The carrier appealed both of the hearing officer's determinations, contending that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The carrier further contends that the hearing officer imposed additional requirements of the validity of the employer's job offer to the claimant beyond those required under the 1989 Act and 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). The claimant responds, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part, reformed in part, and reversed and rendered in part.

The claimant testified that she was injured on [date of injury], while cleaning a table in a conference room. The claimant testified that she twisted her left arm behind her to catch a whiteboard that was falling off the wall, and that although she caught the whiteboard it fell on her back and head. It was undisputed that the claimant sustained a compensable injury on [date of injury].

EVIDENCE PRESENTED

We reform the hearing officer's decision to show that page five of the Carrier's Exhibit J was not admitted into evidence to reflect the correct pages of the exhibit offered by the carrier and admitted into evidence at the CCH.

FINDING OF FACT NO. 1.C.

The hearing officer stated in Finding of Fact No. 1.C. that the parties stipulated that the claimant sustained a compensable injury on [date of injury]. However, a review of the record reflects that the parties made no such stipulation. Accordingly, we reform the hearing officer's decision by striking Finding of Fact No. 1.C.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury extends to a partial tear of the left rotator cuff is supported by sufficient evidence and is affirmed.

BFOE

The hearing officer found in Finding of Fact No. 5 that the employer's offer of employment dated July 16, 2013, complies with Rule 129.6. This finding of fact was not appealed. The hearing officer determined that the employer did not make a BFOE to the claimant, entitling the carrier to adjust the post-injury weekly earnings for the period from July 16, 2013, through the present on the basis that the employer's offer of employment was not provided to the claimant in Spanish nor was the offer translated for the claimant. The carrier contended that the hearing officer imposed additional requirements of the validity of the employer's job offer to the claimant beyond those required under the 1989 Act and Rule 129.6.

Section 408.144 provides in part that if an employee is offered a bona fide position of employment 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 wages for the position offered to the employee.

Rule 129.6 provides:

(a) An employer or insurance carrier may request the treating doctor provide a Work Status Report [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.

(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 [Texas Department of Insurance, Division of Workers' Compensation (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:

(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.

(d) 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; and

(C) was communicated to the employee in writing, in the form and manner prescribed by the [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 Post-Injury Earnings (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.

In Appeals Panel Decision 001978, decided October 3, 2000, the claimant asserted that the employer failed to communicate the offer of employment to him in an acceptable manner because his primary language is Spanish and the offer was made in English. The Appeals Panel in that case stated that ". . . there is no requirement in the 1989 Act that an employer accommodate an employee in such a manner. . . ."

We agree that the hearing officer in this case imposed an additional requirement that is not contained in the 1989 Act or Rule 129.6. Nothing in the 1989 Act or Rule 129.6 requires a BFOE to be communicated to the claimant in his or her primary language. As previously discussed, the hearing officer found in an unappealed finding of fact that the employer's offer of employment dated July 16, 2013, complies with Rule 129.6. Accordingly, we reverse the hearing officer's determination that the employer did not make a BFOE to the claimant, entitling the carrier to adjust the post-injury weekly earnings for the period from July 16, 2013, through the present, and we render a new decision that the employer did make a BFOE.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of [date of injury], extends to a partial tear of the left rotator cuff.

We reform the hearing officer's decision to show that page five of the Carrier's Exhibit J was not admitted into evidence.

We reform the hearing officer's decision by striking Finding of Fact No. 1.C.

We reverse the hearing officer's determination that the employer did not make a BFOE to the claimant, entitling the carrier to adjust the post-injury weekly earnings for the period from July 16, 2013, through the present, and we render a new decision that the employer did make a BFOE to the claimant, entitling the carrier to adjust the post-injury weekly earnings for the period from July 16, 2013, through the present.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH SAINT PAUL STREET
DALLAS, TEXAS 75201.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge