

APPEAL NO. 210163
FILED APRIL 14, 2021

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 December 21, 2020, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issue by deciding that: 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. The carrier appeals the ALJ's determination that the employer did not make a BFOE. The appeal file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that includes at least a right shoulder contusion, low back contusion, and thoracic sprain. The claimant testified she was injured when she was hit by a student.

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

(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 Work Status Report [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.

The executive director for the employer testified at the CCH that she delivered the offer of employment dated September 22, 2020, to the claimant. The executive

director specifically identified in the exhibits the pages she gave to the claimant as part of the offer of employment. None of the pages identified included the DWC-73. In her discussion of the evidence, the ALJ noted that the more persuasive evidence supported that no DWC-73 was included in the offer of employment. In Finding of Fact No. 3, the ALJ found that the written offer of employment dated September 22, 2020, did not comply with the requirements of Rule 129.6(d). The ALJ inadvertently cited Rule 129.6(d) rather than Rule 129.6(c). As stated above, Rule 129.6(c) requires a copy of the DWC-73 on which the offer is based to be included with the offer. The Appeals Panel has held that 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. We reform Finding of Fact No. 3 to include the correct rule citation as follows: The written offer of employment dated September 22, 2020, did not comply with the requirements of Rule 129.6(c). The ALJ’s determination that the employer did not make a BFOE entitling the carrier to adjust the post-injury weekly earnings is supported by sufficient evidence and is affirmed as reformed.

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. RICHARD J. GERGASKO, PRESIDENT
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge