APPEAL NO. 010110-S

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 20, 2000. The hearing officer determined that the employer's offer of employment did not constitute a bona fide offer of employment under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)), and that the respondent (claimant) had disability from the injury date through the date of the CCH. The appellant (carrier) has appealed both determinations and there has been no response from the claimant.

DECISION

Affirmed.

FACTS: On _____, the claimant was employed by (employer) and sustained a compensable injury when he stepped from a moving golf cart. The claimant twisted his left ankle and sustained a left bimalleolar fracture. He was treated at (Hospital), was given a 3-D boot and crutches, and sent home. Ms. W, the adjuster for the carrier, contacted the claimant and told him she wanted him to see a doctor she knew. The claimant agreed and went to see Dr. M, an orthopedic surgeon, on July 13, 2000. Dr. M placed the claimant on unable to work status at that time. The claimant became dissatisfied with Dr. M and ceased treating with him after his August 10, 2000, appointment. At that point, Dr. M still had the claimant on unable to work status. The claimant started to treat with Dr. L, a chiropractor, on August 22, 2000. Dr. L immediately placed the claimant on unable to work status. As of the date of the CCH, Dr. L still had the claimant on unable to work status. The claimant's August 24, 2000, request to change his treating doctor to Dr. L was approved on September 5, 2000. Dr. L issued an Initial Medical Report (TWCC-61) dated September 9, 2000.

On or about August 17, 2000, the employer had a sedentary position open up. The job entailed sitting in a car and watching containers to ensure they were not tampered with. The claimant would not have to exit the car, as there would be another security guard at the site. If a problem arose, the claimant would be able to radio the other guard to respond. The job was at the same location and had the same pay and hours as the claimant had been working prior to his injury. Upon learning of the open position, the adjuster contacted Dr. M's office, sent the job description to Dr. M and requested an undated release from Dr. M to allow the claimant to work modified duty. Dr. M's office sent a Texas Workers' Compensation Work Status Report (TWCC-73) directly to the employer that same day. The TWCC-73 indicated that the claimant was released to do sedentary work only. The employer called the claimant on August 17, 2000, and informed him that Dr. M had released him to do sedentary work and offered him the container watching position, explaining the duties, physical requirements, hours, location and rate of pay. The claimant informed him that he would get back to the employer the following Monday. That same day, August 17, 2000, the employer mailed the claimant a job offer, but did not attach a copy of the Work Status Report from Dr. M. The following Monday, August 21,

2000, the employer informed the claimant that the position needed to be filled right away. The claimant told the employer to do what he had to do.

Appealed Issue 1 and Decision: The hearing officer did not err in making the determination that the employer's offer of employment did not constitute a bona fide offer of employment under Rule 129.6(c).

Rationale: On appeal, the carrier asserts that it is totally illogical to invalidate the employer's job offer to the claimant simply because it did not parrot the exact language of Rule 129.6(c), and because it did not have a copy of the Work Status Report, upon which the offer was based, included with it. We disagree. Rule 129.6 deals with Bona Fide Offers of Employment. Rule 129.6(c) sets out the requirements for a bona fide offer of employment. This section of the rule is clear and unambiguous, it states:

> (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 Commission. ***A copy of the Work Status Report 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.** [Emphasis added.]

Rule 129.6(d) provides that a carrier may deem an offer to be bona fide if it, among other requirements, included ***all*** the information required in Rule 129.6(c). Rule 129.6 indicates that the 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 that there was no bona fide offer of employment extended to the claimant because the offer did not contain the statement required in Rule 129.6(c)(5), and the Work Status Report upon which the offer was based was not attached.

We believe the language of Rule 129.6 is clear and unambiguous. The rule contains no exceptions for failing to strictly comply with its requirements.

Appealed Issue 2 and Decision: The hearing officer did not err in deciding that the claimant had disability from the date of the injury, _____, through the date of the hearing.

Rationale: On appeal, the carrier asserts that there is no competent evidence from Dr. L that the claimant "is disabled"; the work status report from Dr. L is deficient on its face as it says the claimant is totally unable to work yet fails, as required by part II, no. 16(c) of the TWCC-73 dated December 1999, to describe how the employee's workers' compensation injury precludes working in any capacity; the claimant's testimony that he is unable to do sedentary work, with no explanation why, is insufficient evidence to rebut the employer's light-duty offer.

Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, May 29, 1992. It is undisputed that the claimant sustained a compensable injury on _____. No doctor has released the claimant to return to anything but sedentary work watching containers. Dr. L placed the claimant back on unable to work status immediately following his August 22, 2000, appointment through the time of the hearing. The claimant has not worked since the date of the injury, and has not been extended a bona fide offer of employment. It is clear from the evidence presented that the claimant has disability.

We agree that a statement explaining how a claimant's workers' compensation injury prevents the claimant from returning to work is required on a TWCC-73 and under Rule 129.5. Such a statement is helpful in determining whether or not there was a bona fide offer of employment, which there was not in this case, but it is not necessary to establish disability. For purposes of disability, the hearing officer may take into consideration the records of the treating doctor, even in the absence of a TWCC-73 or other conforming documents, when making a decision as to disability.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing

officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Robert E. Lang
Appeals Panel
Manager/Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge