APPEAL NO. 011878-S
FILED SEPTEMBER 28, 2001

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 July 19, 2001. With regard to the two issues before him, the hearing officer determined that the employer had not made a bona fide offer of employment (BFOE) entitling the appellant (carrier) to adjust the respondent's (claimant) post injury weekly earnings and that the claimant had disability from December 12, 2000, through January 1, 2001, and from January 3, 2001, through the date of the CCH.

The carrier appeals, contending that the employer made both verbal and written BFOEs, that the claimant's complaints about the light duty dealt with a disputed body part (low back) which the carrier asserts was not part of the compensable injury, and that the claimant did not have disability because the claimant's inability to work was due to a nonwork-related condition. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant was employed by a staffing service (employer) and assigned to a uniform company (company) to perform general clerical duties. The claimant sustained a compensable injury on _____, when she tripped on a rug and fell. Apparently, the carrier has accepted a neck or head and right upper extremity injury while disputing a low back injury. The claimant reported the injury and initially declined medical treatment. The employer's representative testified that the claimant's job with the company ended on December 11, 2000.

The claimant first sought medical attention from Dr. HG on December 18, 2000. Dr. HG treated the claimant and released her to restricted duty. (There are a number of Work Status Report (TWCC-73) forms from various doctors in evidence, and the hearing officer fairly summarizes many of them. None release the claimant to regular duty.) The claimant attempted to return to work with the employer at restricted duties on January 2, 2001; she worked one day, and on January 3, 2001, she left work after two hours, complaining of right shoulder pain. Dr. HG subsequently referred the claimant to Dr. JG for treatment of the claimant's shoulder, and Dr. CG for cervical complaints. The claimant saw Dr. JG for the first time on January 31, 2001, and began seeing Dr. CG on February 19, 2001. Dr. CG eventually became the claimant's treating doctor on May 29, 2001. Dr. CG, in a work status report dated April 13, 2001, took the claimant off work on that date. In another work status report, dated May 16, 2001, Dr. CG states that the claimant "has been unable to work since 2-19-01 and continues to be disabled–surgery process [for cervical surgery] started."

The carrier relies on a "verbal" offer of employment made to the claimant in December 2000. The hearing officer "finds no merit" in the carrier's assertion, noting that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) requires that 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 [Texas Workers' Compensation Commission]." The hearing officer did not err in his ruling on this point.

The carrier also sent the claimant a written offer of employment. Although the certified letter was unclaimed, the hearing officer found that the written offer sent by first-class mail was deemed to have been received by the claimant on February 28, 2001. Attached to the letter was an amended TWCC-73 dated February 7, 2001, from Dr. JG setting some restrictions for the claimant's shoulder injury (the neck was not addressed). The hearing officer discussed the restrictions and the claimant's argument that the TWCC-73 was not valid because Dr. JG had not examined the claimant immediately prior to issuing the TWCC-73 and repudiated that argument. The hearing officer commented that while the employer "made a sincere effort to comply with Rule 129.6(c)," the offer did not meet the requirements of Rule 129.6(c). The hearing officer found:

FINDING OF FACT

16. The offer of modified duty failed to comply with the requirements of Rule 129.6(c) in that the offer failed to include a description of the physical and time requirements that the offered position would entail and did not state that the employer would provide training if necessary.

Rule 129.6(c) 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 skill and will provide training if necessary.

While we disagree with the hearing officer's finding that the offer failed to include a description of the physical and time requirements, very clearly the offer did not include the phrase "and will provide training if necessary." The claimant in this case may have known

what the job involved but in Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001, the Appeals Panel held that all of the information required by Rule 129.6(c) shall be present, and that Rule 129.6 "contains no exceptions for failing to strictly comply with its requirements." *See also* Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). The hearing officer's determinations on this point are supported by sufficient evidence.

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. The claimant testified that she was unable to return to her preinjury employment. While several of the doctors released the claimant to light or modified duty with various restrictions, none released the claimant to full duty. In addition, Dr. CG placed the claimant in an off-duty status on April 13, 2001, and subsequently opined that the claimant was unable to work since February 19, 2001. There is ample evidence to support the hearing officer's decision on disability.

The hearing officer weighed the credibility of the evidence, and the hearing officer's determination on the issues is not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Accordingly, the hearing officer's decision and order are affirmed.

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

AIG
JIM MALLOY, RESIDENT VP
8144 WALNUT LANE
SUITE 1600
DALLAS, TEXAS 75231.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

Certainly, the outcome is one which would appear to ignore the forest in preference for the trees; there is no doubt in my mind that the offer that was made was a genuine one for a job within the claimant's capabilities. However, the literal construction approach to our rules, as written, has been somewhat forced upon the Texas Workers' Compensation Commission (Commission) by Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex 1999). While I believe that rejection of this offer, only because a short phrase relating to training was omitted, is an unforeseen consequence of this rule, it is up to the Commission to set out what is required, what is not, and how literal ("shall" versus "should") the interpretation is to be.

Susan M. Kelley
Appeals Judge