

APPEAL NO. 071637
FILED NOVEMBER 1, 2007

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 August 8, 2007. The hearing officer resolved the disputed issues by deciding that: (1) the employer made a bona fide offer of employment (BFOE) to the appellant (claimant), entitling the respondent (carrier) to adjust the post-injury weekly earnings effective October 19, 2006, through the date of the CCH; and (2) the claimant did not have disability beginning October 19, 2006, through the date of the CCH. The claimant appealed the hearing officer's BFOE and disability determinations. The carrier responded, urging affirmance.

DECISION

Reversed and remanded.

We reverse and remand this case to the hearing officer for reconstruction of the record and for reconsideration of the BFOE and disability issues. The parties stipulated that the claimant sustained a compensable injury on _____.

RECONSTRUCTION OF THE RECORD

Section 410.203(a)(1) requires the Appeals Panel to consider the record developed at the CCH. The CCH was recorded on two compact discs (CDs). The first CD indicated that it contained 79 tracks, for a total time of 1 hour, 18 minutes, and 9 seconds. The second CD indicated that it contained 10 tracks, for a total time of 9 minutes and 9 seconds. Part of the recording on the first CD, beginning on track 47 continuing through track 66, is inaudible. We note that the first CD is damaged showing a deep scratch mark. Also, we note that both CDs were enclosed in the same CD paper case envelope. Additionally, the testimony of the claimant was, for the most part, unintelligible because both CDs contained background noise. The file indicates that there was no court reporter and the file does not contain a transcript. Consequently, we remand the case to the hearing officer for reconstruction of the CCH record.

BFOE AND DISABILITY

Section 410.203(c) provides that the Appeals Panel may not remand a case more than once. Given that this case is remanded to the hearing officer for reconstruction of the record as explained above, we also remand this case to the hearing officer for reconsideration of the BFOE and disability issues.

With regard to the BFOE issue, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)) provides, in part, that a copy of the Work Status Report (DWC-73) on which the offer is being based shall be included with the offer. We note that the DWC-73, that

is purportedly attached to the BFOE, is not signed by Dr. S. In evidence is another DWC-73 with the same information as the unsigned DWC-73 from Dr. S, however this form is signed by the medical director and stamped with the words in the signature box "IN LIEU OF TREATING PHYSICIAN SIGNATURE, [signature], MEDICAL DIRECTOR." (Claimant's Exhibit No. 11). See Rule 129.5(c) which provides that the DWC-73 be signed by the doctor. See Appeals Panel Decision (APD) 042765, decided December 8, 2004.

With regard to the disability issue, we note that in APD 023020, decided January 16, 2003, the Appeals Panel explained that the disability issue was different from the BFOE issue and that these issues "can be related if the offered and then imputed weekly earnings after the injury equal the preinjury average weekly wage (AWW). There might be a situation where the imputed wages are 'wages equivalent' such that disability would not exist. However, the mere fact of a [BFOE] will not serve to end disability where the wages are not equivalent to the preinjury AWW."

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 Texas Department of Insurance, Division of Workers' Compensation, 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 APD 92642, decided January 20, 1993.

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

**LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge