

APPEAL NO. 111191
FILED OCTOBER 7, 2011

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 13, 2011. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), includes the herniated and bulging discs at T12-L1, L1-2, L2-3, L3-4, and/or L4-5; (2) the employer made a bona fide offer of employment (BFOE) to the respondent (claimant) but effectively rescinded that offer on the day it was made and the appellant (self-insured) is not entitled to adjust the post-injury weekly earnings; and (3) the claimant had disability from September 14 through December 5, 2010, resulting from the injury sustained on (date of injury).

The self-insured appealed, disputing the hearing officer's determinations of extent of injury, BFOE and disability. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury). The hearing officer's determination that the claimant had disability from September 14 through December 5, 2010, is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The hearing officer found the designated doctor appointed for extent of injury opined that the claimant's injury of (date of injury), includes the herniated and bulging discs at T12-L1, L1-2, L2-3, L3-4, and L4-5 and that the preponderance of the evidence is not contrary to his opinion. These findings are supported by sufficient evidence. However, the hearing officer determined in a conclusion of law that the compensable injury of (date of injury), "includes the herniated and bulging discs at T12-L1, L1-2, L2-3, L3-4, and/or L4-5." Because the hearing officer included the "and/or" language in his decision, it is unclear in his determination the exact herniated and bulging levels of the spine in dispute that the hearing officer determined are part of the compensable injury. See Appeals Panel Decision (APD) 050239, decided March 17, 2005. However, it is clear from the above referenced findings that the hearing officer intended to include all of the herniated and bulging levels of the spine in dispute as part of the compensable injury. Accordingly, we reverse the hearing officer's determination that the compensable injury of (date of injury), includes the herniated and bulging discs at T12-

L1, L1-2, L2-3, L3-4, and/or L4-5 and render a new decision that the compensable injury of (date of injury), extends to the herniated and bulging discs at T12-L1, L1-2, L2-3, L3-4, and L4-5.

BONA FIDE OFFER OF EMPLOYMENT

28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) sets out the requirements for a BFOE. The hearing officer found that the claimant accepted the employer's July 21, 2010, written offer of modified duty employment, but when she reported to work, the actual duties required by the modified duty of employment did not comply with the written offer or the claimant's restrictions as set forth on the Work Status Report (DWC-73) that formed the basis of the modified duty offer of employment. The hearing officer was persuaded that the actual duties assigned to the claimant exceeded the restrictions of the DWC-73 that formed the basis of the modified duty offer of employment. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer's finding that the actual work duties did not comply with the written offer or restrictions as set forth on the DWC-73 is supported by sufficient evidence.

Therefore, the hearing officer erred when he determined that the employer made a BFOE to the claimant, but effectively rescinded that offer. Because the duties assigned to the claimant exceeded the restrictions of the DWC-73 the self-insured did not make a BFOE. See APD 030292, decided March 20, 2003. Accordingly, we reverse the hearing officer's determination that the employer made a BFOE to the claimant, but effectively rescinded that offer on the day it was made and that the self-insured is not entitled to adjust the post-injury weekly earnings and render a new decision that the employer did not make a BFOE.

SUMMARY

We affirm the hearing officer's determination that the claimant had disability from September 14 through December 5, 2010.

We reverse the hearing officer's determination that the compensable injury of (date of injury), includes the herniated and bulging discs at T12-L1, L1-2, L2-3, L3-4, and/or L4-5 and render a new decision that the compensable injury of (date of injury), extends to the herniated and bulging discs at T12-L1, L1-2, L2-3, L3-4, and L4-5.

We reverse the hearing officer's determination that the employer made a BFOE to the claimant, but effectively rescinded that offer on the day it was made and that the

self-insured is not entitled to adjust the post-injury weekly earnings and render a new decision that the employer did not make a BFOE.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is:

For service in person the address is:

**JONATHAN BOW, EXECUTIVE DIRECTOR
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Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas L. Knapp
Appeals Judge