

APPEAL NO. 160495

FILED MAY 18, 2016

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 February 3, 2016, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues before her by deciding that: (1) the respondent (claimant) had disability resulting from the compensable injury beginning on September 17, 2015, through the date of the hearing; and (2) the employer did not make a bona fide offer of employment (BFOE) to the claimant. We note that the first paragraph of the Decision and Order contains an error in that the hearing officer indicates that the claimant had disability "from April 1, 2015, through the present from the compensable injury of February 24, 2015. . . ." The correct date of injury; however, is (date of injury) 2015, and the period of claimed disability begins on September 17, 2015, as noted in the benefit review conference report and as agreed to by the parties at the CCH.

The appellant (carrier) appeals the hearing officer's determinations based upon sufficiency of the evidence and argues further that the hearing officer's finding regarding disability is based upon inaccurate information and a medical opinion resulting from an examination of an individual other than the claimant. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury).

BFOE

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 (Division)]. 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.
- d. A carrier may deem an offer of modified duty to be a [BFOE] if:
1. it has written copies of the [DWC-73] and the offer; and
 2. the offer:
 - A. is for a job at a location which is geographically accessible as provided in subsection (e) of this section;
 - B. is consistent with the doctor's certification of the employee's work abilities, as provided in subsection (f) of this section; and
 - C. was communicated to the employee in writing, in the form and manner prescribed by the [Division] and included all the information required by subsection (c) of this section.

The employer's written offer of modified duty dated September 8, 2015, was based upon activity restrictions contained in the DWC-73 issued by (Dr. N) on August 31, 2015, and directed that the claimant notify the employer by September 21, 2015, if he wished to accept the offer. The DWC-73 dated August 31, 2015; however, was superseded by revised DWC-73s issued by Dr. N and dated September 10, 2015, and September 17, 2015. The September 10, 2015, DWC-73 imposed additional restrictions of no lifting/carrying objects weighing more than five pounds and reduced the number of hours the claimant was allowed to work to four per day. The September 17, 2015, DWC-73 increased the number of hours the claimant was allowed to work to eight per day and revised the claimant's work capacity from light duty to a sedentary level with no kneeling/crawling or climbing stairs or ladders. The employer's written offer of modified duty was not based upon the claimant's activity restrictions effective on September 21, 2015, the claimant's deadline to notify the employer of his acceptance of the offer. Accordingly, the hearing officer's determination that the employer did not make a BFOE in accordance with Rule 129.6 is supported by sufficient evidence and is affirmed.

DISABILITY

In the Discussion section of her decision, the hearing officer states that (Dr. L) was appointed as designated doctor to address the issues of disability and return to work; that Dr. L examined the claimant on May 5, 2015, and August 3, 2015, and that Dr. L determined that the claimant could return to work with restrictions and that the claimant's disability was a direct result of the compensable injury. There is no evidence that Dr. L or any other designated doctor was appointed in this case to address the issues of disability and ability to return to work, nor are there any reports or other evidence from Dr. L in the record. Because the hearing officer based her determination regarding disability on evidence not in the record, we reverse the hearing officer's determination that the claimant had disability resulting from the compensable injury of (date of injury) 2015, beginning September 17, 2015, and continuing through the date of the hearing and remand the issue of disability to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand, the hearing officer is to make findings of fact, conclusions of law, and a decision regarding disability which are consistent with the evidence admitted and this decision. The hearing officer is not to consider additional evidence on remand.

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 Division, 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 Appeals Panel Decision 060721, decided June 12, 2006.

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

CINDY GHALIBAF
5221 NORTH O'CONNOR BOULEVARD, SUITE 400
IRVING, TEXAS 75039-3711.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge