APPEAL NO. 000448

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 10, 2000. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the second quarter. The hearing officer determined that the claimant "was 'totally unable to work' during the qualifying period" and is entitled to SIBS for the second quarter. The appellant (carrier) appeals, contending that the hearing officer did not apply Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) and requesting that we reverse the hearing officer's decision and render a decision in its favor. The appeals file contains no response from the claimant. There has been no appeal from the hearing officer's finding that claimant's unemployment was a direct result of his impairment and that fact will not be addressed further.

DECISION

Reversed and remanded.

This case was presented to the hearing officer on a good faith job search theory and decided by the hearing officer on a total inability to work theory. Claimant had apparently been employed as a "pipe fitter" on _____, when he slipped and fell in a ditch, injuring his low back and hip. Claimant had spinal surgery in 1996 and again in January 1998 in the form of L4-5 and L5-S1 discectomies performed by Dr. G. Claimant's present treating doctor is Dr. HB.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an impairment rating (IR) of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

The parties stipulated that claimant sustained a compensable lower back injury on _____, that claimant has a 28% IR, that IIBS have not been commuted and that the qualifying period for the second quarter was from August 12 through November 10, 1999. Carrier made it quite clear that the "new" SIBS rules, those in effect after January 31, 1999, were applicable.

As previously indicated, claimant submitted his case on a good faith job search theory. Claimant's Application for Supplemental Income Benefits (TWCC-52) lists two job contacts during the qualifying period, one of which was with the Texas Rehabilitation Commission (TRC). In evidence is a letter dated January 4, 2000, from TRC indicating that they have claimant's application on file and stating "[e]xploring job search vs training.

Client does not have a medical release for employment however." The other job contact was with a construction company as a laborer (a job for which claimant is questionably qualified). The testimony, however, was that claimant was offered the job but then turned it down as exceeding his physical ability. Rule 130.102 *et seq*., has tightened and specifically addresses the standard of good faith effort to obtain employment. Rule 130.102(e) provides that "an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." When claimant submitted his case and, in response to the hearing officer's question of how many job searches he had made, claimant replied "two"; the hearing officer then asked "[i]s there anyway I can find for the claimant?" and proceeded to insist that the claimant proceed on a total inability to work theory. We hold that claimant's one (or two, if the TRC contact is considered a job search) job search is insufficient to meet the good faith effort requirement of Rule 130.102(e). *See* Texas Workers' Compensation Commission Appeal No. 980044, decided February 19, 1998.

In regard to the theory that claimant has a total inability to work, Rule 130.102(d) addresses the good faith effort requirement of the 1989 Act and Rule 130.102(d)(3) (the version then in effect) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee "has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work." The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. *See* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992712, decided January 18, 2000 (Unpublished). The Appeals Panel has also encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3) when that rule is applicable. *See* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999.

Evidence regarding a total inability to work is in a "To Whom Concern" note dated November 11, 1999 (one day after the qualifying period), where Dr. HB notes claimant "suffers with a great deal of pain," has had an "extensive amount of conservative medical treatment," and concludes "[d]ue to the complications that [claimant] suffers with on a daily basis, he cannot resume his work and/or daily responsibilities." In what appears to be an accompanying progress note of the same date, Dr. HB notes that claimant "has had two back surgeries and [Dr. G] wants to do a fusion. [Claimant] does not want anymore surgeries." Carrier represented that claimant has been offered additional back surgery for over a year and that claimant has consistently declined. Dr. HB lists claimant's medications. In another progress note, dated January 24, 2000, Dr. HB repeats that claimant has had two back surgeries, Dr. G wants to do a fusion and that claimant "does not want anymore surgeries." Dr. HB recites claimant's medication and concludes:

> He has gone to Dr. Blow [sic, Dr. B] who said he can do just sedentary work and I think he is very limited in any type of work that he can do because of the trouble with sitting for any length of time. He can do no lifting. I feel that at the present time he probably cannot do any type of work.

Evidence to the contrary includes a functional capacity evaluation (FCE) performed on January 17, 2000, by Dr. B, which rates claimant as being able to do "modified sedentary work" (the report notes that claimant "[d]id not meet these maximum SEDENTARY DOL requirements") with sedentary pushing/pulling ability "adequate for occasional standing throughout an 8 hour day" and "occasional sitting throughout an 8 hour day." An earlier FCE, performed on August 18, 1998, indicated that claimant had "light work capabilities."

The hearing officer failed to address or even mention the requirements of Rule 130.102(d)(3); quoted from Dr. HB's November 11, 1999, and January 24, 2000, reports (noted above); noted that both FCEs offered by carrier "fall outside the qualifying period" (as do both of Dr. B's notes); and speculated that "[i]t is reasonable to assume that the Claimant's condition is worsening, in light of the recommendation for further surgery." That speculation is not supported by the evidence in that no mention is made of the fact that claimant has continually declined surgery and continued to do so at the CCH. The hearing officer told claimant that he "would have been better served" if he had said "I am totally unable to work" and lectured the ombudsman on her failure to write the doctor and obtain further "clarification" regarding claimant's condition. The hearing officer told claimant that while he has to follow the law, he is not going to "abdicate his responsibility" to the Appeals Panel.

As we have indicated, the standard of good faith effort to obtain employment was tightened and specifically addressed after January 31, 1999, in Rule 130.102(d)(3), which requires the employee (claimant) to prove three elements, namely, (1) that he is unable to perform any type of work in any capacity; (2) that a narrative from a doctor specifically explains how the injury causes a total inability to work; and (3) that "no other records show that the injured employee is able to return to work." The hearing officer does not address Rule 130.102(d)(3), but makes a finding that claimant was "totally unable to work" during the qualifying period. That finding arguably addresses the first element of Rule 130.102(d)(3) that claimant is unable to perform any type of work in any capacity. The hearing officer, although quoting one sentence from two of Dr. HB's reports, fails to make a finding regarding "a narrative report from a doctor which specifically explains how the injury causes a total inability to work." The hearing officer also makes no findings regarding other records which show claimant is able to return to work. *See* Texas Workers' Compensation Commission Appeal No. 000318, decided March 29, 2000. Based on the Statement of the Evidence, the hearing officer appears to disregard the FCEs because "both reports fall outside the qualifying period"; however, we note that both of Dr. HB's reports that the hearing officer appears to rely on also fall outside the qualifying period.

We remand the case for the hearing officer to make specific findings addressing the elements of Rule 130.102(d)(3) and reach conclusions of law supported by the evidence and specific findings of fact.

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 Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge