

## APPEAL NO. 000525

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 15, 2000. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the 12th and 13th quarters, from August 30, 1999, to November 28, 1999, and from November 29, 1999, to February 27, 2000, respectively; and whether the claimant timely filed a Statement of Employment Status (TWCC-52) for the 12th quarter. The hearing officer determined that claimant had not attempted in good faith to obtain employment commensurate with her ability to work, and that claimant was not entitled to SIBs for the 12th and 13th quarters and that the claimant did not timely file a TWCC-52 for the 12th quarter. The claimant appeals the findings that claimant had some ability to work and did not attempt in good faith to obtain employment commensurate with her ability to work citing medical reports that support her contention. Claimant requests that we reverse the hearing officer=s decision and render a decision in her favor. The respondent (self-insured) responds, urging affirmance. The hearing officer=s decision that claimant did not timely file her TWCC-52 for the 12th quarter has not been appealed and has become final pursuant to Section 410.169 and will not be addressed further.

### DECISION

Affirmed.

This is a "no ability to work" case. Claimant had been employed as a floral department manager by the self-insured grocery store chain. Claimant sustained a repetitive trauma injury "pulling pallet jacks" and/or lifting buckets of water. Claimant described various injuries she sustained, eventually was diagnosed with bilateral epicondylitis, and had epicondylar release surgery which eventually resulted in reflex sympathetic dystrophy (RSD) of both upper extremities. Currently, claimant is claiming RSD, a rib injury, tremors in her right hand, and several other problems including dental problems. The hearing officer recites that claimant appeared at the CCH in a wheelchair. The hearing officer made an unappealed finding of fact that claimant sustained a compensable injury to her arms on \_\_\_\_\_.

The parties stipulated that claimant has reached maximum medical improvement with an 18% impairment rating (IR), that impairment income benefits (IIBs) have not been commuted, and that the qualifying period for the 12th quarter was from May 18 through August 16, 1999, with the qualifying period for the 13th quarter being from August 17 through November 15, 1999. The parties stipulated that claimant had no earnings during the qualifying periods and the hearing officer found that claimant did not seek any employment during that time.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an 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 her ability to work.

The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was substantially tightened and was specifically addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)). Rule 130.102(d)(3) (the version then in effect<sup>1</sup>) requires the employee (claimant) to prove three elements, namely (1) that she 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 specifically address Rule 130.102(d)(3), but makes a finding that "[d]uring the qualifying periods . . . Claimant had some ability to work." That finding addresses the element of whether claimant was "unable to perform any type of work in any capacity." 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. 992717, decided January 20, 2000. 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.

The hearing officer comments that regarding claimant=s "ability to work, the medical evidence is conflicting." Dr. TH, claimant=s treating doctor, in a report dated November 6, 1999, recites that claimant continues to have bilateral upper extremity RSD, right more than left, "some right rotator cuff tendinitis, situational depression" and increasing right upper extremity tremors. Dr. TH concludes:

It is my professional opinion that [claimant] is and will be totally and permanently disabled due to her [RSD], as well as her other medical problems which have been catastrophic for her.

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<sup>1</sup>Rule 130.102(d) was amended, effective November 28, 1999, by the addition of a subsection and, consequently, Rule 130.102(d)(3) was renumbered as Rule 130.102(d)(4) after November 28, 1999.

In a handwritten report dated April 9, 1998, Dr. TH states "[claimant] has been unable to work in any capacity since I first attended her 2/24/92." (Emphasis in the original).<sup>2</sup> In an undated "To Whom it May Concern" handwritten note, Dr. TH comments that "I encourage [claimant] to try to find work or a hobby that perhaps can accommodate her severe restrictions (absolutely no repetitive motion)." Dr. AH, the designated doctor who apparently first diagnosed RSD (according to claimant-s testimony) in a report dated October 15, 1999, apparently to the group health disability carrier, wrote:

I have been treating [claimant] with nerve block injections and medications. [Claimant-s] prognosis is poor. It is my professional opinion that [claimant] is totally and permanently disabled due to her [RSD] and psychological problems.

The self-insured referred claimant to a functional capacity evaluation (FCE) for group health disability benefits. The FCE report dated December 7, 1999, stated "Physical assessment reveals patient is able to maintain an upright posture. Patient states she is unable to ambulate due to equilibrium problems and did not attempt to do so . . . . Unable to test trunk flexibility due to position of patient." Claimant was noted to have severe depression symptoms. The hearing officer made no findings whether any, all or some combination of these reports constitute such a narrative which specifically explains how the injury causes a total inability to work.

Medical evidence contrary to the opinions of Dr. TH and Dr. AH, includes reports by Dr. SS which release claimant to light duty in May 1995 with lifting restrictions and full duty in July 1995. The self-insured-s doctor, Dr. HS, in a report of May 14, 1996, releases claimant "to return to a modified light-duty type activity" and to avoid heavy lifting. Dr. G releases claimant to full duty in July 1996. Dr. JT released claimant to "limited activity" in a report dated February 18, 1997. The Texas Workers-Compensation Commission (Commission) appointed Dr. CT as a Commission required medical examination doctor. In a report dated May 7, 1997, Dr. CT noted that claimant "did not give her best effort or was not able to give her best effort," commented that some poor test effort was "non-physiologic" and concluded that claimant "would be capable at working at a sedentary position" with a five-pound lifting restriction. Dr. CT referred claimant to an FCE which in a report dated May 9, 1997, concluded that claimant would be "able to return to work on light physical demand characteristic level." The self-insured presented testimony and evidence that claimant had been scheduled and approved for several medical examinations since 1997 but had, for one reason or another, either failed

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<sup>2</sup>Although Dr. TH uses a February 1992 date and the date of injury is \_\_\_\_\_, claimant explained that Dr. TH-s note is a typographical error and should be February 1996.

to go to the scheduled exams or had refused to go. The hearing officer, in his Statement of the Evidence, commented:

Claimant apparently failed or refused to attend required medical evaluations that were scheduled by Carrier during the qualifying period for the 13th quarter and afterwards.

Claimant responded to the self-insured's contention by pointing out that she had attended an FCE appointment on December 7, 1999. The hearing officer did not make any specific findings whether the cited reports were such other records which show claimant is able to return to work.

Although the hearing officer failed to address the last two elements of Rule 130.102(d)(3), which in some circumstances would invite a remand, in this case, the hearing officer, having found that claimant "had some ability to work," and that finding being supported by the evidence and being dispositive (the claimant having the burden of proving all three elements of Rule 130.102(d)(3)), we will affirm the hearing officer's decision.

Finding sufficient evidence to support the hearing officer's decision and finding that decision to not be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, we affirm the hearing officer's decision and order. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Thomas A. Knapp  
Appeals Judge

CONCUR:

Philip F. O'Neill  
Appeals Judge

Gary L. Kilgore  
Appeals Judge