

## APPEAL NO. 000581

On February 11, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that respondent (claimant) is entitled to supplemental income benefits (SIBs) for the sixth and seventh quarters and that appellant (carrier) waived its right to contest claimant=s entitlement to SIBs for the seventh quarter by failing to timely request a benefit review conference (BRC). Carrier requests that the hearing officer=s decision on all issues be reversed and that a decision on all issues be rendered in its favor. Claimant requests that the hearing officer=s decision on all issues be affirmed.

### DECISION

Reversed and remanded in part and reversed and rendered in part.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102 (Rule 130.102). The new SIBs rules effective January 31, 1999, apply to this case.

The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable injury; that she reached maximum medical improvement (MMI) on June 29, 1997, with a 15% impairment rating (IR); that she did not commute impairment income benefits; that the sixth quarter was from August 9, 1999, to November 7, 1999, with a qualifying period of April 27, 1999, to July 26, 1999; and that the seventh quarter was from November 8, 1999, to February 6, 2000, with a qualifying period of July 27, 1999, to October 25, 1999. There is no appeal of the hearing officer=s findings that during the relevant qualifying periods, claimant was unemployed as a direct result of her impairment. The SIBs criterion in issue is whether claimant made a good faith effort to obtain employment commensurate with her ability to work during the relevant qualifying periods. It is undisputed that claimant did not look for work during the relevant qualifying periods. Claimant contended that she had no ability to work during the relevant qualifying periods.

Claimant testified that she injured her low back and neck while working as a home health aide on \_\_\_\_\_. Claimant had lumbar surgery at L3-4 and L5-S1 in December 1996 and underwent a second surgery in February 1997 for drainage of a seroma in the area of the previous surgery. Dr. H, the designated doctor appointed by the Texas Workers= Compensation Commission (Commission) to determine MMI and IR, reported in November 1997 that claimant reached MMI on June 29, 1997, with a 15% IR for impairment of the lumbar spine and the cervical spine. On April 1, 1999, claimant was examined by Dr. K at carrier=s request (Dr. K notes that at some previous time she had been claimant=s treating doctor) and she referred claimant for a functional capacity evaluation (FCE). Physical therapist SS reported that the April 4, 1999, FCE results suggest that claimant is at the high end of light/low

end of medium physical demand level. On July 20, 1999, Dr. K referred to the FCE and stated that claimant tested in the high end of light duty, low end of medium physical demand level. In September 1999, the Commission sent claimant to Dr. S for a determination of whether claimant had any ability to work during the qualifying period for the sixth quarter, and Dr. S referred claimant for an FCE. Physical therapist RS reported that he was hesitant to state a functional capability after claimant underwent the FCE in September 1999 because of claimant's submaximal effort. On September 29, 1999, Dr. S reported that the FCE report of September 1999 reflected submaximal effort. Dr. S stated that claimant's work injury diagnoses were lumbar laminectomy and left lower extremity radiculitis and that claimant's cervical spine pain was unrelated to her work injury. Dr. S stated that based on claimant's FCE, physical examination, and medical history, as it relates to the \_\_\_\_\_, injury alone, claimant may work full time in a category of up to light/medium.

Claimant said that Dr. C is her treating doctor and that he referred her to Dr. M. Dr. M wrote in August 1998 that he began seeing claimant in August 1996. Apparently Dr. M performed claimant's lumbar surgery. In the August 1998 report, Dr. M noted claimant's physical problems and limitations and wrote that she is a poor candidate for returning to work and that he advised her not to do so and that he feels she is totally and permanently disabled. In several subsequent reports in 1998 and 1999 Dr. M wrote that claimant is completely disabled for purposes of employment. Dr. M wrote in July 1999 that claimant continues to be totally disabled and has not reached a condition that would allow her to return to work in any capacity. In September 1999, Dr. M reviewed claimant's history of medical treatment for her injury and wrote that claimant is not able to work full or part time largely due to pain, the medication she requires, and positional intolerance, as well as the inability to lift or carry more than a few pounds, to bend or stoop at all, to kneel or crawl at all, or to push or pull any kind of heavy weight. Dr. M wrote in November 1999 that Dr. S's evaluation of claimant's work ability did not take into account claimant's neck injury. Dr. M also wrote that claimant is not able to tolerate even sedentary work.

Dr. C wrote in August and September 1999 that claimant is totally disabled and in October 1999 stated that he disagrees with Dr. S's report and that claimant is totally disabled to do any kind of job. Dr. M referred claimant to Dr. D who noted in November 1999 that claimant has chronic low back pain with radiculopathy and chronic neck pain with radiculopathy and recommended an epidural steroid injection. Dr. M also referred claimant to Dr. E who reviewed the April 1999 FCE report of SS and wrote that based on that report, claimant's sitting and standing tolerances would not be adequate for gainful employment even at a sedentary level. Dr. E also wrote that he would find it very difficult for claimant to be capable of gainful employment at any level, based upon his examination of claimant and review of the FCE. Claimant testified that she has back and neck pain for which she takes medications and that she was unable to work during the relevant qualifying periods.

Carrier appeals the hearing officer's findings that during the relevant qualifying periods, claimant had no ability to work and that claimant's requirement to attempt in good faith to obtain employment commensurate with her ability to work was satisfied because claimant had no ability to work and her conclusion that claimant is entitled to SIBs for the sixth and seventh quarters. During the relevant qualifying periods Rule 130.102(d)(3) provided 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. In the Statement of the Evidence portion of her decision, the hearing officer states that claimant had shown by a preponderance of the evidence that she was unable to work during the relevant qualifying periods and that the reports of Drs. M and E show in narrative form that claimant is unable to perform any type of work in any capacity and specifically explain how the injury causes a total inability to work. The hearing officer also states that Dr. S limited his consideration to claimant's lumbar spine and that his report is not credible as an other record which shows that claimant is able to return to work. Carrier does not take issue with the hearing officer's evaluation of the reports of Drs. M, E, and S.

The carrier contends that the April 1999 FCE report and Dr. K's report of July 20, 1999, are records that show that claimant is able to return to work, and that, while the hearing officer mentions these reports, she ignored them in her Rule 130.102 analysis. At the CCH, carrier urged that the April 1999 FCE; Dr. K's July 20, 1999, report; and Dr. S's report all showed that claimant has some ability to work. Although the hearing officer does mention the April 1999 FCE and Dr. K's July 20, 1999, report in her Statement of the Evidence, she does not state or find whether those reports do or do not show that claimant is able to return to work. The Appeals Panel has said that in no-ability-to-work cases, hearing officers should make findings of fact addressing all of the elements of the rule regarding no ability to work. Texas Workers=Compensation Commission Appeal No. 992777, decided January 24, 2000. We reverse the hearing officer's decision that claimant is entitled to SIBs for the sixth and seventh quarters and we remand the case to the hearing officer for the hearing officer to make findings of fact which address all the elements of Rule 130.102(d)(3) regarding no ability to work (Rule 130.102(d)(3) became Rule 130.102(d)(4) as amended effective November 28, 1999), including, but not limited to, findings addressing the April 1999 FCE and Dr. K's July 20, 1999, report.

Regarding the waiver issue, carrier received claimant's Application for [SIBs] (TWCC-52) for the seventh quarter on November 19, 1999, and requested a BRC on November 30, 1999, which was more than 10 days after its receipt of the TWCC-52. However, it is undisputed that carrier did not pay SIBs for the sixth quarter. Carrier appeals the hearing officer's decision that it waived its right to contest claimant's entitlement to SIBs for the seventh quarter by failing to timely request a BRC. The Appeals Panel has held that under Rule 130.108(e), waiver does not apply against a carrier where there has been no SIBs payment in

the preceding quarter. Texas Workers= Compensation Commission Appeal No. 992759, decided January 18, 2000; Texas Workers= Compensation C ommission Appeal No. 991354, decided August 9, 1999. The hearing officer=s decision that carrier waived its right to contest claimant=s entitlement to SIBs for the seventh quarter is reversed and a decision is rendered that carrier did not waive its right to contest SIBs for the seventh quarter.

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

Robert W. Potts  
Appeals Judge

CONCUR:

Thomas A. Knapp  
Appeals Judge

Alan C. Ernst  
Appeals Judge