

APPEAL NO. 000835

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 March 22, 2000. The hearing officer concluded that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth quarter because he "has not shown by a preponderance of the evidence that during [the] qualifying period for the fourth quarter [he] made a good faith effort to seek employment within the meaning of the [r]ules." Claimant requests our review of the dispositive legal conclusion and two underlying findings of fact, asserting that the hearing officer has misapplied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)). The respondent/cross-appellant (carrier) has also requested our review, asserting that the hearing officer erred in finding that claimant's impairment from his compensable injury prevented him from returning to his preinjury employment earning preinjury wages and was a cause of his reduced earnings during the qualifying period. Each party filed a response to the other's appeal.

DECISION

Affirmed.

The parties stipulated that the carrier accepted liability for claimant's _____, injury; that Dr. R was the designated doctor selected by the Texas Workers' Compensation Commission (Commission) for that injury; that claimant has an impairment rating (IR) of 15% or greater from that injury and did not elect to commute any portion of the impairment income benefits (IIBs); and that the fourth quarter is from December 8, 1999, through March 7, 2000. Neither party disputes the finding that the qualifying period for the fourth quarter is the 13-week period ending 14 days before December 8, 1999, or from August 26 through November 24, 1999. This being the case, the version of the new SIBs rules in effect before November 28, 1999, apply to this case. *And see* Texas Workers' Compensation Commission Appeal No. 991634, decided September 14, 1999 (Unpublished).

Claimant's Application for Supplemental Income Benefits (TWCC-52) for the fourth quarter reflects that during the fourth quarter qualifying period he earned no wages and did not seek employment. The carrier's Request for Benefit Review Conference [BRC] (TWCC-45) states that the carrier disputes claimant's entitlement to fourth quarter SIBs because his inability to earn 80% of his preinjury wage is not a direct result of his impairment; that claimant sustained an intervening stroke unrelated to his compensable injury; and that the effects of the stroke may prevent claimant from working. According to the report of the BRC held on January 20, 2000, claimant took the position that since he had no ability to work, he was relieved from seeking employment and that his unemployment was a direct result of his compensable injury and not his subsequent stroke.

The carrier took the position that claimant's unemployment is not a direct result of his compensable injury and that his inability to work is due to his subsequent stroke. Notwithstanding the onset of symptoms the day after undergoing a discogram, claimant does not contend on appeal that his compensable neck and back injury extends to the stroke; the carrier's doctor, the designated doctor, and claimant's treating doctor all disassociate the brain condition from the compensable neck and back injury; and there is medical evidence that the brain stem lesion is above the area of the cervical spine fusion.

The following findings are not disputed:

FINDINGS OF FACT

2. On _____ Claimant had an on the job injury. Carrier became liable for a neck and lower back injury to Claimant. Claimant had a neck fusion related to the _____ injury. Claimant's _____ injury causes Claimant to have limitations in the range of motion [ROM] in the neck, some popping in the neck on movement, but no numbness or loss of strength in the upper extremities.

* * * *

4. [Dr. R], a commission designated doctor, examined Claimant on January 27, 1999. [Dr. R] assigned a 29% whole person [IR], consisting of 11% for a specific disorder and 20% for loss of [ROM] in the cervical spine. [Dr. R] noted no neurological deficit from the _____ injury, and noted that it was not possible to rate the lumbar spine. [Dr. R's] opinion was that Claimant's brain stem lesions were unrelated to the _____ injury.
5. The fourth quarter is from December 8, 1999 through March 7, 2000. The qualifying period for the fourth quarter is the thirteen week period ending fourteen days before December 8, 1999 or from August 26, 1999 through November 24, 1999.

Claimant testified that he injured his neck and back on _____, while installing insulation and that he subsequently underwent cervical spine fusion surgery. The carrier's representative averred that the carrier accepted the neck and back injury but disputed the compensability of injury to all other body parts. The parties agreed that claimant was given an IR for the accepted injury which exceeded 15% and that in October 1997 he had manifested symptoms which the parties refer to, variously, as a stroke or stroke-like symptoms. The medical reports refer to this condition, variously, as a brain stem stroke, infarct, or lesion. Claimant stated that during the qualifying period, his neck hurt and would pop; that he had tingling in his left arm; that he had chest pain; that he was legally blind in the right eye; that he could not walk because his legs are weak; and that he has problems

with balance, muscle coordination, and speech. He further stated that he can use his arms to roll his wheelchair; that he has difficulty eating and dressing himself; that he draws Social Security benefits; that he began to receive some home health care assistance in March 1999; and that his wife also helps with his activities of daily living. He acknowledged that following the fusion surgery, his neck condition improved but he also said it later got worse. Claimant maintained that during the qualifying period, he could not have performed his previous job installing insulation nor perform any other sort of work and that no doctor has released him to return to work, not even for light duty.

Dr. MS, a neurologist, testified that he reviewed claimant's medical records for the carrier but did not examine claimant. Based on his review of the medical records Dr. MS opined that claimant's injury of _____, would not have prevented him from returning to work and that claimant's brain stem stroke is the reason he cannot presently work. Dr. MS stated that he has treated many patients who have had cervical spine surgery and that they are able to return to work, including work of a higher level than sedentary work. In Dr. MS's opinion, to a reasonable medical probability, claimant's stroke-like symptoms are the reason he cannot work.

The August 6, 1997, report of Dr. RS states that claimant underwent surgery in January 1997 by Dr. J and reports that "he gained a very important amount of improvement in his cervical spine symptoms, although he does have some mild residual symptoms." Dr. RS further states that claimant is being seen for severe lumbar spine pain with paresthesias into his lower extremities. He also noted that claimant had right eye blindness, apparently from an old injury. Dr. RS's impression was status post cervical spine fusion and lumbar radiculopathy.

The March 27, 1998, report of Dr. L, a neurologist who performed a required medical examination for the carrier, states that he examined claimant and summarizes claimant's extensive medical records. Dr. L reports that claimant's job as an insulation installer in commercial buildings required him to do heavy lifting and pulling; that claimant said he injured his upper body, ribs, and back while pulling on some insulation in a confined space; that claimant underwent three-level cervical spine fusion surgery on January 2, 1997, by Dr. J and Dr. RS; that following the surgery, claimant's headaches went away and he did not have any weakness in his legs; that he returned to Dr. RS for a discogram in October 1997 which "did not disclose anything to be operated on"; that the following day, while in the shower, claimant was suddenly unable to hold himself up and later that day weaved while trying to walk; that his speech difficulties have become worse; and that claimant has to use a walker to avoid falling. Dr. L further reports that claimant's right eye is blind with the cornea severely cloudy; that since the event in the shower, claimant has had a problem coordinating his upper extremities and has gross, uncoordinated movements, even when trying to use his hands. Dr. L finds claimant's gait to be grossly ataxic (failure of muscular coordination), states that claimant is at severe risk of falling, and reports that claimant demonstrated gross abnormalities in the finger-nose-finger coordination test. Dr. L states the impression as probable bilateral cerebellar-brain stem lesion. Dr. L states his suspicion

that claimant had a brain stem infarct superimposed on a cerebellar degenerative disorder and notes that MRI scans of the brain in November and December 1997 show a lesion not seen on January 1996 scans. Dr. L opined that the cause of the sudden onset of ataxia is unrelated to the discogram or to the work-related injury of _____.

Dr. R's January 27, 1999, report states that claimant's neck motions were generally restricted but that he had good shoulder joint motions and fairly good upper extremities strength; that claimant could not stand and that when an attempt was made to get him out of the wheelchair, his legs were quite unstable, not from weakness but from coordination problems; that claimant's finger-to-nose testing was grossly abnormal bilaterally and his reflexes diminished; that claimant had a right cornea injury; that there was no sensory deficit; and that there was no way to examine the lumbar spine. Dr. R assigned a 29% IR for claimant's neck injury and states the diagnosis as "cervical injury with status anterior cervical discectomies and fusion, multiple levels" and "probable cerebellar brain stem infarction."

Dr. J, apparently claimant's treating doctor, wrote to the Commission on May 14, 1998, stating that claimant has permanent and serious neck and back injuries secondary to work-related functions and that he also has significant cerebellar parenchymal degeneration which causes significant motor dysfunction but not pain, and which, in Dr. J's opinion, has no relation to claimant's marked neck and back injuries. Dr. J further stated that the neck injury required extensive surgery; that the back injury was too extensive to correct with surgery; that the neck and back injuries do cause pain and moderate decrease in motor dysfunction; and that claimant "has pain and incapacity secondary to severe neck and back condition (work-related) and has motor incapacity and poor coordination secondary to cerebellar parenchymal degeneration (non-work-related)." In substantially similar reports of December 15, 1998, March 30, 1999, May 13, 1999, August 24, 1999, and December 2, 1999, Dr. J stated, among other things, that claimant is "100% disabled." On June 29, 1999, and October 21, 1999, Dr. J wrote "yes" to the question sent to him asking whether, in his opinion, claimant's impairment from his _____, injuries helped cause him to be 100% disabled between December 1, 1998, and June 1, 1999.

Dr. M wrote on March 20, 2000, that claimant's EMG study on April 24, 1996, showed an L5 and S1 radiculopathy.

Claimant challenges the following findings of fact:

FINDINGS OF FACT

3. In October 1997 Claimant had a bilateral brain stem lesion and possible infarct unrelated to the _____ injury, that caused speech impediments, confinement to a wheelchair, and loss of coordination in the upper extremities. Claimant is functionally blind, unrelated to the _____ injury.

* * * *

7. During the qualifying period for the fourth quarter Claimant had not returned to any kind of work, did not participate in any full time rehabilitation program, and did not conduct any job search. During the qualifying period for the fourth quarter Claimant was unable to perform any work in any capacity because of limitations from an unrelated catastrophic event. The narrative reports of [Dr. J] do not specifically explain or even establish that Claimant's _____ injury causes a total inability to work during the qualifying period for the fourth quarter, and other medical reports indicate that but for Claimant's unrelated catastrophic event Claimant could work in some capacity. Claimant did not make good faith efforts to seek employment commensurate with his ability to work during the qualifying period for the fourth quarter.

The carrier appeals the bracketed portion of the following factual finding:

FINDING OF FACT

6. Claimant did not earn any wages during the qualifying period for the fourth quarter. Claimant's catastrophic event prevented Claimant from returning to pre-injury employment earning pre-injury wages. [Claimant's impairment from the _____ compensable injury also prevented Claimant from returning to pre-injury employment earning pre-injury wages, and was a cause of Claimant's reduced earnings during the qualifying period for the fourth quarter.]

Claimant disputes the entirety of the following legal conclusion while the carrier disputes the bracketed portion.

CONCLUSION OF LAW

4. [Because Claimant has shown by a preponderance of the evidence that he had an IR of 15% or greater, did not elect to commute any portion of [IIBs], and during the qualifying period for the fourth quarter that the impairment from the _____ injury was a cause of reduced earnings, he meets three eligibility criteria,] but because Claimant has not shown by a preponderance of the evidence that during [sic] qualifying period for the fourth quarter [sic] made a good faith effort to seek employment within the meaning of the Rules, Claimant is not entitled to SIBS for the fourth quarter.

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 (AWW) 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.

Rule 130.102(b), Eligibility Criteria, provides that "[a]n injured employee who has an [IR] of 15% or greater, and who has not commuted any [IIBs], is eligible to receive [SIBs] if, during the qualifying period, the employee:

- (1) has earned less than 80% of the employer's [AWW] as a direct result of the impairment from the compensable injury; and
- (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(c), Direct Result, provides that "[a]n injured employee has earned less than 80% of the employee's [AWW] as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings."

Rule 130.102(d)(3) (the version in effect when the qualifying period began) 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 work [emphasis supplied]; . . ."

The Preamble for Adoption of New §§130.100-130.108, 24 Tex. Reg. 399, states at page 401 that the new Section 130.102(c) adds the standard for determining direct result in a dispute and that this is the standard which has been used in the dispute resolution process and is added for clarity and consistency of interpretation. The Preamble further states at page 401 that Section 130.102(d) sets out situations in which the injured employee has made a good faith effort to obtain employment; that the previous rules included no standard, no description and no definition of good faith; and that the new rule provides standard elements for determining this commonly disputed issue. The Preamble further states at page 401 the following:

New § 130.102(d)(3) provides that an employee has made a good faith effort to obtain employment if the employee cannot return to any type of employment. This should be a limited situation and only applies where it is clear that the injured employee cannot return to work because of the compensable injury. While the actual question of whether or not a person

has the ability to work is a factual issue, the inclusion of a requirement for a medical report which explains how the injury causes a total inability to work helps to ensure that there is documentation, in addition to the injured employee's testimony, that can be evaluated by the reviewing authority. This provision is not intended to create new areas of entitlement, but to establish the finding of good faith in situations where the injured employee truly cannot work. If a person cannot perform any type of work, it appears contradictory to require that person to attempt to look for work. [Emphasis supplied.]

In the discussion portion of his Decision and Order, the hearing officer notes that "the comments to the rules indicate that a complete inability to work must be the result of the compensable injury for there to be a 'good faith effort to seek employment commensurate with the ability to work.'" Claimant contends that the hearing officer has misinterpreted Rule 130.102(d)(3) to require that a claimant must provide a doctor's narrative report explaining how the compensable injury is the "sole cause" of the inability to work and that the rule can be interpreted to mean the doctor's narrative report need only show that the compensable injury is a "producing cause" of the inability to work, consistent with other areas of workers' compensation law. Claimant further contends that under the hearing officer's interpretation of Rule 130.102(d)(3), a claimant must not only show causation under the "direct result" criterion but also under the "good faith" criterion and that this makes no sense.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the evidence sufficiently supports the factual findings challenged by claimant. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We also do not find error as a matter of law in the hearing officer's construction and application of Rule 130.102(d)(3) in this case. The plain language of Rule 130.102(d)(3) refers to "the injury" and the Preamble comments support the hearing officer's construction of Rule 130.102(d)(3). To ignore the plain language of the rule and the comments in the Preamble would place the Appeals Panel in the position of rule making.

We view the portion of Finding of Fact No. 6 disputed by the carrier as being sufficiently supported by the evidence. The hearing officer could consider the evidence that claimant sustained a serious injury with lasting effects and could not return to his preinjury occupation.

We affirm the decision and order of the hearing officer.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge