APPEAL NO. 001112

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 December 16, 1999, and March 21, 2000, with the record closing on April 18, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the 10th and 11th compensable quarters; that the claimant filed late applications for these quarters; and that the appellant/cross-respondent (carrier) did not waive the right to contest entitlement to 10th quarter SIBs. The carrier appeals the award of 10th and 11th quarter SIBs, contending that these determinations are against the great weight and preponderance of the evidence. The claimant appeals the finding of non-waiver by the carrier, contending that the rule on which this determination is based is contrary to the 1989 Act. Each party responds that the portion of the decision appealed by the opposing party was correctly decided. The findings of late filings of the applications have not been appealed and have become final. Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part as to entitlement to 10th and 11th quarter SIBs.

The 10th SIBs quarter was from June 2 to August 31, 1999, and the qualifying period for this quarter was from February 18 to May 19, 1999. The 11th SIBs quarter was from September 1 to November 30, 1999, with a qualifying period of May 20 to August 18, 1999. At issue in this case is whether the claimant made the required good faith job search during each qualifying period. *See* Section 408.142(a)(4). For the 10th quarter, the hearing officer found a good faith job search based both on an actual job search and an inability to work in any capacity. For the 11th quarter, the hearing officer found a good faith job search based on an inability to work.

We address the actual job search in the 10th quarter qualifying period first. The claimant submitted an Application for [SIBs] (TWCC-52) for this quarter in which he listed numerous job search activities, many of which were on dates outside of the filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides that a claimant with an ability to work "shall look for employment commensurate with his or her ability to work and document his or her job search efforts." In Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, we held that the documentation requirement of Rule 130.102(e) was mandatory and that a hearing officer could not consider nondocumented employment contacts in arriving at the good faith determination. A finding of a documented job contact in the absence of documentation is against the great weight and preponderance of the evidence.[1] Pursuant

[1]We expressly disapprove of the hearing officer's *sua sponte* offer to the claimant to keep the record open to permit him to supplement the record with documentation of his job search. This documentation was to be printed out from the claimant's computer records. Any such documentation would not have been timely exchanged. *See* Rule 142.13(c). In addition, such a procedure would create open-ended proceedings. The documentation produced for the

to the carrier's appeal on this basis, we have reviewed the claimant's TWCC-52 for this quarter and observe that it documents no job searches in the month of February 1999, even though the qualifying period began on February 18, 1999. The finding of the hearing officer (Finding of Fact No. 9) that the claimant made a good faith job search in the 10th quarter filing period reflects a failure to apply the applicable regulation and is contrary to the great weight and preponderance of the evidence. For this reason, we reverse that determination and render a determination that the claimant did not make a documented good faith job search during the10th quarter qualifying period.

We next address the inability-to-work determinations for each qualifying period in issue. The pertinent portion of the version of Rule 130.102(d)(3) then if effect provided that an employee meets the good faith job search element of SIBs entitlement if the employee "has been unable to perform any type of work in any capacity [and] has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work. . . ." In his findings of fact, the hearing officer commented only on the report of Dr. W on the question of whether a "narrative report" existed to establish an inability to work. The claimant also appeared to rely only on this report. We assume from the decision and order that the hearing officer rejected any other medical evidence as constituting a sufficient "narrative" either alone or in combination with Dr. W's report. Thus, we will address this claim of an inability to work solely in terms of whether Dr. W's report constituted a "narrative" as contemplated by the rule. Rule 130.102(d)(3).

Dr. W stated in her report of February 2, 1999, based on a required medical examination of the claimant, that the claimant "brought up that he owns his own business, but he states he can only work on this approximately 10 hours per week"; that he is at the "minimal functional level" but can perform the activities of daily living; that his pain "appears to be out of proportion to structural findings"; that "[s]ome symptom magnification behaviors are present and one must wonder how secondary gain factors into the level of this patient's symptomatology"; and that "I would proceed with surgery on this gentleman very cautiously." Asked to specifically address the question of whether the claimant could return to "gainful employment at this time" she responded:

> I believe that this patient could return to at least a sedentary physical demand level position. I have no reason to believe that the patient could not lift or carry up to 10 pounds on an occasional basis from the waist to chest level. He should be able to perform fine and gross motor manipulation and walk and stand for short periods of time. A home based business would be perfect for this patient.

Asked about the effects of the claimant's methadone treatment for pain relief from his compensable injury, she replied that such dependency and its side effects (poor

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hearing officer dealt with events outside the qualifying period.

concentration and drowsiness) "would contribute to this patient's difficulty in returning to work. Alternative medications could be sought."

The claimant argued both at the hearing and on appeal that the real meaning of Dr. W's report was that the claimant's methadone dependency made him unable to work and that what Dr. W was saying was that he could only do sedentary work if he were not taking the methadone.

The hearing officer found that Dr. W's report "states that Claimant has no ability to work due to the Methadone treatments he is receiving and sets out in detail why he is unable to work." Finding of Fact No. 12. We conclude that this interpretation of Dr. W's report has no basis in the express language of her report or in any remotely reasonable interpretation of that report. In it, she explicitly stated that the claimant could do sedentary work "at this time" and considered the impact of the methadone report on this ability. Accordingly, we find that the determination that Dr. W provided a "narrative report" sufficient to establish no ability to work is so against the great weight and preponderance of the evidence as to be clearly erroneous. We reverse that determination and render a decision that the claimant did not establish a total inability to work as provided in the applicable rule and that he is not entitled to 10th and 11th quarter SIBs.

There remains the question of whether the carrier waived the right to contest 10th quarter entitlement because it failed to timely contest this entitlement. The 10th quarter TWCC-52 was received by the carrier on July 1, 1999. The carrier filed a dispute with the Texas Workers' Compensation Commission (Commission) on July 14, 1999. The claimant was found not entitled to ninth quarter SIBs. Texas Workers' Compensation Commission Appeal No. 991515, decided August 30, 1999 (Unpublished). Rule 130.108(d) provides that when a carrier has paid the prior quarter SIBs, it must dispute the following quarter SIBs by requesting a benefit review conference (BRC) within 10 days after receiving the TWCC-52. This subsection of the rule expressly states that a carrier which fails to timely request a BRC under these circumstances waives the right to contest entitlement to SIBs. Rule 130.108(e) provides that when a carrier has not paid SIBs for the immediately preceding quarter and disputes the immediately succeeding quarter, it must send this determination to the employee within 10 days of the date the application was filed with the carrier. There is no parallel provision in subsection (e) establishing carrier waiver for failing to dispute in 10 days. The hearing officer found subsection (e) applicable and no carrier waiver. *See* Texas Workers' Compensation Commission Appeal No. 991354, decided August 9, 1999; Texas Workers' Compensation Commission Appeal No. 000581, decided May 1, 2000. The claimant does not disagree with this interpretation of the rule, but argues that the rule is contrary to Section 408.147(b) of the 1989 Act, which does not make this distinction between paid and unpaid prior quarters. We decline to hold a formally promulgated rule of the Commission inconsistent with the 1989 Act and not applicable to the proceedings.

For the foregoing reasons, we affirm the determinations of untimely filing and no carrier waiver. We reverse the determinations of a good faith job search and entitlement to SIBs for the 10th and 11th quarters and render a decision that the claimant was not entitled to 10th and 11th quarter SIBs.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I dissent on the same basis as I did in Texas Workers' Compensation Commission Appeal No. 992460, decided December 22, 1999, wherein I stated as follows:

> As far as the requirement that a job search be documented, I believe that the claimant's testimony documented his search. First, I would note that the word "document" in Rule 130.102(e) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e)] is used as a verb and not as a noun. As such, I would interpret it to mean to "provide evidence of" and not merely to mean a piece of paper. This view is further supported by the language in Rule 130.102(e) which states "the reviewing authority shall consider the information from the injured employee." This language does not limit the requirement that the reviewing authority consider only written information. In fact, it would seem to me to be most incongruous that the rule would permit a job search to be evidenced by an unsworn writing by a claimant but could not be evidenced by sworn testimony. While the majority apparently cites Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, for proposition that Rule 130.102(e) requires a writing concerning a claimant's job search, I believe that to the degree Appeal No. 992321 stands for this proposition this case is wrongly decided and violates the language of Rule 130.102(e) itself.
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> I would affirm the decision of the hearing officer. I believe that reversal of the hearing officer's decision does violence to the language of Rule 130.102(e) when the rule is reasonably read as a whole. I also see no

reason to strain the meaning of the rule or focus only on a portion of the language of the rule to reach a result which I view as contrary to the very purpose of the 1989 Act, which is to compensate injured workers. To me, the claimant in this case is exactly the type of injured worker for whom [supplemental income benefits] was designed and I see no legal reason that requires abandoning common sense or compassion to deny him these benefits.

I would affirm the decision and order of the hearing officer in the present case.

Gary L. Kilgore
Appeals Judge