

## APPEAL NO. 001466

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 8, 2000. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000546, decided May 1, 2000 remanded for further consideration and findings on each element of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) relative to the first and second quarters of supplemental income benefits (SIBs). A CCH on remand was scheduled for May 31, 2000, but upon the request of the appellant (carrier), who successfully obtained the remand, the hearing was canceled since only further consideration of the evidence was required. The record was opened and closed on May 31, 2000, to take official notice of pertinent items and to admit the carrier's request for cancellation. The hearing officer again determined that the respondent (claimant) was entitled to SIBs for the first and second quarters.

The carrier appealed all of the hearing officer's findings of fact and conclusions of law except those involving jurisdiction and venue, but including the qualifying periods, setting out verbatim much of Rule 130.102. The carrier contends that there are no narrative reports which specifically explain how the injury causes a total inability to work and that a report by Dr. P, a Texas Workers' Compensation Commission (Commission)-appointed physician, was a record which showed that the claimant was able to return to work. The carrier requests that we reverse the hearing officer's decision and render a decision in her favor. The claimant responds to the points raised by the carrier and urges affirmance.

### DECISION

Affirmed.

The background facts and statutory elements were recited in Appeal No. 000546, *supra*, and will not be repeated in detail here. That decision resolved an extent-of-injury issue and also resolved that the claimant had cervical and lumbar spine and left arm and shoulder injuries, with a 39% impairment rating. The claimant's treating doctors are Dr. H and Dr. S. Although the carrier has appealed the finding that the qualifying periods for the first and second quarters ran from March 26, 1999, through September 24, 1999, there is no evidence to the contrary and we affirm that finding. It is also undisputed that the claimant had left shoulder surgery on May 24, 1999, which would be one month into the qualifying period for the first quarter. The claimant contends that she had a total inability to work during the relevant qualifying periods.

The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Rule 130.102(d)(3) (the version then in effect), which 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, in Appeal No. 000546, *supra*, failed to address those elements and the Appeals Panel remanded

[f]or further specific findings of fact on each element of Rule 130.102(d)(3) required to establish an inability “to perform any type of work in any capacity.” On remand, the hearing officer should consider whether the narratives relied on by the claimant specifically explain how the injury causes the total inability to work. See Texas Workers’ Compensation Commission Appeal No. 991616, decided September 15, 1999 (Unpublished).

The hearing officer, in her Statement of the Evidence, comments:

The evidence showed that during the qualifying period for the first quarter, the Claimant had left shoulder problems that led to surgery during that time frame. Throughout both qualifying periods, she had primarily neck and left shoulder problems that required her to take prescription medication. The records of her treating doctor and shoulder surgeon, [Drs. H and S], respectively, establish in their totality that the Claimant had no ability to work during the qualifying periods. She, therefore, met her burden of proof on her entitlement to first and second quarter supplemental income benefits [SIBs].

While Dr. S’s records during the qualifying periods do not directly comment on ability to work, progress notes beginning on March 18, 1999, show continuing left shoulder problems which culminated in left shoulder surgery on May 24, 1999, during which the claimant was under general anesthesia. A progress note of June 4, 1999, noted “no lifting/pushing/pulling.” The note does prescribe some “ROM [range of motion] exercises.” (This progress note is not a release to light duty with no lifting, etc.) Another progress note of July 8, 1999, notes complaints of “horrific” pain and “cont ROM exercises.” Dr. S’s reports principally address whether the claimant’s shoulder condition is part of the compensable injury, a matter resolved in Appeal No. 000546, *supra*. In a report dated July 13, 1999, Dr. H recommended a pain program and commented:

[Dr. S] has not started [the claimant] on any formalized physical therapy [PT] plan. He has her doing some home exercises. He does not usually start formal [PT] on a shoulder for several weeks. He is always afraid that the physical therapist will hurt the shoulder.

In an August 10, 1999, note (quoted by the carrier and in Appeal No. 000546), Dr. H comments:

[The claimant] has been under my care for her work related injuries. She was in my office today for follow up consultation and treatment. As I have mentioned in my previous reports, [the claimant] remains instructed by me to be completely off work due to her ongoing physical and psychological

problems. Any attempt by [the claimant] to return to any level of work will likely aggravate her injuries.

The hearing officer found that the reports of Dr. S and Dr. H “collectively and in their totality” specifically explain how the injury causes a total inability to work. In view of the fact that the claimant had shoulder surgery during the first quarter qualifying period and was receiving active treatment throughout with various forms of pain management with PT being contemplated we find the hearing officer’s decision on that point sufficiently supported by the evidence.

Regarding whether there is another record which shows that the claimant “is able to return to work,” the carrier points to the October 28, 1999, report of Dr. P. The summary of that report is quoted in Appeal No. 000546, *supra*, and will not be repeated here. We recognize that Dr. P was a Commission-appointed required medical examination (RME) doctor, rather than a carrier RME doctor. Dr. P’s report is detailed and, while the claimant gave a verbal history of her May 24, 1999, surgery, Dr. P does not have the left shoulder operative report and appears to concentrate on the claimant’s cervical injury. Further, and possibly more importantly, Dr. P’s examination and report were approximately one month after the end of the second quarter qualifying period. While the claimant may have been able to do sedentary work at that time (which is also two and one-half months after Dr. H’s report), Dr. P’s report certainly does not show that the claimant was “able to return to work” during the first quarter qualifying period when she had shoulder surgery or, necessarily, the second quarter while the claimant was recovering from the surgery.

The hearing officer has complied with the remand in Appeal No. 000546 and her decision is not against the great weight and preponderance of the evidence.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer’s determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. *In re King’s Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and

order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Robert E. Lang  
Appeals Panel  
Section Manager/Judge