APPEAL NO. 001487
FILED AUGUST 10, 2000

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 June 9, 2000, in _____, Texas, with _____presiding as hearing officer. With regard to the issues before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first through fourth compensable quarters, for the inclusive dates beginning July 7, 1999, through July 3, 2000. The appellant (carrier) appealed, contending that the hearing officer applied an incorrect legal standard, that the claimant failed to establish that he had a total inability to work in any capacity, that no narrative from a doctor sufficiently explains how the injury causes a total inability to work, that the hearing officer failed to address other records which show the claimant is able to work, and that the hearing officer improperly "shifted the burden to the carrier to rebut a presumption of entitlement." The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The claimant testified that he had been employed as an "oil technician," that his job required travel, and that he was injured in a motor vehicle accident (MVA) on _____. Although there were no stipulations agreed upon by both parties, it is generally undisputed that the claimant sustained a compensable injury on _____; that he has an impairment rating (IR) of greater than 15%; that impairment income benefits (IIBs) have not been commuted; and that the qualifying periods for the first quarter began on March 24, 1999, with the qualifying period for the fourth quarter ending on March 21, 2000. The claimant testified that he sustained injuries to his left shoulder, left arm, neck, low back, left leg, and head in the compensable MVA. The claimant has had four surgeries, the first being cervical surgery in August 1996. The claimant testified that he moved from Texas to Louisiana in September 1996 and that subsequent treatment and surgeries have been in Louisiana by (Dr. H), with (Dr. P) subsequently becoming the treating doctor. Dr. H performed lumbar surgery in July 1997, ulnar release surgery on the left arm in March 1998, and a second cervical surgery on October 1, 1998. The claimant testified that he had therapy after the first two surgeries but not after the second two surgeries because it had been denied by the carrier. The claimant testified that he has one year of college and seven or eight years of law enforcement experience, including three years or so as a security company supervisor. The claimant testified that his daily activities involve getting his son "off to school," and preparing simple meals. There was extensive, and disputed, testimony about how much, if any, hunting, fishing, and camping the claimant

does; however, it appears undisputed that the claimant can, and does, drive regularly in his standard transmission car, contrary to the recommendation of his doctors.

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 the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

The claimant proceeds on a theory of a total inability to work. The standard of what constitutes a good faith effort to obtain employment commensurate with the ability to work when one asserts a total inability to work was specifically defined and addressed after January 31, 1999, and amended effective November 28, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)). The requisite good faith effort to obtain employment commensurate with the ability to work can be asserted by meeting the requirements of Rule 130.102(d)(3) (for the first three qualifying quarters) or (4) ( for the last, fourth, qualifying period). (The rule is the same, having only been renumbered effective November 28, 1999.) That rule provides that the good faith element is met when the injured employee is (1) 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 Appeals Panel has further held that the claimant has the burden of proving all three elements of Rule 130.102(d)(3) or (4), as applicable. Texas Workers' Compensation Commission Appeal No. 992592, decided December 31, 1999 (Unpublished).

Various notes and progress reports, including a longhand note dated October 22, 1999, from Dr. P, state that the claimant "is not capable of returning to any gainful employment." In another report of a December 1, 1999, visit, Dr. H writes that the claimant "has been unable to return to any type of work activities as far back as January 1999" giving as reasons "persistent, residual, chronic pain problems with atrophy and deconditioning." In a report dated April 7, 2000 (just after the fourth quarter qualifying period), Dr. H writes that the claimant "has been unable to work since March 1999" and gives as reasons the claimant's "gross deconditioning, stiff muscles, and contracture in his neck, shoulder and lower back." In a letter dated November 29, 1999, the claimant's ombudsman wrote Dr. P, stating:

> We have received two reports from you dated 6/24/99 and 8/11/99 in which you indicate that [the claimant] is not capable of performing any consistent work of any kind. However, on 9/14/99 you completed a Physical Capacities Evaluation in which you indicate various permanent

> work restrictions/ capabilities that [the claimant] would be able to perform on a part-time basis.

The ombudsman goes on to state:

> If he is not able to return to **any type of employment in any capacity**, he needs a **detailed** narrative report that specifically **explains** how his work related injury and impairment as a result of that injury is causing a **total inability** to return to work. [Emphasis in the original.]

Dr. P responded by letter dated January 9, 2000, stating:

> I have written to several people about [the claimant]. He was injured in an accident. This caused him to rupture two cervical disc and damage his ulnar nerve on the left. He presently still has weakness in the left and also uncoordination on that side. He also has severe pain in the neck, back, shoulder, and arm. He is on several medicines to control his pain. He can't drive a car in this condition. He is presently incapable of holding any job. He will never be able to work again and I have advised him to apply for disability. In addition to the old injuries, his mother has recently died and he is suicidally depressed at this time.

It is this report that the hearing officer quotes as meeting the "narrative from a doctor [which] specifically explains how the injury causes a total inability to work."

The carrier relies on a "Physical Capabilities Checklist" dated April 26, 1999 (during the first quarter qualifying period) completed by Dr. H. That checklist indicates that the claimant cannot at all drive a standard transmission vehicle (which the claimant readily admits he does), and that the claimant can sit, stand, walk, bend "1-3 hrs," can occasionally lift or carry up to 10 pounds and can return to "Full Time Sedentary Work–10 lbs maximum lifting and/or carrying articles, walking/standing on occasion." (Emphasis in the original.) The hearing officer makes no mention of this report in her decision. The carrier also points to the claimant's testimony that he drives his standard transmission automobile around town and on "extended multi-state trips" and is able to go hunting and fishing, and suggests that with the claimant's supervisory security guard experience there is nothing which would preclude the claimant from working at least part time in a security guard supervisory position.

The hearing officer gives a lengthy summary of her understanding of the SIBs provisions of the 1989 Act and the Texas Workers' Compensation Commission (Commission) rules. The hearing officer, apparently in referring to Rule 130.102(d)(3) or (4), as applicable, states:

> The new Rules add an additional requirement: **no other records created concomitant with the qualifying period show that he or she is able to return to work.** [Emphasis in the original.]

The carrier correctly points out that this is a misstatement of the rule. That portion of Rule 130.102(d)(3) states "and no other records show that the injured employee is able to return to work." There is no requirement that the records be "created concomitant with the qualifying period." The Appeals Panel has held that the time frame in which the records were made are a factor that the hearing officer could consider and the closer to the qualifying period the records are, presumably, the more probative they may be, but there is no requirement they be "created concomitant." Texas Workers' Compensation Commission Appeal No. 961403, decided August 30, 1996 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 000096, decided February 29, 2000. In this case that point is irrelevant in that the "other record" that the carrier relies on was created during the first quarter qualifying period and therefore was "created concomitant" with the qualifying period.

Of greater concern, and the reason for our remand, is the hearing officer's comment:

> Although it is my feeling that the Claimant could work in a sedentary capacity, without evidence to support my inclination, I will not determine that the Claimant is not entitled to [SIBs] for the compensable quarters at issue. I anticipate that in the next proceeding, the Carrier will be better equipped to come forward with evidence to discredit at least one element of the Claimant's *prima facie* case that he is totally unable to work because of the impairment from his compensable injury.

The carrier argues that the hearing officer improperly "shifted the burden to the carrier to rebut a presumption of entitlement." We agree. We read that comment as saying the hearing officer found that the claimant had the ability to "work in a sedentary capacity" but because the carrier had not presented evidence "to discredit at least one element of the Claimant's *prima facie* case" the hearing officer found for the claimant. We point out again, as we do in nearly all decisions, that the claimant has the burden to prove the entitlement to benefits that he or she seeks. The carrier can choose to present no evidence and the claimant must still prove his or her case. As we noted earlier, the claimant has the burden of proof to establish all three elements of Rule 130.102(d)(3) or (4), as applicable, and the carrier is not required to prove that the claimant can work. The burden is not on the carrier to prove, through private investigators or otherwise, that the claimant has an ability to work at any certain level. In this case, we view the hearing officer's comment, quoted above, to mean that the claimant failed to prove to the hearing officer's satisfaction that he had a total inability to work in any capacity, and that her finding for the claimant was premised on the carrier's lack of evidence that the claimant had an ability to work (i.e., discredit the claimant's "*prima facie*" case).

We remand this case for the hearing officer to apply the proper standard of proof and to specifically address the April 1999 Physical Capacity Checklist.

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge