APPEAL NO. 001575

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 May 15, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second quarter, from January 31, 2000, through April 30, 2000. The claimant appealed the findings that the claimant had some ability to work and did not make a good faith effort to obtain employment commensurate with her ability to work as well as the adverse determination that the claimant is not entitled to SIBs for the second quarter. As grounds for appeal, the claimant asserted that the hearing officer erred in the standard he used in making his decision as to whether the claimant had any ability to work. The respondent (carrier) responded that the hearing officer did not misapply the law in making his findings of fact and urged that the hearing officer's decision and order should be affirmed. The hearing officer's finding of fact regarding direct result, not having been appealed, has become final. Section 410.169.

DECISION

Affirmed.

The claimant testified that she worked as a forklift driver and packer for employer and sustained an injury to her lower back in _____ while picking up heavy boxes at work. As a result of her back injury she underwent a two-stage 360 fusion decompression using hardware with a bone graft. The claimant stated that during the filing period for the second quarter of SIBs, she had no ability to work because she had muscle spasms and pain in her lower back radiating into her legs and had problems sitting and standing which required her to use pain medication to ease her pain. Because of her pain, a surgical procedure was performed on April 7, 2000, to remove the hardware.

The claimant acknowledged that she underwent a functional capacity evaluation (FCE) in September 1999, performed by Dr. S, which she claimed was terminated because of an abnormal increase in her heart rate. She stated the test was never completed. The claimant offered a copy of a complaint she made against Dr. S, which she sent to the Texas State Board of Medical Examiners, wherein she alleged that Dr. S did not properly examine her.

Medical records from the claimant's treating doctor, Dr. V, begin on August 10, 1999, and reflect that the claimant had pain in her sacral and lumbar areas and had been undergoing physical therapy. Dr. V discusses that he prescribed pain medication and considered sending the claimant to a pain management program and/or for hardware removal in the future. By letter dated October 18, 1999, Dr. V wrote that "my feeling is that the patient is totally disabled and unable to return to work" after providing a summary of the claimant's treatment over the prior three months. He stated that the claimant was taking large amounts of hydrocodone for pain control and needed to have the hardware removed. The claimant also offered a form document dated January 28, 2000, in which Dr. V

checked the box marked "please excuse from work" and entered the statement "patient will be off work until all required exams have been completed and patient has returned to our office for re-evaluation." Another status report dated February 29, 2000, from Dr. V reflects that surgery had been approved to remove the hardware and he disagreed with the FCE performed by Dr. S because the claimant was taking pain medication on a daily basis and needed surgery. He wrote "she certainly is not a candidate to return to any work at this time."

The carrier offered a medical narrative and a copy of an FCE performed by Dr. S on September 7, 1999, in which he found that the claimant was capable of working full time in a light/medium-duty capacity with the ability to lift up to 35 pounds occasionally and up to 15 pounds frequently with the support of a back belt. In his narrative, Dr. S discussed the claimant's medical history and treatment and noted the surgery in 1996 and that the claimant had pain in the sacral region but no other complaints to other body areas. During examination, Dr. S found the claimant's low back soft and supple with negative midline tenderness and negative iliosacral provocation. There was no evidence of muscle wasting or atrophy and the claimant walked with a normal gait. He found strength testing to be normal with full resistance.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) provides:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> * * * *
>
> (3) 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[.]

Rule 130.102(d)(3) is the designation for the rule in effect at the time of the qualifying period in question with an effective date of January 31, 1999. Current revisions to Rule 130.102 (effective November 28, 1999) have redesignated the pertinent provision as Rule 130.102(d)(4) with no substantive modifications. The Appeals Panel has stated that all three prongs of Rule 130.102(d)(3) must be satisfied. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999.

The hearing officer did not make a finding of fact on each of the three criteria in Rule 130.102(d)(3), but did make a finding of fact that during the qualifying period the claimant had some ability to work. We do not find that the hearing officer erred in adhering to the requirements of Rule 130.102(d)(3). The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there

are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The record does contain an FCE which states that the claimant can work at a light to medium capacity. The hearing officer's findings of fact that during the qualifying period the claimant had some ability to work and did not attempt in good faith to obtain employment commensurate with her ability to work and his conclusion of law that the claimant is not entitled to SIBs for the second quarter are not 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We affirm the decision and order of the hearing officer.

Kathleen C. Decker
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

CONCURRING OPINION:

I agree with the majority that the decision of the hearing officer is affirmable. The determination of whether or not a report shows a claimant had some ability to work is a factual question. Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. In the present case, the hearing officer apparently believed that Dr. S report showed an ability to work. I would defer to the hearing officer as the fact finder in this regard. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

I remain uncertain what is meant by the term "three prongs" of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) [formerly Rule 130.102(d)(3)], even though this language continues to appear in Appeals Panel decisions.

Clearly, proof of an inability to work requires proof of the requirements of Rule 130.102(d)(4). I do not believe that separate findings are required in regard to each element of these requirements. Nor do I believe that the fact finder is limited from looking at all the medical evidence in determining whether or not these requirements are met. I believe that the fact finder may consider the medical evidence indicating an inability to work in evaluating whether or not a record shows an ability to work. The mere existence of a record stating a claimant has an ability to work does not establish this as a fact. As the claimant points out in this appeal, if this were the case, meeting the requirements of Rule 130.102(d)(4) would be nearly impossible as doubtless a record could be obtained from some source in virtually any case stating that a claimant has some ability to work, whether or not such record is factually accurate. I believe the factual determination of whether or not a claimant has an ability to work must be made by the hearing officer as the fact finder based upon all the evidence.

Gary L. Kilgore
Appeals Judge