APPEAL NO. 001657

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 June 15, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second compensable quarter. The claimant appealed, asserting that certain objected-to documents offered by the respondent (carrier) should not have been admitted and that the hearing officer's decision on entitlement to SIBs is against the great weight and preponderance of the evidence and should be reversed. The claimant requests that we render a decision in his favor. The appeals file does not contain a response from the carrier.

DECISION

Affirmed in part and reversed and rendered in part.

Initially, we note that the hearing officer was requested to, and did, take official notice of the record transcript of a prior CCH involving this claimant and the first quarter of SIBs. We further note that the decision in that case was appealed to the Appeals Panel and resulted in Texas Workers' Compensation Commission Appeal No. 000868, decided June 7, 2000. The claimant sustained a compensable injury on _____, when he fell 10 to 12 feet off a drilling rig. The parties stipulated that the claimant sustained a compensable injury to his neck and low back on _____; that the claimant has a 16% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the second quarter was from December 3, 1999, to March 2, 2000. The claimant has not had surgery for his compensable injury and testified that during the qualifying period there were some days when he could not get out of bed.

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 claimant proceeds on a total inability to work theory. The standard of what constitutes a good faith effort to obtain employment was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) as amended effective November 28, 1999. 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)(4), the version then in effect. 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." We have held that hearing officers should make findings of fact on all elements of the new SIBs rule on no ability to work. Appeal No. 000868, *supra*.

The claimant's testimony and the medical reports are summarized in Appeal No. 000868 and are identical, or substantially similar, to the reports submitted in this case. We note that there are no narrative reports that specifically explain how the injury causes a total inability to work and that the medical evidence of an inability to work consists of the word "no" on Specific and Subsequent Medical Report (TWCC-64) forms in the blocks for "Return to Limited Type of Work" and "Return to Full-time Work" plus the claimant's testimony that he cannot work. Appeal No. 000868 notes that in "a March 1998 TWCC-64, Dr. P [Dr. P] . . . noted that the claimant could return to a limited type of work but not to full time work." That report is not in the record here as Dr. P's TWCC-64 reports skip from August 18, 1997, to May 26, 1998. In fact, Dr. P's most recent report in evidence is dated October 19, 1999, and in the narrative he states:

> The patient continues with pain to the lumbar spine with radiculopathy. Positive findings compatible with compression of the nerve root of the lumbar spine. Positive straight leg. Deep tendon reflexes decreased bilaterally. Recommendation: MRI of the lumbar spine secondary to clinical and objective findings. Return after MRI for findings and further recommendations.

The carrier's evidence consists of an unsigned investigative report dated April 6, 2000 (well after the qualifying period), and a signed investigative report dated March 2, 2000, admitted over the claimant's objection. These reports suggest that the claimant may have been employed as a trucker in 1998. The claimant denies that was so and the reports were submitted only to question the claimant's credibility.

The hearing officer makes the following appealed findings:

FINDINGS OF FACT

14. Claimant did not present a medical opinion from the qualifying period that indicated that Claimant was totally unable to work.

15. The medical narratives that detail Claimant's symptoms were intended to support requests for further diagnostic testing.

16. The medical evidence does not support a total inability to work during the qualifying period.

17. The preponderance of the credible evidence did not establish that Claimant possessed a total inability to work during the qualifying period.

18. The evidence did not establish that during the qualifying period for the 2nd quarter, Claimant was unable to return to his former employment due to his impairment.

19. The evidence did not establish that during the qualifying period for the 2nd quarter, any inability to obtain employment was a direct result of Claimant's impairment.

We read Findings of Fact Nos. 14, 15, 16, and 17 as essentially finding that the claimant has failed to prove that he "has been unable to perform any type of work in any capacity" and that there is no "narrative report from a doctor which specifically explains how the injury causes a total inability to work." The hearing officer's Finding of Fact No. 18 states that the evidence does not establish that the claimant "was unable to return to his former employment due to his impairment." There is no requirement for a claimant to establish he cannot return to his former employment. The standard in total inability to work cases is an inability "to perform any type of work in any capacity." We consider that finding superfluous in light of other findings applying the standard enunciated in Rule 130.102(d)(4).

Finding of Fact No. 19 uses incorrect, or at least confusing language, and we reverse it as being unsupported by the evidence (there was no evidence that the claimant's unemployment was due to anything other than impairment from the compensable injury) and render a new finding that the claimant's unemployment was a direct result of the impairment. The reversal of this specific finding does not mandate a change in the decision in favor of the claimant.

The claimant appeals the admission of the carrier's investigative reports based on the objection of "lack of relevance, lack of authentication and hearsay within hearsay." The claimant is correct that we review the admission and exclusion of evidence on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 941414, decided July 6, 1994. The same objection was raised in the prior CCH and in Appeal No. 000868, *supra*, we wrote:

> Claimant contends that the hearing officer committed reversible error in admitting a January 1999 investigation report into evidence over his objections as to relevancy, lack of authentication, and hearsay within hearsay. The report is signed by a manager of the investigation company. The investigation report states that several of claimant's neighbors, who are named in the report, told the investigator that claimant had been doing construction work before and at the time of the interviews in December 1998 and January 1999. Claimant testified that he has not worked since his injury

and that he does not talk to the neighbors who gave interviews. Section 410.165(a) provides, in part, that conformity to legal rules of evidence is not necessary. We conclude that claimant has not shown reversible error in the admittance of the investigation report.

We decline to change our position.

The claimant also cites numerous pre-1999 Appeals Panel decisions for various propositions, many of which have been overcome or superceded by the adoption of Rule 130.102(d), as amended. The claimant cites authority for the proposition that a claimant "need only establish by a preponderance of the evidence that he is unable to work and this should be supported by medical evidence." *See* the requirements of Rule 130.102(d)(4) regarding what needs to be established.

Accordingly, we reverse Finding of Fact No. 19 and render a finding that the claimant's unemployment was a direct result of his impairment from the compensable injury. We otherwise affirm the hearing officer's findings as referenced and that the claimant failed to establish the required good faith job search and the decision that the carrier is not liable for SIBs for the second compensable quarter.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Alan C. Ernst
Appeals Judge