APPEAL NO. 001723

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 July 6, 2000. With regard to the only issue before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first compensable quarter.

The appellant (carrier) appeals, contending that despite the claimant's one or two job contacts, the claimant was proceeding on a total inability to work in any capacity theory and as such he had not complied with the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) and that the hearing officer misapplied Rule 130.102(d). The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

Reversed and remanded.

The claimant was employed as a laborer and on _____, developed low back pain which radiated into his buttocks and right leg. There is no stipulation to the fact, but it appears undisputed that the claimant sustained a compensable low back injury. The parties stipulated that the claimant has a 16% impairment rating (IR) and that impairment income benefits (IIBs) have not been commuted. Dr. G is the treating doctor, Dr. H is the designated doctor, and Dr. B is a peer review doctor. Again, there is no stipulation but the parties appear to agree that the qualifying period for the first quarter is from December 4, 1999, through March 4, 2000. The claimant was treated conservatively and although Dr. G has recommended spinal surgery, the claimant has refused surgery, hoping his condition gets better. An MRI indicates bulging discs at L3-4 and L4-5 with degenerative findings at L5-S1. The claimant proceeds principally on a total inability to work in any capacity theory although it appears that he may have made two job contacts during the qualifying period and was given two additional job leads which the claimant said he would be unable to perform.

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 principally 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. 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). 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)(4). Texas Workers' Compensation Commission Appeal No. 001487, decided August 10, 2000.

In a chart note dated July 28, 1999, Dr. G states that the claimant continues to have back and leg pain, that the claimant "has difficulty standing and walking over 200 feet" and that he "remains off work duties." A similar note dated October 27, 1999, notes the same complaints and states the claimant "remains disabled," as does a chart note dated February 23, 2000. In a "To Whom It May Concern" report dated June 13, 2000, Dr. G writes:

> Please be advised that [the claimant] remains under medical treatment for his lumbar stenosis at L4-5 and L5-S1. [The claimant] continues to have severe low back pain with radiculopathy, as well as neurologic claudication due to his stenosis. [The claimant] has been unable to return to a work status due to his above delineated condition. He is unable to seek or obtain gainful employment. He is to be considered totally and medically disabled.
>
> [The claimant] has been disabled from December 5, 1999 to the present. [The claimant] is unable to stand even for a short period of time. He is unable to sit longer than 10 minutes at any given time. Again, [the claimant] is medically and totally disabled due to his above delineated condition.

Dr. H, the designated doctor, in a report dated August 12, 1999, commented on the claimant's ability to work, stating:

> [The claimant] is limited in the type of work that he can perform. He is unable to lift greater than five pounds, push or pull greater than 10-15 pounds. He may be able to tolerate a sedentary type of position. However, he will require frequent breaks to move and stretch his back.

A functional capacity evaluation (FCE) was performed on January 10, 2000, which measured the claimant's physical abilities including an ability to stand or walk "50% of work day" or four hours. Dr. B, in a report dated May 30, 2000, commented on the FCE, stating:

> [The claimant] may not be able to return to his prior duties, however, there is a lack of objective data to preclude this gentleman from returning to a sedentary-type job. His restrictions listed include his ability to lift up to 6 pounds and carry 5 pounds, sit for 30 minutes at a time and stand for 22 minutes at a time based on this assessment.

Dr. B stated that for "more specific restrictions" he would need "an independent examination." Dr. G has not commented one way or the other regarding the FCE.

The carrier also retained a vocational counselor but correspondence in the record indicates that the claimant, on several occasions, failed to return telephone calls or requests for written information. The counselor sent the claimant job leads (apparently around the first of January 2000) for a census worker, school crossing guard, and lunchroom monitor. The claimant apparently followed up on the census worker job on February 10, 2000, but determined that it involved too much walking and standing. The claimant made no effort to contact anyone about the school crossing guard or lunchroom monitor because he thought it would involve too much standing and walking. The claimant may have contacted a septic tank company on January 28, 2000, but that job was listed as "moderate/heavy" labor.

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)(4), 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.

As we pointed out in Appeal No. 001487, *supra*, Rule 130.102(d)(4) 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 is 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 somewhat irrelevant because the FCE was performed during the applicable qualifying period and therefore was "created concomitant" with the first quarter qualifying period. However, both Dr. H's report well before the qualifying period and Dr. B's report after the qualifying period may not have been considered because of the erroneous notion that the record be created concomitant with the qualifying period.

The hearing officer, in her recitation of the law regarding SIBs, comments that "[v]ery few injured workers will fall into the category [total inability to work in any capacity]" and that "most injured workers will be able to work in some capacity . . . ." The hearing officer then goes on to make the following finding, which is the basis of our remand:

FINDING OF FACT

> 2. The medical records of [Dr. G], M.D. show that the Claimant was unable to work during the qualifying period for the first (1st) compensable quarter, and no other medical records of doctors who have examined the Claimant have stated that he can work.

First, Rule 130.102(d)(4), which has been quoted several times herein, only specifies "no other records show that the injured employee is able to return to work." There is no requirement that it be a "medical record" and in fact surveillance videotapes have been used as such other records. Second, the record need not be by a doctor who has examined the claimant. While the hearing officer may consider that as a factor that is not a requirement of Rule 130.102(d)(4) and the carrier argues that was not a basis for disregarding Dr. B's report. We agree and it appears the hearing officer has engrafted new requirements to Rule 130.102(d)(4) that the other records be medical records of doctors that have examined the claimant. Consequently, we remand the case back for the hearing officer to apply Rule 130.102(d)(4) as written based on the existing record, without requiring other records be "created concomitant with the qualifying period."

Upon remand, if the hearing officer finds that the claimant is entitled to SIBs, the hearing officer is to make specific findings regarding which report or reports "specifically explain how the injury causes a total inability to work" and to specifically address Dr. H's and Dr. B's reports as other records.

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:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I dissent. The hearing officer provides a thoughtful three-paged explication relating the law to the facts in this case. The majority seizes upon her use of the word "concomitant" to reach the conclusion that the hearing officer does not understand the proper legal standard. I view her use of this term to mean, in the context in which she uses it, that there be some reasonable temporal relationship between the medical evidence indicating an ability to work and the filing period. I think such a temporal relationship is a factor the hearing officer may consider when making the factual determination as to whether a record shows that the claimant has an ability to work. I do not think the hearing officer was stating that the record showing an ability to work must have been created during the qualifying period itself. I do not join my colleagues in presuming the hearing officer does not understand the law. I think the majority's reversal and remand has much more to do with reaching a desired result in this case than in insuring proper legal standards are followed. I personally would suggest a closer adherence to our oft-stated standard of appellate review of hearing officers' factual determinations.

I also disassociate myself from the gratuitous *dicta* found in the majority decision. For instance, I do not understand the need to express the opinion that a surveillance film is a record for purposes of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) when there is no such film in evidence in the present case. I think the majority is in error in stating that the hearing officer may not base a finding that a record does not show a claimant has ability to work on the fact that the author of the report never examined the claimant. To state as a matter of law that a hearing officer may not do this has no basis

in the 1989 Act or in the rules of the Texas Workers' Compensation Commission. It deprives the fact finder of an ability to make a factual judgment on the credibility of evidence based upon what the majority appears to recognize is a valid factor in making this determination, and which I think clearly is one. To say something is a factor to consider, but somehow may not be controlling, just makes no sense to me.

It appears to me that it is the majority that is engrafting new requirements onto Rule 130.102(d)(4) which would create requirements that are impossible to meet. I believe that there is sufficient evidence in the record to support the findings and decision of the hearing officer, and, applying the proper standard of appellate review, I would affirm her decision.

Gary L. Kilgore
Appeals Judge