APPEAL NO. 002092

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 August 15, 2000. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the third compensable quarter because he had no ability to work.

The appellant (carrier) appeals, contending that the treating doctor's reports "are conclusory" and do not explain why the claimant is totally unable to work. The carrier also contends that a functional capacity evaluation (FCE) and doctor's report, well after the qualifying period, shows some ability to work during the qualifying period. 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

Affirmed.

The claimant was employed as a brick mason and testified that he sustained a low back injury on _____, when a scaffold he was working on collapsed and he fell some five feet or so to the ground. The claimant had had a number of lumbar surgeries prior to the compensable injury. The claimant's testimony and the medical records reflect that he had a "fifth lumbar laminectomy done on 1-30-97" and subsequently underwent a sixth procedure in the form of a "360 degree lumbar fusion . . . on 11-8-97" due to the compensable injury. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has an 18% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; and that the qualifying period was from January 27 to April 27, 2000.

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 in favor of the claimant on direct result has not been appealed and will not be addressed further.

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, as amended on November 28, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)). Rule 130.102(d)(4) provides that the statutory good faith requirement may be met if the employee:

(4) 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[.]

The claimant's treating doctor is Dr. L. In September 1999 (prior to the qualifying period), Dr. L writes:

> [The claimant] is unable to return to work at this time and will need extensive physical therapy [PT] and work hardening if he is to return to the work force. He has debilitating severe low back pain status post lumbar laminectomy with 360 degree lumbar fusion done 11-8-97. He also suffers with depression secondary to his chronic low back pain. Specific limitations: The patient should not be lifting. He should not be driving over 10 miles. No prolonged standing, sitting, walking, bending or pushing.

The carrier argues this report shows some ability to work because it gives restrictions. The claimant argues that this report shows an inability to work and the restrictions are for activities of daily living. The interpretation of the report was a factual determination for the hearing officer to resolve. Dr. L, in a report dated January 31, 2000, expresses frustration in not getting PT approved by the carrier and states:

> I would like to be on the record that as long as the patient is not getting the [PT] and subsequently work hardening program, I cannot release him to return to any type of work.

In a follow-up report dated April 28, 2000, Dr. L again recites his frustration, and explains how the claimant's back pain precludes his return to work and need for further treatment, stating:

> Again, I would like it to be on the record that as long as the patient did not get [PT] and work hardening program, that he will not be released to any type of work. . . . If the insurance company would have stopped interfering with my proposed treatment plans, [the claimant] would have been back to work already since the proposed treatment would only require approximately three months of time. As it turns out, his return to work is indefinitely postponed due to his insurance company refusing to approve for [sic] [PT] and work hardening program as well as pain management.

The carrier referred the claimant to Dr. H for a required medical examination. Dr. H examined the claimant on June 6, 2000 (almost one and one-half months after the end of the qualifying period), and recommended an FCE which was performed on June 23, 2000. Dr. H, in a report dated July 18, 2000, commented on the results of the FCE. The carrier relies on these records and reports as showing the claimant "is able to return to

work." The claimant contends that they should not be considered as being after the qualifying period.

The hearing officer refers to Dr. H's reports and comments that "[t]here is no persuasive medical evidence that Claimant had any ability to work during the Qualifying Period"; that Dr. L makes it "very clear" that the claimant needs additional treatment; and that Dr. L "has not released Claimant to return to work under any conditions." The carrier responds by arguing that the claimant said that "his condition during the qualifying period had not substantially changed." What the claimant actually said was:

> Q. Yes, sir. From the middle of 1999, has your condition pretty much been the same as it is now?
> A. That's really hard to say. I do think I'm dealing with it better.
>
> Q. Okay.
> A. I'm not too sure that it's physically better.

We hold that the hearing officer's findings are sufficiently supported by the evidence and that the hearing officer's findings, interpretations and determinations are not so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge