APPEAL NO. 002261

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 August 31, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the sixth compensable quarter.

The claimant appealed, contending that his treating doctor had told him not to return to work; that the examination by the respondent's (carrier) doctor had been in September 1999; and that he needs additional surgery, which had been denied, or delayed, by the carrier. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The appeal file does not contain a response from the carrier.

DECISION

Affirmed.

The claimant had been employed as a lab technician/phlebotomist by the employer when he was involved in a compensable motor vehicle accident on _____. The parties stipulated that the claimant sustained a compensable injury to his neck, right shoulder, and low back on _____; that the claimant reached statutory maximum medical improvement with a 20% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; and that the qualifying period for the sixth quarter began on March 8, 2000, and ended on June 6, 2000. (The claimant appealed the stipulation of when the sixth quarter began but apparently confused the sixth quarter with the qualifying period for the sixth quarter.)

Sections 408.142(a) and 408.143, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) 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 alleges a total inability to work. 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 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 was initially treated by Dr. G, who performed spinal surgery in the form of an L5-S1 laminectomy with fusion on September 11, 1997. An infection developed and the claimant had additional surgery in 1997. The claimant moved out of state in February 1999 and has been under the care of Dr. Y, the claimant's current treating doctor. In a number of progress notes in evidence, Dr. Y discusses the claimant's medical condition, including a recommendation for additional surgery, without referencing the claimant's ability to work. In a note dated June 21, 1999, Dr. Y comments that the claimant "needs to be extremely careful." In a letter response dated November 29, 1999, to the carrier, Dr. Y remarks "I do not recommend that [the claimant] return to work until the issue of his spine has been resolved." In another note dated June 28, 2000, Dr. Y states that the claimant "is currently disabled because of his cervical spine problem." In another letter dated August 7, 2000, Dr. Y writes:

> I cannot recommend or clear [the claimant] to return to any sort of work because of the significant stenosis of his cervical spinal cord and nerve roots at several levels. [The claimant] has surgery pending to decompress his spinal cord and nerve roots.

Evidence to the contrary is in a report dated September 30, 1999, from Dr. K, the carrier's required medical examination doctor. After reviewing the claimant's medical history, diagnostic studies, and results of his examination, Dr. K concludes:

> With regard to this patient's work status, he indicates that he is a lab technician, but I have not reviewed any specific work status. It is difficult to say if he is capable of returning to his regular duty status. I would like to review the work description before commenting on that aspect. He is at this time, however, capable of some type of light duty status which would restrict him from overhead lifting and would have a lifting limitation overall of 15 pounds. He would have to have a restriction against repetitive bending.

The hearing officer reviewed the medical reports in some detail in her Statement of the Evidence and commented:

> Although [Dr. Y] indicates in his last letter [the August 7, 2000, letter] that the Claimant is pending surgery, the evidence is unclear if surgery has been scheduled or even approved. The previously discussed evidence does not contain a narrative explaining how the injury causes total inability to work for the period beginning on March 8, 2000, and ending on June 6, 2000. Further, the Carrier provided evidence that the Claimant had some ability to work through the medical report of [Dr. K], dated September 30, 1999, in which he wrote, "He (claimant) is at this time, however, capable of some type

> of light duty status which would restrict him from overhead lifting and would have a lifting limitation overall of 15 pounds. He would have a restriction against repetitive bending." Although [Dr. K's] opinion was given without the benefit of the myelogram results it is clear from his report that he understands a myelogram may indicate more levels of the cervical spine are affected. Yet despite this he feels the Claimant is capable of performing in a light duty capacity. Therefore, based on the evidence the Claimant has failed to meet the standard set forth by Rule 130.102(d)(3) [sic, 4], and has failed to establish his alleged total inability to work in any capacity from March 8, 2000 through June 6, 2000.

The claimant's appeal stresses the claimant's perceived inability to work, that Dr. Y has told him not to return to work (there is no evidence that Dr. Y considered part-time or light-duty work), and that he was following the advice of his doctor. The hearing officer clearly applied the applicable rule, finding that Dr. Y's report (or reports) did not constitute a narrative report which specifically explains how the claimant's injury causes a total inability to work and finding that Dr. K's report, while being some six months prior to the qualifying period, was a record which showed that the claimant was able to work in a light-duty capacity. There was no testimony or evidence presented at the CCH regarding whether the claimant had received SIBs for the prior quarters.

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:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge