

APPEAL NO. 002428

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 September 26, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 20th quarter from June 1 through August 30, 2000. The appellant (carrier) appealed, contending that the determination was against the great weight and preponderance of the evidence. The carrier also contended that the hearing officer erred in refusing to add the issue of extent of injury, asserting that an intervening injury was the cause of the claimant's unemployment and inability to work during the first 10 days of the qualifying period. The appeals file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury to the neck, low back and right wrist on _____; that he reached maximum medical improvement on August 24, 1994, with an 18% impairment rating (IR); and that impairment income benefits (IIBs) were not commuted. The parties also stipulated that the qualifying period for the 20th SIBs quarter began on February 18 and ended on May 18, 2000.

The claimant testified that he sustained an injury to his neck, right wrist and lower back and had returned to work on September 13, 2000, under the auspices of the Texas Rehabilitation Commission (TRC) working for (company). At the time of injury the claimant worked as a truck driver and swamper (truck driver assistant who loads and unloads cargo). Medical records reflect that the claimant sustained a fractured wrist, and, when questioned by the hearing officer, both parties represented that the injury included a back strain which did not require surgery.

The claimant explained that prior to the beginning date of the qualifying period, he was hospitalized from February 7 through February 12, 2000, because, on _____, "I hurt my back once again. I -- I think I -- my cane fell and I bent down to get it and -- the groaning, you could hear my bones cracking, popping -- so I went to the hospital That's why I wound up at the hospital, because I hurt my back." At the hospital he was diagnosed with a herniated disc. The claimant stated that upon discharge from the hospital, "I had a lot of pain when I left the hospital. I couldn't move. So I couldn't look for a job for two weeks, there was a lot of pain." The claimant asserted that he reinitiated his search for work on February 29, 2000, and admitted that prior to the incident on _____, he was able to look for work.

The claimant testified that he had a functional capacity evaluation (FCE) on September 21, 1999, which demonstrated that he had a sedentary capacity to work. He agreed with Dr. G (the claimant's treating doctor) letter of February 25, 2000, that he could not do overhead lifting, prolonged standing, walking or sitting, and stated that he had no

other restrictions from February 18 through May 18, 2000. In response to a question as to whether he had a sedentary ability to work, the claimant replied, “[w]ell, that’s what my doctor says. What I am doing now at work is fine. They treat me well. I don’t do anything -- I don’t do any heavy work.”

The claimant contacted the TRC on January 10, 2000, and May 23, 2000, then began a computer training course in June 2000 (after the conclusion of the qualifying period) which was completed as of the date of the CCH. The claimant testified that Ms. T sent him job leads during the qualifying period but he did not use these jobs leads because in his opinion they did not conform to his restrictions and he might get hurt. The claimant testified that otherwise he made 31 job contacts trying to find work and filled out applications or talked to the employer at all the businesses where he looked for work. He admitted that he could not do the types of jobs that he applied for but stated that “I was going to try wherever I could.”

The claimant related that he was registered with the Texas Workforce Commission since 1994 or 1995 but was unable to provide dates as to when he looked for jobs using this resource and denied that he refused to cooperate with the carrier’s vocational specialist, Ms. T, stating that he could never get in contact with her and that Ms. T was sending him jobs outside his restrictions.

Ms. T testified that when she was initially given the claimant’s file in 1998 he was cooperative and would take her calls and tell her that he was looking for work but that no one would accept his applications at that time. She stated the claimant told her that he was looking at industrial sites, but that the work was too heavy. Ms. T explained that she and the claimant met to determine what kind of jobs he could do which would be light enough for him to be able to perform because he was having difficulty in standing, walking, lifting, having his arms over his head, pushing and pulling. The claimant told Ms. T that he could drive, but not for long periods of time because he had problems with prolonged periods of sitting. Ms. T explained that despite cooperation from the claimant, Dr. G “was not very responsive at that time, only saying no he can’t go back to work. So it was mostly [the claimant’s] information that allowed me to take a look.”

Ms. T stated that during the applicable qualifying period she was unable to contact the claimant and he did not return or respond to any of her correspondence. Ms. T stated that she spoke with several of the potential employers listed on the claimant’s SIBs application and found out that they were interested, but that the claimant never followed up with the inquiries. Ms. T stated that after she initially met with the claimant in 1998 she was under the assumption that he was not fluent in English and it was difficult to find him jobs, but she later found out from the TRC that he could read and write in English and had been accepted to a computer training course. Ms. T testified that had she known of his proficiency in English, more job leads, other than general labor ones which she had sent to him, would have been available to the claimant as most jobs required the ability to speak English.

The parties offered various medical records to establish the claimant's capacity for work during the qualifying period. The designated doctor's report from Dr. H dated February 28, 1995, reflects the claimant was assigned an impairment for abnormal range of motion of the cervical, thoracic and lumbar spine as well as for the right wrist. No specific disorder impairment was assessed from Table 49 (II) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, indicating any intervertebral disc or other soft tissue lesions in the spine.

An FCE completed on September 21, 1999, ordered by Dr. G was performed by Mr. M, a physical therapist. Attached to the FCE was a letter from Mr. M reflecting that he believed the claimant gave unreliable efforts that were diminished or biased by disability behaviors or active choice to portray efforts that were less than true. He stated that the claimant exhibited symptom magnification on his right wrist and hand, compromising the accuracy of the examination. Based on these efforts the claimant was determined to be able to work at the sedentary physical-demand level. The FCE contained an entry that a radiological consultation report reflected that a three-phase bone scan of the lumbar spine indicated posterior spur formation at L5-S1.

At the carrier's request Dr. K performed another FCE on December 7, 1999, took a history from the claimant and reviewed medical records available to him at the time of the examination. He was asked to review the FCE of September 21, 1999, and to provide an opinion regarding the claimant's work status. The claimant told Dr. K that he fell off a truck fracturing his wrist and was in a cast for about five months. He also told Dr. K that an MRI was performed and that he had two herniated discs but that no surgery was performed. Dr. K reviewed an x-ray of the wrist indicating that the claimant had mild degenerative arthritis.

On examination, Dr. K noted a negative straight leg raise on sitting at 45E bilaterally and normal motor function; that the claimant gave inadequate grip examination of the forearm; that there was no significant atrophy; that sensory evaluation was totally inconsistent; that the claimant had normal muscle tone; that upon examination of the back there was marked limitation on shifting and that the claimant showed poor effort with jumping everywhere during the evaluation; and that the claimant could not walk on his heels and toes without difficulty. Dr. K wrote that during the examination there was a significant amount of excess verbalization, submaximal effort, and generalized overreaction. Dr. K reviewed the September 21, 1999, FCE noting that the claimant was currently taking Hydrocodone; that he was able to sit for 20 minutes, stand for about 40 minutes, walk with a cane about one mile at a slow pace and could lift 10 to 15 pounds. No further treatment was recommended.

A letter dated December 15, 1999, from Dr. G states that he was treating the claimant for back, wrist and shoulder injuries and that the claimant was "unable to return to work. He is unable to do any prolonged sitting, standing, lifting, bending, repetitive lifting, or excessive use of his hands." Dr. G did not address the September 1, 1999, FCE

which he had ordered or Dr. K's report from December 7, 1999. On January 5, 2000, Dr. G wrote that the claimant was "unable to lift any weight over 20 pounds, and is to do no overhead lifting, and no prolonged standing, walking or sitting. He is unable to climb stairs or safely drive a car with other employees in the vehicle and was taking Lortab which alters the decision making process." Dr. K wrote that the claimant was unable to work until further notice. On February 25, 2000, Dr. G wrote another letter containing the same restrictions as stated in the January 5, 2000, letter and that the claimant was admitted to the hospital on February 7, 2000, for treatment of spinal stenosis and disc protrusions. Dr. K wrote that the claimant was unable to work until further notice.

On February 7, 2000, the claimant was admitted to (hospital) for complaints of low back pain. Per a discharge record from Dr. G, the claimant underwent a lumbar myelogram and CT scan which revealed a right paracentral disc herniation at L5-S1 with impression on the thecal sac and an extruded disc fragment posteriorly on the right. The possibility of surgery was discussed with the claimant. The radiological report from Dr. L included a finding of a mild diffuse disc bulge at L4-L5 without evidence for significant spinal canal stenosis as well as the disc herniation at L5-S1.

The Texas Workers' Compensation Commission (Commission) wrote a letter to Dr. G on July 3, 2000, requesting that Dr. G provide a medical opinion as to the claimant's work status during the qualifying period. The ombudsman wrote that the claimant "conveyed to us that during the month of February he was hospitalized for his compensable injury" and that "when he was released he had a difficult time getting around and was unable to walk because of the myelogram which he had undergone while in the hospital." An undated letter from Dr. G, apparently written in response to a letter from the Commission, contains a reply from Dr. G that the claimant was unable to work due to a work-related injury; that as of February 7, 2000, the claimant was unable to seek gainful employment due to the severity of his condition; and that the claimant was hospitalized due to severe lower back pain caused by a herniated disc at L5-S1 and an extruded disc fragment. Dr. G wrote that "there was no way this man can try to look for work due to his condition and the fact he is on narcotic pain medication. . . ." The letter from Dr. G did not contain a discussion of the incident on _____, that the claimant testified to at the CCH.

Eligibility criteria for SIBs are set forth in Sections 408.142 and 408.143. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)) provides that an injured employee who has an IR of at least 15% and has not commuted any IIBs is eligible to receive SIBs if, during the qualifying period, the employee has: (1) earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury; and (2) made a good faith effort to obtain employment commensurate with the employee's ability to work.

The hearing officer determined that during the qualifying period the claimant's unemployment was a direct result of his impairment. The Appeals Panel has on numerous occasions commented on the phrase "as a direct result of the employee's impairment" in

Sections 408.142 and 408.143 and stated that the unemployment need only be a direct and not the direct result. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. Upon review of the record submitted, we find no reversible error and find the evidence sufficient to support the determination of the hearing officer that the claimant's unemployment was a direct result of his impairment and we affirm that portion of the hearing officer's decision and order.

The standard of what constitutes a good faith effort to obtain employment in SIBs cases was specifically defined and addressed after January 31, 1999, in Rule 130.102(d) which provides in relevant part that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has:

- (4) 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; or,
- (5) provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

Rule 130.102(e) provides in part that, except as provided in subsections (d)(1), (2), (3) and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The claimant contended at the CCH that he had a total inability to work from the inception of the qualifying period on February 18, 2000, until he began looking for work on February 29, 2000, and that from this date until the end of the qualifying period on May 18, 2000, he looked for work every week which satisfied the good faith criterion of Rule 130.102(d). Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. However, the analysis and final determination must be made in conformity with the 1989 Act and Commission rules.

We have held that all elements of Rule 130.102(d)(4) must be established in order to prevail under a theory of no ability to work. The carrier contends that the hearing officer erred when she failed to add an issue as to extent of injury after the claimant testified at the CCH that he went to the hospital on February 7, 2000, because of pain he experienced when he bent over at home to pick up his cane. The carrier asserts that the claimant's inability to work, if any, was due to an intervening injury which occurred on _____, rather than from the compensable injury of _____.

The hearing officer did not err when she declined to add an issue regarding extent of injury as the inquiry is more properly made in terms of whether, under the criterion of Rule 130.102(d)(4), there was a narrative from a doctor which specifically explained how the compensable injury (emphasis added) caused a total inability to work from February 18 through February 29, 2000, and no other record showed that the claimant was able to return to work during this period of time.

The hearing officer made the following findings of fact:

- (2) Claimant was hospitalized for his low-back condition from February 7, 2000, until February 12, 2000, and as a result was unable to job search.
- (3) Claimant began his job searches within a reasonable time from his hospital release on February 29, 2000.

These findings do not conform to the requirements of Rule 130.102(d)(4) to establish no ability to work during the applicable qualifying period, specifically between February 18 and February 28, 2000. Finding of Fact No. 2 addresses a period of time before the beginning of the qualifying period. Except as otherwise provided in Rule 130.102(d)(1) through (4), there are no exceptions to the requirement that an injured worker must, in order to satisfy the good faith criterion, search every week for work commensurate with his or her ability to work. Texas Workers' Compensation Commission Appeal No. 001328, decided July 24, 2000.

It is apparent the hearing officer applied the wrong standard in determining whether the claimant made a good faith effort to obtain employment commensurate with his ability to work from February 18 through February 28, 2000. She either did not follow Rule 130.102(d)(4) or attempted to create a good cause exception to Rule 130.102(e), which the hearing officer or the Appeals Panel is not at liberty to do. Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999).

A claimant may satisfy the good faith requirement under a hybrid theory. In Texas Workers' Compensation Commission Appeal No. 001877, decided September 18, 2000, the Appeals Panel noted that a claimant could satisfy the good faith requirement by demonstrating that he or she had no ability to work for part of the qualifying period and by conducting a good faith job search in the other part of the qualifying period. However, in order to prevail, the claimant must produce evidence that established the requirements of Rule 130.102(d)(4) for the period of time that no ability to work was asserted and evidence that meets the criteria of Rule 130.102(e) for that period of time wherein a good faith job search was claimed.

In Appeals Panel No. 001877, *supra*, the Appeals Panel wrote:

We stop short of saying, as a matter of law, that a claimant cannot have some ability to work during the qualifying period, then experience a deterioration of his or her condition, documented by medical evidence as contemplated by Rule 130.102(d)(4), and be unable to work in any capacity during other periods during the qualifying period, or vice versa. While the injured employee may change status during the qualifying period, that change in status must meet the requirements of Rule 130.102 for the specific period involved.

We reverse and remand the matter back to the hearing officer to make findings consistent with Rule 130.102(d)(4) and Rule 130.102(e) for the periods of time from February 18 through February 28, 2000, and from February 29 through May 18, 2000. The hearing officer must make findings that address whether there is a narrative report from a doctor which specifically explains how the compensable injury caused a total inability to work from February 18 through February 28, 2000, and whether there were no other records which showed that the claimant was able to return to work for the same period of time. The hearing officer must also specifically address the evidence that supports these findings and provide an explanation for her determinations. No further hearing is necessary.

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.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge