APPEAL NO. 011152
FILED JULY 16, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on May 8, 2001, the hearing officer resolved the disputed issue by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter. The appellant (carrier) has requested our review, asserting that the findings of fact addressing the elements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) are against the great weight of the evidence. Claimant's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

We reverse and remand.

Carrier contends the hearing officer erred in determining that there is a narrative that explains why claimant was unable to work during the qualifying period. Carrier asserts that the hearing officer erred in determining that claimant is entitled to SIBs. The hearing officer made the following determination:

FINDINGS OF FACT

> 12. Claimant and Carrier have provided a September 13, 2000, report from Dr. R and a May 22, 2000 report from Dr. S which, read together, explain that Claimant's injury causes a total inability to work because Claimant's injury causes such intense pain that Claimant experiences nausea and vomiting which prevent him from working, and no other records show that Claimant is able to return to work.

Our concern in this case is that the hearing officer determined that two reports from two different doctors, when "read together," explain that claimant's injury causes a total inability to work. Rule 130.102(d)(4) calls for a narrative that "specifically explains how the injury causes a total inability to work." In our view, the doctor who states that there is no ability to work must also explain why the injured employee cannot work at all. Another doctor's general listing of an injured employee's physical problems and symptoms does not provide an explanation for the other doctor regarding the reason for the inability to work. While such a report might allow us to venture a guess as to why the doctor thinks the employee cannot work, this is not sufficient under the rule. Therefore, we must remand for a determination whether there is a narrative from one doctor that specifically explains how the injury causes a total inability to work. As an appellate body, we cannot make a fact finding regarding whether there is a narrative from one doctor, and the hearing officer has not yet identified such. We also remand this case for a determination whether claimant's return to work was to a position which was relatively equal to the injured employee's ability to work. Rule 130.102(d)(1). The hearing officer should permit the

parties to present argument regarding this matter. We will review the other contentions after receiving the decision on remand.

The decision and order of the hearing officer is reversed and remanded for reconsideration consistent with this decision. 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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy L. S. Barnes
Appeals Judge

CONCURRING OPINION:

I concur in the decision to remand because our prior decisions have required that the narrative report, specifically explaining how the injury causes a total inability to work, come from "a doctor." That is, we have interpreted Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) such that the fact finder is not permitted to "read together" two different reports from two different doctors to find a narrative, as the hearing officer did here. Based upon those decisions, it is necessary to remand for the hearing officer to determine if a doctor has provided a narrative that specifically explains how the injury causes a total inability to work in this instance. The hearing officer, as the fact finder, is required to make that determination, and his determination in that regard is reviewable under a sufficiency standard of review. I note also that the majority of our prior decisions have not required that the narrative be contained in a single document. Rather, the bulk of the decisions have recognized that the report addressing the inability to work can be supplemented by other reports from that doctor, by testimony, and by a report from another doctor that has been incorporated by reference.

I concur in the remand based on the doctrine of *stare decisis*; however, in the absence of our prior decisions, I would affirm the hearing officer's decision. While I acknowledge that Rule 130.102(d)(4) uses the phrase "a narrative report from a doctor," in my opinion the critical element of Rule 130.102(d)(4) is the explanation itself and I do not believe that the number of documents or the source of the documents that provide that explanation matters. In my view, our interpretation of Rule 130.102(d)(4) has resulted in

the fact finders' hands being tied in that they are not permitted to consider and weigh all of the relevant evidence admitted at the hearing in resolving the issue of entitlement to supplemental income benefits, surely an unintended consequence.

Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

The claimant testified that on _____, while working as a packer and shipper, he injured his back and neck when he lifted a large box, which was heavier than he had anticipated, and twisted his spine as he dropped the box; that he underwent lumbar spine surgery in September 1997; that a functional capacity evaluation (FCE) in December 1999 determined that he could work at light duty, but that he disagreed with that conclusion because of his pain; that Dr. S, a pain management specialist, treated his spinal pain conservatively, including medications, work hardening, and injections, but that the pain continued; that he attempted to work at a convenience store in April 2000 but could not continue because of his pain; that Dr. S referred him to Dr. R, a neurosurgeon whom he first saw on August 28, 2000; that diagnostic testing performed in October 2000 for Dr. R revealed a cervical disc herniation and Dr. R recommended cervical spine surgery; that he worked as a cashier at a convenience store for two and one-half days in October 2000 but had to quit due to his pain and to the nausea he was experiencing from pain medication; that following an evaluation for a second opinion on cervical spine surgery, as well as an FCE, Dr. O reported in December 2000 that the claimant could perform light work; and that, in January 2001, he underwent cervical spine surgery.

Although the claimant worked two and one-half days on October 8 through 10, 2000, it was his contention that he had no ability to work at all during the August 20 through November 18, 2000, qualifying period because of his pain and the effects of his pain medicine.

FINDINGS OF FACT

12. Claimant and Carrier have provided a September 13, 2000 report from [Dr. R] and a May 22, 2000 report from [Dr. S] which, read together, explain that Claimant's injury causes a total inability to work because Claimant's injury causes such intense pain that Claimant experiences nausea and vomiting which prevent him from working, and no other records show that Claimant is able to return to work.

13. The December 19, 2000 [FCE] from [Dr. O] and the December 13, 1999 report do not show that Claimant is able to return to work because, although Claimant may have an ability to do some lifting, the reports do not take into account the nausea and vomiting from Claimant's pain and Claimant's need to use pain relievers which have a sedative effect.

15. During the qualifying period for the 3rd quarter, Claimant attempted in good faith to obtain employment commensurate with Claimant's ability to work.

With respect to Finding of Fact No. 12, Dr. R's September 13, 2000, report states that he saw the claimant on August 29, 2000; that the claimant is symptomatic with a left C6 radiculopathy and also has a left C7 radiculopathy; that the claimant needs a cervical myelogram to rule out suspected spinal cord or nerve root compression; and that the claimant "is unable to work at this time." Dr. S's May 22, 2000, report states that the claimant returned for medication follow-up and that he complains of headaches from neck pain, of upper back and left arm pain, depression, irritability, and anger, of getting nauseated and throwing up, and of lots of pain and a decrease in activities "as he lost his job." The report also states that the claimant "worked 11/30 days and had to quit because 'I couldn't get out of bed.'"

In my view, Finding of Fact No. 12 is against the great weight and preponderance of the evidence because neither of the reports relied on by the hearing officer meet the requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) for a narrative report "which specifically explains how the injury causes a total inability to work." Further, I believe that the requirement of Rule 130.102(d)(4) for such a narrative report does not contemplate the combining of reports from more than one doctor to somehow fashion a combination narrative report. Both in Finding of Fact No. 12 and his discussion of the evidence, the hearing officer explicitly ties the satisfaction of the requirement for a narrative report to the two reports he specifies. In my view, neither of these reports is sufficient to satisfy the requirements of Rule 130.102(d)(4), and the hearing officer apparently felt likewise since he combined them in an effort to fashion a narrative report.

With respect to Finding of Fact No. 13, I first note that the FCE reported on December 13, 1999, was performed by a licensed physical therapist for Dr. S and not by Dr. O, as is stated in the finding. That report determined that the claimant could perform work at the light physical demand level and that the job he held when injured required the capacity to work at the medium physical demand level. Dr. O's detailed report of December 19, 2000, states that in his opinion neck surgery will not significantly improve the claimant's condition given the extent of the defects revealed by the MRI and myelogram; that the claimant showed no sensory deficit on exam; that on the claimant's functional test he could perform a 56-pound high near lift and frequent lifting of 21 pounds, with blood pressure and respiratory rate staying basically normal; that his functional testing

showed rather remarkable results considering that he has had multiple surgeries; and that he showed good cardiovascular conditioning after stepping. Dr. O further reported that the claimant performed a 73-pound squat lift, a 43-pound back lift, and a 56-pound high near lift, and that he "would be amazed" that anyone with a significant abnormality or residual problem in the neck or low back could perform at that strength level. Dr. O concluded that, based on the findings of the FCE and considering the previous lumbar spine surgeries, the claimant would have to be restricted to sedentary, light, or medium work; that his maximum lift cannot exceed 50 pounds, and frequent lifting should not exceed 25 pounds; that he can sit or stand at least two hours at a time; that he should not climb ladders or work at unprotected heights; and that he should be able to work an eight-hour day.

In my view, Finding of Fact No. 13 is against the great weight of the evidence because of the functional capacity clearly demonstrated by the claimant over the course of an obviously lengthy exam; because the hearing officer relies on only one reference to nausea and vomiting to effectively invalidate Dr. O's report as a record showing an ability to work; and because, while the medical reports do reflect that the claimant takes pain medication, they do not reflect that such medications result in an inability to do any work whatsoever. As mentioned, Dr. S's May 22, 2000, report does reflect that the claimant's complaints then included "having problems with headaches, throwing up, lots of pain, [and] couldn't work at convenience store." However, no other record of Dr. S (from December 30, 1999, through December 28, 2000) mentions problems with nausea and vomiting; nor do any reports of Dr. R (from August 28, 2000, through January 2001); nor does the second opinion for spinal surgery report of Dr. K dated December 20, 2000; nor does Dr. O's December 10, 2000, report. In fact, a December 15, 2000, "Interval History" sheet, on which the claimant was given the opportunity to circle any of numerous complaints for Dr. R, reflects that the claimant circled only constipation, muscle problems, bone or joint problems, and depression, and did not circle heartburn, stomach problems, or intestinal problems. While the records of Dr. S and Dr. R consistently note the various medications the claimant takes, they make no mention of side effects restricting the claimant from all work. The only record that refers to this aspect is the January 4, 2001, report of Dr. S to the claimant's attorney stating that the claimant was unable to work from May 21 to August 19, 2000, due to constant pain from a cervical herniated disc and myofascial pain syndrome; that the claimant required significant doses of long-acting narcotics and was unable to commute to and from work; that these medications do affect concentration and are sedating; and that given Dr. R's findings of the cause of the claimant's severe pain, he, Dr. S, has reconsidered his earlier release of the claimant for light-duty work. In my view, the hearing officer has not articulated a legally sufficient basis for determining that Dr. O's December 19, 2000, report is not another record that shows that the claimant was able to return to work during the period from August 20 through November 18, 2000.

Because I view Findings of Fact Nos. 12 and 13 to be against the great weight of the evidence, I necessarily view Finding of Fact No. 15 as against the great weight of the evidence and conclude that the claimant is not entitled to SIBs for the third quarter. I would reverse the decision and order of the hearing officer and render a new decision that the claimant is not entitled to SIBs for the third quarter.

I further dissent from the principal opinion's adding an instruction to the hearing officer to consider evidence relating to establishing “good faith” under Rule 130.102(d)(1). This theory was not raised by the parties at the hearing, let alone urged. I do not feel it appropriate for the Appeals Panel to interject a new theory for the parties to consider when remanding. The theorizing of their respective cases should be left to the parties.

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Philip F. O'Neill
Appeals Judge