APPEAL NO. 012075
FILED OCTOBER 23, 2001

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 19, 2001. The hearing officer resolved the disputed issues by concluding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first and second quarters, and that the claimant had disability from October 11, 1998, through September 3, 1999. The appellant (carrier) appeals, arguing that certain medical records show that the claimant had some ability to work during the qualifying periods, and that the medical records do not indicate how the compensable injury caused a complete inability to work during these periods. The carrier also generally appeals the sufficiency of the evidence to support the disability determination. In his response, the claimant urges that there is sufficient evidence to support the challenged determinations.

DECISION

Affirmed in part and reversed and rendered in part.

It was stipulated that the claimant sustained a compensable injury to his cervical spine on _____. The parties also stipulated that the claimant reached maximum medical improvement (MMI) on September 2, 1999, with an 18% percent impairment rating (IR), and that he did not commute any portion of his impairment income benefits (IIBs). The claimant seeks disability from October 11, 1998, through September 3, 1999. The claimant is seeking SIBs for the first and second compensable quarters, which run from September 15, 2000, to March 15, 2001. The qualifying periods for the first and second quarters ran from June 2, 2000, to December 1, 2000, during which time the claimant asserts he was not able to work at all and conceded that he did not look for any employment.

DISABILITY

The claimant asserts that he had disability for the period October 11, 1998, through September 3, 1999. "Disability" means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The claimant had the burden to prove that he had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)),

resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.).

The evidence reflects that during the period of disability found by the hearing officer the claimant was only released to work with restrictions. *See, generally*, Texas Workers' Compensation Commission Appeal No. 950246, decided March 31, 1995. As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case with respect to the disability issue. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

SIBs

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 whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

The claimant contends that he had a total inability to work during the qualifying periods in issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d) (Rule 130.102(d)) addresses the good faith effort requirement of the 1989 Act. Rule 130.102(d)(4) provides 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 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." We have noted that the current SIBs rules are more demanding than the rules in effect prior to January 1999, and that all three elements of Rule 130.102(d)(4) must be met to establish good faith in a no-ability-to-work situation. Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000; Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. Clearly, the Texas Workers' Compensation Commission mandated that certain requirements be met where it is asserted that there is no ability to work at all, and they cannot be disregarded. Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000.

In Texas Workers' Compensation Appeal No. 002724, decided January 5, 2001, the concurring opinion specified what would be considered as a doctor's narrative report as follows:

[t]o determine if the requirements of Rule 130.102(d)(4) for a doctor's narrative report are met, the following will be considered:

- amendments;
- supplements, including contested case hearing testimony from the doctor;
- information incorporated in the report by reference; or
- information from a doctor's medical records in evidence that can be reasonably incorporated in the doctor's narrative report by inference based on some connection between the report and the information in the medical records.

The medical records reflect that during the time period from October 8, 1998, through October 19, 1999, the claimant was off work and undergoing conservative treatment from his treating doctor, Dr. P, a chiropractor; that he also received cervical epidural steroid injections; that he underwent cervical spine fusion surgery at the C5-6 and C6-7 levels in October 1999; and that he underwent further cervical spine surgery in May 2001 to further repair the fusion at C6-7.

The hearing officer's Finding of Fact No. 4 states only that "the narrative reports from the claimant's treating doctor specifically explain how the claimant's [_____] injury caused his total inability to work between June 2, 2000 and December 1, 2000."

Dr. P discusses the claimant's retraining through the Texas Rehabilitation Commission (TRC) in two of the records in evidence. On February 10, 2000, Dr. P reported that the claimant had improved with therapy and would be attempting to get retrained through the TRC. Dr. P's plan of treatment in a reevaluation dated August 17, 2000, included a referral to TRC for job retraining.

In a reevaluation report dated February 24, 2000, Dr. P stated that the claimant had retrogressed to some degree since therapy ceased February 20, 2000, and also noted that the results of the x-ray study performed February 15, 2000, showed a solid fusion at C5-6 with a questionable incomplete fusion at C6-7.

The records in evidence reflected that the claimant's health was improving. Disputing Dr. B's date of MMI and impairment rating, Dr. P, in a report dated March 27, 2000, noted the claimant has improved but also has some residual difficulties but has shown significant improvement. Dr. P observed in a record dated April 28, 2000, that overall the claimant had "substantially improved."

A series of Work Status Report (TWCC-73) forms from Dr. P were in evidence. The TWCC-73 dated March 9, 2000, restricts the claimant from work from August 30, 1997, to June 3, 2000, and states that the claimant is "still in post-op rehab and is not suited for return to work as yet." The TWCC-73 forms filed in May and June 2000 merely state that the claimant is unable to work but do not describe how the injury precluded work in any capacity. The TWCC-73 dated December 5, 2000, restricted the claimant from all work from April 11, 2000, to June 1, 2001; however, the only explanation given was that the claimant "may not ever be able to return. Disabled."

A February 15, 2001, report from Dr. P states that the claimant is "not recommended for return to work or any strenuous activity for a period of at least six months. The resumption of work activities may compromise the situation and may result in a retrogression of [claimant's] condition." This report was written outside the qualifying periods at issue.

While there are various reports from Dr. P in evidence, the information in his reports does not cover the entirety of the qualifying periods, e.g., August 18 through December 4, 2000, and gives no indication that all possible types of employment were considered by him, and does not state specifically how the compensable injury prevents the claimant from working. Appeal No. 002724, *supra*.

In our view, the records of Dr. P, upon which the hearing officer clearly states she relied, fail to contain the specificity required by Rule 130.102(d)(4) in explaining how the injury causes a total inability to work. We determine that the finding that the claimant made a good faith effort in not seeking employment since he had no ability to work is against the great weight of the evidence.

The decision and order of the hearing officer are affirmed as to disability. The decision and order of the hearing officer as to SIBs are reversed and a new decision is rendered that the claimant is not entitled to first and second quarter SIBs.

The true corporate name of the insurance carrier is **FARMINGTON CASUALTY COMPANY** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Philip F. O'Neill
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

DISSENTING OPINION:

I dissent. I think that the hearing officer's finding that the narrative reports of the treating doctor specifically explain how the claimant's compensable injury caused his total inability to work is sufficiently supported by the evidence. The hearing officer is the finder of fact and her factual findings should only be overturned if they are contrary to the great weight and preponderance of the evidence. Here, in my view, the majority ignores the standard of review to reach a result it finds more palatable. I think the Commissioners in promulgating Rule 130.104(d)(4) intended that some claimants be entitled to SIBs based upon an inability to work or otherwise the rule itself would be superfluous. The relentless reversal of any hearing officer who dares to find the rule applicable in a particular case appears to me to be an undermining of that intent.

Gary L. Kilgore
Appeals Judge