

APPEAL NO. 012159  
FILED OCTOBER 29, 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 August 17, 2001. The hearing officer resolved the disputed issue by concluding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter. The appellant (carrier) appeals, arguing that the hearing officer's determination is against the great weight of the credible evidence. The carrier contends that credible medical records exist which evidence the claimant's ability to work. The claimant filed an untimely response. Pursuant to Section 410.202(b), a written response to an appeal must be filed no later than the 15th day after the date on which the copy of the request for appeal is served. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Texas Government Code from the computation of time in which to file an appeal. Section 410.202(d). Rule 143.4(c) provides that a response is presumed to have been timely filed if it is mailed on or before the 15th day after the date receipt of appellant's request for review and received by the Texas Workers' Compensation Commission (Commission) not later than the 20th day after the date of receipt of the appellant's request. The claimant acknowledged receipt of the carrier's appeal on September 13, 2001, and mailed a copy of his response to the Commission on October 4, 2001, within the required 15-day period. However, the response was not received by the Commission's Chief Clerk of Proceedings until October 12, 2001, more than 20 days after the date of receipt of appellant's request. The claimant's response was not timely filed and will not be considered.

DECISION

Affirmed.

The claimant testified that while working for the employer on \_\_\_\_\_, he was lifting a box that was heavier than he anticipated, causing him to injure his back and neck. The parties stipulated that the claimant reached maximum medical improvement on July 3, 1999, with a 16% whole body impairment rating (IR); that he did not commute impairment benefits; that he filed his SIBs application (TWCC-52) for the fourth quarter with the carrier on March 28, 2001; that the qualifying period for the fourth quarter was from November 19, 2000, through February 17, 2001; and that the fourth quarter was from March 4, 2001, through June 2, 2001, inclusive.

The claimant testified that he did not have any dealings or contacts with the Texas Rehabilitation Commission (TRC) during the qualifying period for the fourth quarter; that he never refused services or refused to cooperate with the TRC; that he had no ability to work during the fourth quarter qualifying period; and that he did not seek employment during the fourth quarter qualifying period. The claimant testified that he did have contact with a vocational counselor, Ms. H, but that she did not provide him with any job leads.

Sections 408.142(a) and 408.143, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.102(b)-(d) (Rule 130.102(b)-(d)) provide that an employee is entitled to SIBs when the impairment income benefits (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) of Rule 130.102, whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

The claimant alleges a total inability to work during the qualifying period. 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 hearing officer, applying Rule 130.102(d)(4), found that the claimant was unable to work in any capacity during the qualifying period for the fourth quarter; that he provided a narrative report from Dr. R which specifically explains how the injury caused a total inability to work; and that no other records show that the claimant was able to return to work.

On August 15, 2001, Dr. R stated the [claimant] was not able to work from August 20, 2000, through February 17, 2001, because he was having a lot of pain from his herniated cervical disc and attempting to return to work could have caused deterioration of his condition as well as spinal cord compression which could cause paralysis. Additionally, Dr. R noted the claimant was taking sedating medications during that time and was depressed and in extreme pain which affected his ability to work.

Dr. S performed a functional capacity evaluation (FCE) on December 13, 1999, which indicated that the claimant could return to work at a light-duty level and stated "there are no potential barriers to successfully completing Work Hardening program." This FCE was completed almost a year prior to the qualifying period of the fourth quarter. Several records dated after December 13, 1999, indicate that the claimant's condition worsened. The records also reflect that on January 4, 2001, Dr. S rescinded his opinion on a light-duty release based on findings made by Dr. R which confirmed reasons for the claimant's severe pain.

An FCE report by Dr. O dated December 19, 2000, indicated the claimant could work from the sedentary to the medium-duty level. The claimant testified that he felt a lot

of pain during this FCE and that after it was over he was “spent.” The records reflect that due to his deteriorating condition on January 19, 2001, the claimant had surgery.

Whether or not the claimant produced a narrative report as required by Rule 130.102(d)(4) and whether there exists a record which shows ability to return to work presented the hearing officer with questions of fact to resolve. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence to support the hearing officer's determination that the claimant's evidence satisfied the requirements of Rule 130.102(d)(4) and that he is entitled to SIBs for the fourth quarter.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN MOTORIST INSURANCE CO.** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE CO.  
800 BRAZOS  
AUSTIN, TEXAS 78704.**

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Michael B. McShane  
Appeals Judge