APPEAL NO. 012339
FILED NOVEMBER 5, 2001

Following a contested case hearing held on August 29, 2001, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the first quarter and that the respondent (carrier) is entitled to a reduction of the claimant's SIBs benefits based on contribution from earlier compensable injuries by a percentage of 70.9. The claimant has specifically appealed three findings of fact, one of which was stipulated and one of which is favorable to him. The remaining appealed finding states that during the qualifying period for the first quarter, the claimant had some ability to work in some capacity. The claimant also appears to dispute the admission of two medical records. However, at least one of these records was introduced by both parties, and the claimant did not object to the admission into evidence of any of the carrier's exhibits. The claimant also comments at length on the content of certain medical records and mentions the contribution issue, though he does not appeal the hearing officer's finding or conclusion on that issue. The carrier's response urges the sufficiency of the evidence to support the hearing officer's determinations.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on January 21, 2000, with an impairment rating (IR) of 24%; that he has not elected to commute any portion of his impairment income benefits (IIBs); and that during the stipulated first quarter qualifying period, February 25, 2001, through May 26, 2001, the claimant did not work, earn any wages, or make any job searches. The claimant, perhaps unintentionally, has appealed the finding relating to his not having elected to commute IIBs. As with the claimant's challenge to the finding favorable to him concerning one of the statutory criteria for entitlement to SIBs (discussed below), we need not further address this assigned error.

The claimant testified that he injured his lumbar spine at L4-5 during a lifting accident at a steel works in _____; that in January 1975 he underwent lumbar surgery including fusion at the L5-6 level and was off work for two years; that he next went to work as a manager of a fast-food restaurant; that on _____, while working as a cook at a hotel, he slipped and fell in the kitchen, injuring his lumbar spine at the L5-6 (noting that he has six lumbar vertebrae) and S1 levels; that in February 1990 he underwent a 360 degree lumbar fusion operation from L3 to the sacrum, with instrumentation; that he returned to work as a cook in 1992; and that the instrumentation was removed in September 1999. He further stated that on _____, while working as a cook for the employer in this case, he tripped over a drain cover and fell against a wall, injuring his left shoulder, elbow, and thumb, as well as breaking his lumbar spine fusion at L4-5; and that

he subsequently had shoulder surgery but no further lumbar spine surgery. The claimant also said he has not worked since June 28, 1998.

Concerning the contribution issue, the claimant testified at one point that he felt that no contribution should be awarded the carrier and that Dr. M, the designated doctor who assigned his 24% IR, shared that view. He testified at another point that at the benefit review conference, he was prepared to settle this issue with an offer of a 15% contribution from the oldest of his back injuries but that the carrier was not sufficiently prepared to meaningfully mediate the issue; and that he remains open to a 15% settlement. Dr. S stated in the report of his impairment evaluation of the claimant on February 2, 2000, that he felt that 22% of his 31% IR "preexisted" the _____, injury. Concerning the SIBs issue, the claimant testified at one point that Dr. G, his treating doctor, had not released him to return to work and had issued a report detailing why he could not work. The claimant did not further identify such report.

On January 28, 1998, Dr. G wrote that the claimant "is released to regular duty." Dr. K, who performed a required medical examination for the carrier, reported on December 1,1998, that he saw "no reason why he cannot return to work as a cook" and that he thought this would be a good occupation considering the claimant's preexisting back surgery. Dr. G wrote on February 4, 2000, that the claimant has not worked since June 1998, is using a cane to walk on a daily basis, and is "unable to work," and that he, Dr. G, "will keep him on disability." Dr. G wrote on May 24, 2000, that the claimant continues to be quite symptomatic with poor sitting and standing tolerance, limited ability to sit, stoop, push, pull, bend, or carry, and that he, Dr. G, is recommending medical retirement at this time. Dr. G wrote on December 5, 2000, that the claimant "is not capable of returning to gainful employment because of the type of pain he is having in his back." Dr. G's record of April 23, 2001, reflects that the claimant is applying for Social Security disability benefits and has asked the Social Security Administration to contact Dr. G's office for information. Dr. G's record of May 2, 2001, states that the diagnosis is failed back syndrome, lumbar radicular syndrome, and chronic intractable pain, and that the claimant should be considered permanently medically disabled and unable to work. Dr. G's responses of July 31, 2001, to questions from the claimant's assistant indicate that the claimant had no ability to work from February 22 to May 23, 2001, because of his "inability to sit, stoop, bend, pull, push, carry or lift" and inability to stand for any period of time.

The criteria for entitlement to SIBs are set for in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). Since two of the criteria were stipulated to and since the hearing officer found in the claimant's favor that his unemployment during the qualifying period was a direct result of his impairment, the only statutory criterion in issue on appeal is the requirement that during the qualifying period the claimant have attempted in good faith to obtain employment commensurate with his ability to work. The claimant's contention was that he satisfied this requirement by proving that he had no ability to work in any capacity during the qualifying period. 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 record shows that the injured employee is able to return to work. The hearing officer did not make specific findings of fact on the elements of Rule 130.102(d)(4). Rather, in her Statement of the Evidence she sets out the elements of Rule 130.102(d)(4) and states that the claimant's evidence did not establish that he met them. The hearing officer goes on to state that the claimant failed to provide the required narrative report and that there are other records which show he is able to return to work. The hearing officer does not identify any particular medical records in her discussion. Rather, she states that she makes her determination after reviewing the entire record, "even though I may not have made specific reference to each and every medical record." The Appeals Panel has repeatedly urged hearing officers to make specific findings of fact addressing the elements of Rule 130.102(d)(4).

Concerning the contribution issue, Section 408.084 provides, in part, that at the request of the insurance carrier, the Texas Workers' Compensation Commission (Commission) may order that IIBs and SIBs be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries, and that the Commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section. The hearing officer states in her discussion of the evidence that she considered the August 20, 1999, report of Dr. K concerning the extent of the structural damage to the lumbar spine before and after the _____, injury, and the opinion of Dr. S in his February 2, 2000, report on the extent to which the claimant's impairment from his prior compensable injuries contributed to his impairment from his _____, injury.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, 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)). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **RELIANCE NATIONAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

TIMOTHY J. McGUIRE
633 NORTH STATE HIGHWAY 161, SUITE 200
IRVING, TEXAS 75038.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge