APPEAL NO. 012367
FILED NOVEMBER 26, 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 September 18, 2001. The hearing officer resolved the disputed issues by concluding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 5th and 6th quarters. The appellant (carrier) appeals on sufficiency grounds. The appeals file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant is entitled to SIBs for the fifth quarter. Claimant was injured when he was hit in the head with a sledgehammer. In a narrative dated April 23, 2001, Dr. W noted that the claimant had developed a painful swelling in the posterior cervical spine; that he continues to have pain in the cervical spine and right mandible; and that he has watering of the right eye; and that he has to limit his food intake to soft food because of pain. Claimant had a cervical discogram on January 19, 2001, and was referred to a physician for surgical evaluation. In a report dated January 11, 2001, Dr. W noted that the referring physician determined that the claimant needed spinal surgery and that the claimant "will not be able to handle any heavy labor or use of machinery" as "it will cause irritation to the cervical spine and right mandible exacerbating his condition." A narrative report from Dr. W dated December 12, 2000, stated the claimant was unable to work in any capacity from October 1, 1999, through December 27, 2000, because of the effects and conditions such as pain, range of motion deficits, loss of sensation, disc herniation or lesion and associated residual symptoms, and vibration from machinery causes irritation to neck and jaw causing swelling and pain.

The hearing officer could choose to credit the December 12, 2000, narrative report despite the fact that it was not written out in a long form fashion. The hearing officer could find that claimant could not return to "work in any capacity," as Dr. W stated in this report, due to pain and the other listed problems with sensation and range of motion. This was a fact issue for the hearing officer. The hearing officer reviewed the record and, as the trier of fact, he decided what facts were established. We conclude that the hearing officer's determinations regarding SIBs and claimant's ability to work are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier contends the hearing officer erred in determining that claimant is entitled to SIBs for the sixth quarter. Carrier asserts that the hearing officer erred in determining that the report from Dr. L did not constitute a record showing that the injured employee is able to return to work." *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule

130.102(d)(3)). A functional capacity examination (FCE) was performed on March 15, 2001. The FCE report said that claimant could function at a medium duty level within a "restricted work plane with a maximum lifting of forty-seven pounds on an occasional basis" or a light duty level with no restrictions. Dr. L opined that claimant could return to work. The hearing officer found that the report from Dr. L was not credible, stating that Dr. L's report was based on a lack of knowledge. Dr. L did state that claimant could return to work but also said, regarding the dates he could return to work, that his opinion was given "pending MRI results." Dr. L also noted that claimant had a discogram in January 2001 that showed an annular tear and said claimant needs another MRI to correlate with the positive discogram. Under diagnosis, he wrote "rule out herniated cervical disc, C5-6." Claimant testified that he had cervical fusion surgery in August 2001. The hearing officer could find from the evidence that Dr. L had inadequately diagnosed claimant's condition and that he was uncertain of claimant's condition. This was an adequate reason for rejecting Dr. 's report. Whether there was a record showing that claimant was able to return to work was a fact question for the hearing officer and we decline to reverse it on appeal in this case.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE** and the name and address of its registered agent for service of process is:

C. T. CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I dissent. The findings that the treating doctor submitted narrative reports "explaining how the compensable injury prevented Claimant from doing any work in any capacity" and the finding that "[t]he FCE and [Dr. L's] reports, because of their lack of

credibility, are not 'other records' which show an ability to work" are against the great weight of the evidence. The claimant has failed to prove that he attempted in good faith to obtain employment commensurate with his ability to work, as required by Section 408.142(a)(4), because the medical reports upon which he apparently relies do not meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) for a narrative report from a doctor "which specifically explains how the injury causes a total inability to work" and because the FCE report and from Dr. L's report do indeed constitute "other records" which show that the claimant "is able to return to work."

Curiously, nowhere in his Decision and Order does the hearing officer identify the treating doctor or the specific reports he relied upon as constituting the narrative reports satisfying Rule 130.102(d)(4) for both the fifth and sixth quarter qualifying periods, respectively, October 19, 2000, through January 17, 2001, and January 18, 2001, through April 18, 2001. However, it is apparent from reviewing the evidence that the hearing officer has in mind certain reports of Dr. W. These reports, found sufficient as narrative reports by the hearing officer as well as the majority of this panel, consist of three preprinted forms containing blank lines to fill in, boxes to check off beside certain statements, and two identical statements. The forms are entitled "Doctor's Narrative Report" and contain blank lines for the name of the patient, date of injury, and time period. Below the lines for the name of the patient, the date of injury, and the time period, is the following preprinted statement:

> The above-referenced patient has been under my care for work-related injuries. During the period indicated above, the patient was unable to work in any capacity because of the effects and conditions which resulted from the patient's work-related injuries. These effects and conditions include:....

Below this statement are nine boxes, which can be checked for the various effects and conditions beside them. On the form for the period "10/99 - present," Dr. W checked the boxes for "pain," "range of motion deficits," "loss of sensation," and "disc herniation or lesion and associated residual symptoms." Beside the tenth box, for "Other," Dr. W wrote "vibration from machinery causes irritation to neck and jaw, causes swelling and pain."

Below the boxes is the following preprinted statement:

> The specific factors delineated above resulted from the patient's work-related injuries. The effects of these factors on the patient were such that they precluded the patient from working in a safe and/or effective manner. These factors caused the patient's total inability to work. Notice will be given when there is a change in the patient's work status.

This statement is followed by Dr. W's signature and the date of "12-27-00," a date within the fifth quarter qualifying period.

The form for the period "11/2000 - present," signed by Dr. W on "1-19-01," a date within the sixth quarter qualifying period, has the same boxes checked as well as an additional box for "potential for reinjury or a setback in the patient's medical condition if patient returned to work." Beside the "Other" box Dr. W states: "Use of machinery exacerbates this patient's condition."

The form for the period "January 18, 2001 - April 18, 2001" (the time period for the sixth quarter qualifying period), signed by Dr. W on "4/23/01," has the same boxes checked as the first form as well as an additional box for "muscle spasms." Dr. W did not check the "Other" box.

In a letter of January 11, 2001 (a date within the fifth quarter qualifying period), the only other record of Dr. W's which addresses the ability to work, Dr. W wrote that the claimant states that Dr. M has stated that he needs cervical spine surgery; that he, Dr. W, is trying to arrange for a follow-up visit for the claimant with Dr. M; that the claimant remains off work at this time; and that the claimant will "not be able to handle any heavy labor or use of machinery [because] [i]t will cause irritation to the cervical spine and right mandible exacerbating his condition." Dr. W concluded by writing that he does not feel that the claimant is able to work "due to his condition," explaining that "[c]hanges in temperature, use of heavy equipment, and vibration from said equipment seem to exacerbate his pain and make it difficult for him to function."

The best that can be said for the totality of Dr. W's reports addressing the fifth quarter qualifying period is that they state that the claimant cannot perform labor or work with vibrating machinery because such activity would exacerbate his cervical spine and jaw pain. The evidence for the sixth quarter is even weaker, unless one also includes Dr. W's January 11, 2001, letter. Notwithstanding that we are dealing with a fact issue here, it seems obvious that the preprinted forms are conclusory at best and simply fail to explain how it is that the claimant can perform no work whatsoever, not even sedentary work on a part-time basis. Surely the commissioners who promulgated Rule 130.102(d)(4) did not envision that preprinted forms with blank lines to fill in, boxes to check, and certain generic statements about "no ability to work" would constitute a sufficient explanation as to how a particular claimant's compensable injury actually prevents him or her from performing any type of work whatsoever. The majority opinion in this case substantially lowers the bar for compliance with Rule 130.102(d)(4).

Further, in my view, the hearing officer has committed reversable error in rejecting Dr. L's report as an "other record" showing an ability to return to work. Dr. L has written a very thorough eight-page report concluding that the claimant has an ability to return to medium physical demand work with restrictions and to light work without restrictions, and this report is supplemented by a detailed FCE report. The hearing officer seizes upon two typographical errors in Dr. L's report where she uses "she" for "he," to infer that Dr. L did not even read his own report and, thus, determines that the report lacks credibility. The hearing officer then goes on to clearly speculate that the claimant had severe pain while undergoing the FCE because his heart rate increased. The FCE report itself states that

the claimant's cardiorespiratory fitness is "low." Further, it is common knowledge that an increase in heart rate during an FCE is not only expected, but serves as a validity check on the effort being exerted. While the hearing officer is certainly at liberty to reject a record which merely "states" that a claimant has an ability to return to work if the hearing officer is satisfied such record does not "show" such an ability, and again, such is a fact issue for the hearing officer, in this case that hearing officer's stated rationale for rejecting Dr. L's report along with the FCE report is arbitrary, capricious, uninformed, and resultant in a finding which is against the great weight of the evidence.

For the above stated reasons, I would reverse and render a new decision that the claimant is not entitled to SIBs for the fifth and sixth quarters because he failed to satisfy the requirements of Rule 130.102(d)(4).

Philip F. O'Neill
Appeals Judge