APPEAL NO. 012480
FILED NOVEMBER 15, 2001

This appeal after remand 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 urged the sufficiency of the evidence to support the challenged determinations. The Appeals Panel reversed the hearing officer's decision and remanded the case for a determination whether: (1) there was a narrative from one doctor that specifically explains how the injury causes a total inability to work; and (2) claimant's return to work was to a position which was relatively equal to the injured employee's ability to work pursuant to Rule 130.102(d)(1). Texas Workers' Compensation Commission Appeal No. 011152, decided July 16, 2001. The hearing officer held a hearing on remand on September 12, 2001. In the decision and order after remand, the hearing officer again determined that claimant is entitled to SIBs. The hearing officer determined that the May 22, 2000, report from Dr. S constituted a narrative that specifically explains how the injury causes a total inability to work. The hearing officer also determined that, when claimant had returned to work during a portion of the qualifying period, he had returned to work which was relatively equal to his ability to work. Carrier again appealed, contending that claimant did not establish that he is entitled to SIBs. Carrier asserts that there was no adequate narrative in this case and that functional capacity evaluation (FCE) reports from Dr. S and from Dr. O constitute other records showing claimant could work. Carrier also contends that, although claimant returned to work relatively equal to his ability to work, he did not stay in the position. Claimant filed an untimely response to carrier's appeal.

DECISION

We affirm.

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. The hearing officer determined that the May 22, 2000, report of Dr. S constitutes a narrative that specifically explains how the injury caused a total inability to work. However, that report does not state that claimant cannot work at all. As noted by Judge Chaney in her concurring opinion in Appeal. No. 011152, we have said that a hearing officer may consider one doctor's reports and narrative together to determine whether there is an adequate narrative for the purposes of Rule 130.102(d)(4). The hearing officer did not consider Dr. S's reports together, however. Finding of Fact. No. 12 indicates that he considered only the May 22, 2000, report on remand, and we will review his

determinations with that in mind.[1] Because Dr. S did not state in his May 22, 2000, report that claimant cannot work at all, we conclude that the hearing officer erred in determining that this constituted a narrative for the purposes of Rule 130.102(d)(4). Therefore, we must reverse the hearing officer's determination in Finding of Fact No. 12 that this report constituted a narrative that specifically explained why the injury caused a total inability to work. We now consider whether we may affirm on the other ground that claimant met his burden regarding SIBs and good faith because his return to work was to a position relatively equal to his ability to work.

We also remanded 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 pursuant to Rule 130.102(d)(1). We remanded for the hearing officer to consider this issue because, when determining the issue of SIBs and good faith, which was raised by the evidence, the hearing officer must apply the law to the facts raised at the hearing. The Appeals Panel may affirm on any grounds raised by and supported by the evidence. Texas Workers' Compensation Commission Appeal No. 000558, decided May 1, 2000. Claimant raised the issue of SIBs and good faith and presented facts showing good faith, and he was not required to argue to specifics of the application of the law and Rule 130.102(d). Carrier does not assert on appeal that the hearing officer erred in applying the law set forth in Rule 130.102(d)(1) to the facts raised at the first hearing. In fact, at the hearing, carrier affirmatively stated that this issue could properly be addressed by the hearing officer.

In applying Rule 130.102 in the first decision and order, the hearing officer did not consider all of the rule in considering the facts regarding the good faith issue and claimant's return to work. In his decision after the remand, the hearing officer considered the facts regarding claimant's return to work and determined that, during the qualifying period, claimant returned to a position relatively equal to his ability to work. In its appeal after remand, carrier contends that claimant was capable of light-duty work. Carrier also stated that, "claimant's post injury sales clerk position was relatively equal to his ability to perform light-duty work." Carrier asserted that the company that hired claimant would have let him sit as much as he needed and would have accommodated him. Carrier appears to be contending that, the reason why this return to work did not qualify under Rule 130.102(d)(1) is because claimant left this position and did not work the entire qualifying period.

There was evidence that, for at least a portion of the qualifying period, claimant had returned to work and the hearing officer found that this work was relatively equal to his ability to work. At the hearing, claimant questioned whether the evidence regarding the work he performed was adequately developed and whether this issue should be

[1]Carrier contends the hearing officer again considered reports from other doctors along with Dr. S's May 22 report, but Finding of Fact No. 12 indicates otherwise. This finding indicates that the hearing officer complied with the remand despite language from the prior decision that was again written in the decision on remand.

addressed. However, claimant did not appeal the hearing officer's determination in this regard. Carrier did not dispute the determination that claimant had returned to a position relatively equal to his ability to work, either at the hearing on remand or on appeal. At the hearing, carrier stated that, "[C]laimant's position as a salesclerk after the injury was at least equal to his ability to work. . . ." On appeal as well, carrier does not dispute that claimant returned to a position relatively equal to his ability to work. We have said that a claimant who has established that he has returned to work relatively equal to his ability to work need not establish that he worked any set portion of the qualifying period. Texas Workers' Compensation Commission Appeal No. 001244, decided July 7, 2000; *see also* Texas Workers' Compensation Commission Appeal No. 000616, decided April 26, 2000. Accordingly, we affirm the hearing officer's determination that claimant attempted in good faith to obtain employment commensurate with his ability to work and that he is entitled to SIBs for the third quarter.

We affirm the hearing officer's decision and order.

According to the information provided by the carrier, the true corporate name of the insurance carrier is **AMERICAN MOTORISTS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

DISSENTING AND CONCURRING OPINION:

I dissent in part because I view Finding of Fact No. 13, addressing the "other records that show" element of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §

130.102(d)(4) (Rule 130.102(d)(4)), as being against the great weight of the evidence. I fully set out my views on the insufficiency of the evidence to support this finding in Texas Workers' Compensation Commission Appeal No. 011152, decided July 16, 2001, and no useful purpose would be served by repeating them here. Suffice to say that nothing transpired in the remand of this case to change my views.

I concur in the result reached by the majority, notwithstanding that the majority has sifted through the evidence and constructed a theory of recovery which even the represented claimant did not advocate. While the evidence establishes that the claimant worked a mere two and one-half days at a convenience store during the 90-day qualifying period, the Appeals Panel decision in Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000, stated that no set time is provided for in Rule
130.102(d)(1) for an injured employee to have returned to work during the qualifying period in order to satisfy the "good faith" requirement.

Philip F. O'Neill
Appeals Judge