APPEAL NO. 012588
FILED DECEMBER 19, 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 28, 2001. The hearing officer resolved the disputed issue before him by concluding that the respondent (claimant) "was not required to seek employment" during the qualifying period for the first quarter of supplemental income benefits (SIBs) because she "had no ability to perform any work at all," and that she is entitled to SIBs for the first quarter. The appellant (carrier) appeals, asserting that the claimant failed to meet her burden of proof to show that she had a total inability to work during the qualifying period for the first quarter of SIBs. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

Sections 408.142(a) and 408.143, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) provide the statutory and regulatory requirements for entitlement to SIBs.

The record indicates that the claimant was employed as an accounting assistant. The parties stipulated that the claimant sustained a compensable injury to her neck and right shoulder on _____, which resulted in a 17% impairment rating; that the claimant did not commute any portion of her impairment income benefits; and that the qualifying period for the first quarter was from March 6, 2001, through June 4, 2001.

Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. 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.

The hearing officer made findings that during the qualifying period for the first quarter the claimant was unable to perform any work at all; that the claimant provided a narrative report from a doctor which specifically explained how her injury and impairment caused a total inability to work; and that no other record showed that the

claimant was able to work during the qualifying period.

The hearing officer was aware of, and commented on, the report of Dr. H, an independent medical examination doctor, who conducted an examination of the claimant on February 22, 2001. In his report, Dr. H stated:

> I had a long discussion with the [claimant] and she feels like she cannot return to work on a full time basis. I recommended a four-hour day. She did not think she could perform that even sitting at a desk. I explained to her that she could start off at a four-hour day taking frequent breaks and see how she did in that regard. The type of work she does is administrative work sitting at a computer and it is the opinion of this evaluator that she certainly should be capable of sitting at a desk and using her computer after this type of injury. However, she should be able to take frequent, five-minute breaks from sitting at the computer. She should have a computer that is ergonomically situated for her, but it is the opinion of this evaluator after her surgery and her impairment that she should certainly be able to perform a sitting desk job starting off at a four-hour day with frequent five-minute breaks and gradually increasing her to an eight-hour day over a period of time with continued frequent breaks.

The hearing officer's determination that there is no other record which shows that the claimant is able to return to work is so against the great weight and preponderance of the evidence as to be manifestly unjust. 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). We, therefore, reverse the hearing officer's finding of fact that there is no other record which shows that the claimant is able to return to work.

As we stated in Texas Workers' Compensation Appeal No. 002095, decided October 18, 2000:

> The current SIBs rules are demanding and require that the 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. One of those elements is that "no other records show that the injured employee is able to return to work . . . ." Texas Workers' Compensation Commission Appeal No. 992692, decided January 20, 2000.

In discounting Dr. H's report as envisioning an "unreal work situation," the hearing officer applied the wrong standard for determining eligibility to SIBs under Rule

130.102(d)(4). The test is not how "realistic" the work situation is, but, rather, whether the claimant has the ability to do any type of work at all. In this case, the claimant testified, and the record reflects, that she was able to attend and complete a community education course in medical insurance and bookkeeping. The course consisted of one three-hour class per week from February 21, 2001, through May 2, 2001. Additionally, the hearing officer states that "Dr. H stated he based his opinion largely on an EMG that showed no cervical disc disease. After the doctor's examination, the Claimant underwent the shoulder manipulation and a discogram that showed cervical disc problems. The doctor was unaware of the true injury to the neck when he rendered his opinion." Our review of Dr. H's report shows that Dr. H was clearly aware of the fact that the claimant had cervical disc disease problems. Our review of the record shows that the hearing officer's rejection of Dr. H's determination that the claimant was able to perform part-time, sedentary work is against the great weight of the evidence. The evidence therefore fails to meet the requirements of Rule 130.102(d)(4) for establishing good faith, and the hearing officer's determination that the claimant is entitled to SIBs for the first quarter is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

We reverse the hearing officer's decision and render a new decision that the claimant is not entitled to SIBs for the first quarter.

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

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TX 78701.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge