APPEAL NO. 021729
FILED AUGUST 19, 2002

This appeal 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 June 3, 2002, the hearing officer made certain findings of fact and concluded that the respondent/cross-appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth quarter. The appellant/cross-respondent (carrier) filed an appeal, conditioned upon the claimant's filing an appeal, which challenges the sufficiency of the evidence to support two findings of fact, namely, that the claimant's not returning to work during the qualifying period was a direct result of his impairment, and, that the claimant established by specific, detailed, or explanative medical evidence that he was unable to perform any work at all during the qualifying period. The claimant filed an appeal, challenging not only the dispositive legal conclusion but also the sufficiency of the evidence to support findings that the reports of Dr. C and Dr. G constitute medical records that show that the claimant was able to return to work in some capacity during the qualifying period, and, that the claimant did not make a good faith effort to seek employment during that period. In additional assignments of error, the claimant contends that the hearing officer erred in refusing to add an additional disputed issue concerning the sufficiency of the grounds stated by the carrier for disputing the claimant's entitlement to SIBs; that the Texas Workers' Compensation Commission (Commission) exceeded its rulemaking authority in promulgating Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d)(4) (Rule 130.102(d)(4)) because it imposes burdens and restrictions inconsistent with or contrary to Section 408.142(a)(4) of the 1989 Act and thus that this rule is invalid; and that the hearing officer erred in applying erroneous legal standards in evaluating the evidence of the claimant's having no ability to work. The carrier filed a response to the claimant's appeal urging the sufficiency of the evidence to support the challenged findings and conclusion and explaining how the remaining assignments of error are without merit. The file does not contain a response from the claimant to the carrier's conditional appeal.

DECISION

Affirmed.

The parties stipulated that the qualifying period for the eighth quarter began on November 10, 2001, and ended on February 8, 2002. The claimant testified that on _____, while working for an insect exterminating company, he injured the three regions of his spine lifting a foam machine; that he has not worked since that date; that he has since undergone surgical operations in the cervical and lumbar spinal regions; that he had previously undergone spinal surgery from prior work-related injuries; that during the qualifying period for the eighth quarter, he did not contact the Texas Rehabilitation Commission; and that some of the approximately 18 medications he takes are for his spinal injury and cause him drowsiness and dizziness. The evidence

indicated that the claimant is able to drive and attend to some activities of daily living although friends help him.

The requirements for continued entitlement to SIBs are provided for in Section 408.143(a) and in Rules 130.102 and 130.104. Concerning the requirement that, during the qualifying period, the claimant has earned less than 80% of his average weekly wage, the claimant testified that he has not worked since the date of his injury and his medical records contain certain lifting and other physical restrictions which would prevent him from returning to the job he held when injured. The hearing officer's finding that during the qualifying period the claimant did not return to employment as a direct result of his impairment is 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); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the requirement that, during the qualifying period, the claimant have made a good faith effort to obtain employment commensurate with his ability to work, Rule 130.102(d) provides for several ways to satisfy this requirement. The claimant's position is that he had no ability to work at all. 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 claimant's current treating doctor, Dr. V, reported on January 25, 2002, that the claimant has had a total of seven different operations to his cervical area and low back; that he has not been released to go back to work; that part of the reason he cannot go back to work is that he takes a number of medications which cause insomnia, dizziness, sleepiness, and which impair the ability to drive and cognitive function; and that he has had to be given additional therapy due to the severity of his symptoms despite the fact that he is taking narcotics.

The hearing officer's findings that Dr. V has provided a report which specifically explains how the claimant's injury causes his total inability to work and her finding that the reports of Dr. G and Dr. C constitute other records which show an ability to return to work in some capacity are sufficiently supported by the evidence. Cain, *supra* and King, *supra.*

The April 12, 2002, report of Dr. G, apparently the designated doctor, appointed by the Commission to determine the claimant's ability to work, states under "Work Restrictions," that the claimant is unable to return to his previous job because of his 10-pound lifting restriction; that his restrictions, absent a functional capacity evaluation (FCE), include the 10-pound lifting restriction, no bending, kneeling, crawling, or stooping, and, the ability to take breaks 15 minutes out of every hour from a sitting to a standing position. Dr. G further stated that "[I]t is unlikely that he will be able to work for more than 4 hours per day at a sedentary type job," and that he recommends that an

FCE be undertaken. The carrier did not contend that Dr. G's report was entitled to presumptive weight pursuant to Rule 130.110 in that the report was not received by the Commission until after the qualifying period at issue. Dr. C, who performed a required medical examination of the claimant on October 24, 2001, reported that the "[c]laimant's condition is compatible with a release to work at a sedentary to light duty level with no lifting greater than 15 to 20 lb" and that an FCE may be of further benefit in delineating work duties. The hearing officer found that both these reports constituted records that show an ability to return to work in some capacity during the qualifying period and that the claimant did not make a good faith effort to seek employment. We are satisfied that this finding is sufficiently supported by the evidence. Cain, *supra* and King, *supra.*

The claimant further asserts error in the hearing officer's refusal to add an additional disputed issue concerning the sufficiency of the grounds specified by the carrier in disputing his entitlement to SIBs for the eighth quarter. The evidence reflects that, following the benefit review conference (BRC) held on March 28, 2002, the claimant filed with the hearing officer, by hand delivery on April 24, 2002, his Response to the BRC report. The claimant's principal contention in this response is that the BRC report fails to reflect that, during the BRC, he raised and discussed the carrier's failure to file a sufficient dispute of his entitlement to eighth quarter SIBs; that the carrier's dispute was insufficient because the reasons it stated were "no good faith effort" and "not a direct result," which reasons "fail to constitute a full and complete statement of sufficient, claim-specific information or a description of the factual basis for the action taken by the Carrier as required by Rule 130.104(e)"; and that because the carrier failed to timely file a sufficient dispute, the carrier has waived any dispute of his entitlement to eighth quarter SIBs. In evidence is the hearing officer's order of April 29, 2002, providing that the Statement of Disputes is amended to add the following issue: "Did the Carrier waive the right to dispute entitlement to eighth quarter SIBs by failing to timely file an adequate notice of dispute?" Also in evidence is the carrier's response to the claimant's request, asserting that a waiver cannot be created by implication; that Rule 130.104 does not provide for waiver; that the Preamble to the Rule 130.104, found at 24 Texas Register 409, specifically notes that the Texas Labor Code does not have a provision allowing the imposition of a waiver for a carrier's failure to state adequate grounds in disputing entitlement to a quarter of SIBs; and that while the Preamble suggests the potential for an administrative violation for failure to use such specific language, no waiver can attach because the Texas Labor Code does not provide for such. For these reasons, the carrier opposed the addition of the requested issue, asserting that it would be inappropriate for the hearing officer to add such issue and improper to consider such issue. Also in evidence is the hearing officer's order of May 13, 2002, stating that having considered the carrier's response to the claimant's request to add the additional issue, there is good cause to rescind the earlier order.

At the outset of the hearing, the claimant renewed his request for the additional issue, asserting that all he was required to do to get the issue into play at the BRC was to discuss it and that he did so but that the benefit review officer failed to include such in the BRC report. The carrier again opposed adding the issue, stating that such is not a cognizable issue under the 1989 Act and that the claimant is "trying to do a rule

challenge" with this request. The claimant cited no authority in support of his request but rejoined that it was a matter of "due process" and that the "Downs" case did not have a "cognizable issue" either but that the claimant's attorney had gotten that case to the Texas Supreme Court. The hearing officer denied the request. Rule 130.104(e) provides, in pertinent part, that the carrier's notice of determination of nonentitlement "shall contain sufficient claim specific information to enable the employee to understand the carrier's determination" and that "a generic statement such as 'not a good faith effort', 'not a direct result,' or similar phrases without further explanation does not satisfy the requirements of this section." We do not find an abuse of discretion by the hearing officer in refusing the claimant's request to add the issue. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1985); Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The hearing officer could consider not only that, unlike Section 409.021 of the 1989 Act, Rule 130.104(e) is silent on the matter of waiver by noncompliance, but also that the Commission, in its response to a comment on the proposed Rule 130.104(e), directly discussed the matter of adding a waiver provision and stated that it was not necessary. *See* 24 Texas Register 409, January 22, 1999.

With regard to the claimant's additional assigned errors, we decline to act on the claimant's request that we determine Rule 130.102(d)(4) invalid because it exceeds the Commission's rule-making authority and imposes burdens and restrictions inconsistent with or contrary to the controlling statute, Section 408.142(a)(4). It is well settled that "an agency rule is presumed valid" and that "the burden is upon the person attacking the rule to prove otherwise." Texas Workers' Compensation Commission Appeal No. 93753, decided October 7, 1993. We do not find Rule 130.102(d)(4) contradictory of, or otherwise in conflict with, Section 408.142(a), but rather in harmony with and promulgative of that statute.

Finally, we do not find merit in the claimant's contention that "[b]ecause the Carrier clearly disputed entitlement in violation of Rule 130.108(a) without the required comparison or any factual or legal basis, the hearing officer's decision should be reversed." Our decision In Texas Workers' Compensation Commission Appeal No. 021366, decided July 1, 2002, is dispositive of this assignment. In that case, the claimant contended that the carrier did not make a comparison between the factual situation of the previous qualifying period and the factual situation of the current qualifying period, the Appeals Panel concluded that "any such failure on carrier's part would involve a matter for the Division of Compliance and Practices" and perceived no reversible error.

Finding the evidence sufficient to support the challenged findings and conclusions and no reversible error, we affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TX 78701.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge