

APPEAL NO. 022805
FILED DECEMBER 17, 2002

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 27, 2002. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 15th quarter. In its appeal, the appellant (carrier) argues that the hearing officer's determinations that the claimant satisfied the good faith requirement pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)) by returning to work in a job which was relatively equal to his ability to work and that the claimant is entitled to SIBs for the 15th quarter are against the great weight of the evidence. In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that he was assigned an impairment rating greater than 15%; that he did not commute his impairment income benefits; that the 15th quarter of SIBs ran from May 9 to August 7, 2002; and that the qualifying period for the 15th quarter ran from January 25 to April 25, 2002. During the qualifying period for the 15th quarter, the claimant had a job in which he delivered lost luggage to airline passengers. The claimant testified that he was paid \$40.00 per day on the days that he had deliveries and that he was not paid for the days that he did not have deliveries. The claimant testified that sometimes he was scheduled to work and that, if he is not scheduled, he is on call from 8:00 a.m. to 10:30 p.m., when the last flight arrives. He stated that if he is paged, he goes to the airport, picks up the luggage, and delivers it. The claimant acknowledged that he only worked two to three days per week in the qualifying period, but he testified that he considered the job a full-time job because he was on call on the days he did not work. He stated that he did not look for other work during the qualifying period because of the requirement that he remain "on call." In addition, the claimant testified that he took a one-week unpaid vacation during the qualifying period and that he did not look for employment in that week.

The claimant's treating doctor is Dr. Z. In a letter dated March 27, 2001, Dr. Z noted the part-time, light-duty job that the claimant was performing delivering luggage and opined that the claimant "does not appear to be capable of working longer hours, or lifting any heavier objects than he is at this point." On December 28, 2001, the claimant underwent a functional capacity evaluation (FCE) that was ordered by Dr. Z. The FCE report concludes that the claimant can work at the medium to heavy physical demand level and recommends that the claimant return to "full-time work" with restrictions. On January 9, 2002, Dr. Z completed a Work Status Report (TWCC-73) stating that the claimant could return to work "per [the] FCE." In a letter dated July 10, 2002, in

response to a letter from the ombudsman assisting the claimant, Dr. Z again stated that in his opinion the claimant was “working at maximum ability at [his] part time light duty job.” However, in a letter dated August 7, 2002, addressed to the carrier, Dr. Z stated:

I am in receipt of your letter dated July 26, 2002, asking me to address if there are any new developments in [claimant’s] condition which would render him unable to work in [a] full time capacity. You have reminded me that on January 9, 2002, I released [claimant] to restrictions outlined in the [FCE] of December 28, 2001. I somewhat confused the issue by stating in my July 10, 2002, report that it was my opinion that [claimant] was working his maximum ability with his part time, light duty job.

[Claimant] described for me that he was working part time and did not feel that he could work any more. However, I do not find any medical rationale for decreasing his hours, and would rely on the [FCE] of December 28, 2001.

The hearing officer determined that the claimant satisfied the good faith requirement of Rule 130.102(d)(1) by returning to work in a job relatively equal to the claimant’s ability to work and that he was entitled to SIBs for the 15th quarter. The claimant’s Application for [SIBs] (TWCC-52) demonstrates that the claimant only actually worked part time during the qualifying period. However, the evidence also establishes that, in accordance with the December 28, 2001, FCE and Dr. Z’s report in response to the FCE, the claimant has been released to return to full-time work. The claimant acknowledged that he did not make any effort to look for additional work in the qualifying period. With the evidence in this posture, we believe that the hearing officer’s determination that the claimant satisfied the good faith requirement pursuant to Rule 130.102(d)(1) is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we reverse that determination and render a new determination that the claimant did not satisfy the good faith requirement under Rule 130.102(d)(1). Given our reversal of the hearing officer’s good faith determination, we likewise reverse the determination that the claimant is entitled to SIBs for the 15th quarter and render a new decision that the claimant is not entitled to those benefits.

The hearing officer's determination that the claimant is entitled to SIBs for the 15th quarter is reversed and a new decision rendered that the claimant is not entitled to those benefits.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Elaine M. Chaney
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Gary L. Kilgore
Appeals Judge