APPEAL NO. 030285
FILED MARCH 11, 2003

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 November 18, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter, June 6 through September 4, 2002; and that the appellant (carrier) is not relieved of liability for SIBs because of the claimant's failure to timely file an Application for [SIBs] (TWCC-52) for the first quarter. The carrier appealed, arguing that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly unjust and wrong as a matter of law. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The hearing officer did not err in determining that the carrier was not relieved of liability for SIBs because of the claimant's failure to timely file an application for SIBs for the first quarter. The claimant did not dispute that he filed his application for SIBs late, however, he argued that late filing was due to confusion caused by the carrier's required medical examination (RME) doctor representing himself as the designated doctor. The evidence reflected that the RME doctor filed a Report of Medical Evaluation (TWCC-69) certifying that the claimant had not reached maximum medical improvement. We note that by its plain language, Section 408.143(c), which provides that the claimant's failure to timely file a TWCC-52 relieves the carrier of liability for the period during which the statement is not filed, does not apply to the first quarter. Texas Workers' Compensation Commission Appeal No. 992002, decided October 22, 1999. Section 408.143(a) provides that <u>after</u> the Texas Workers' Compensation Commission's (Commission) initial determination of SIBs, the employee must file a statement. We affirm the determination that the carrier is not relieved of liability for SIBs because of the claimant's failure to timely file an application for SIBs for the first quarter.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) by complying with Rule 130.102(d)(4). It is undisputed that the claimant sustained a compensable injury on October 29, 1998; that the claimant reached maximum medical improvement on October 25, 2000, with an impairment rating of 15% or greater; that the claimant did not elect to commute any portion of impairment income benefits; and that the qualifying period for the first quarter was from February 22 through May 23, 2002.

The claimant asserts that he had met the good faith job search requirement of Rule 130.102(b)(2) by compliance with Rule 130.102(d)(4) for the first quarter. 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 determined that the claimant's total inability to work during the first quarter qualifying period satisfied the good faith requirement that he looked for work commensurate with his ability to work and was a direct result of the impairment resulting from the compensable injury.

The Appeals Panel has encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(4) when that rule is applicable. *See* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999, and Texas Workers' Compensation Commission Appeal No. 000525, decided April 24, 2000. In this case, the hearing officer did not reference Rule 130.102(d)(4) and only found that "the claimant's total inability to work during the first quarter qualifying period satisfied the good faith requirement that he look for work commensurate with his ability to work." Arguably, this meets the first element of Rule 130.102(d)(4); however, there is no finding regarding a "narrative report from a doctor which specifically explains how the injury causes a total inability to work."

Further, the hearing officer noted in her discussion of the evidence that the doctor who performed "an independent medical examination" opined that the claimant was capable of performing sedentary work with lifting and standing restrictions. However, the hearing officer made no finding regarding whether or not there were other records which showed that the claimant had an ability to work. In cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 002498, decided November 30, 2000. We would note that the hearing officer does have some discretion in making this fact determination. "The mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000.

We affirm the determination that the carrier is not relieved of liability for SIBs because of the claimant's failure to timely file an application for SIBs for the first quarter. We reverse the determination of the hearing officer that the claimant is entitled to SIBs for the first quarter and remand the case to the hearing officer to make specific evidentiary findings on the narrative and whether or not there were other records which showed that the injured employee is able to return to work applying Rule 130.102(d)(4).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Chris Cowan
Appeals Judge

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Roy L. Warren
Appeals Judge