

APPEAL NO. 032179
FILED SEPTEMBER 18, 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 July 18, 2003. 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 sixth quarter. In its appeal, the appellant (carrier) argues that the hearing officer's determinations that the claimant satisfied the good faith requirement by demonstrating that she had no ability to work pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) and that she is entitled to SIBs for the sixth quarter are against the great weight of the evidence. In her response to the carrier's appeal, the claimant urges affirmance.

DECISION

Reversed and a new decision rendered that the claimant is not entitled to sixth quarter SIBs.

Section 408.142(a) and 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 showing that she had a total inability to work during the relevant qualifying period. 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 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.

Assuming, without deciding, that the reports from the claimant's treating doctor satisfy the requirement of Rule 130.102(d)(4) that the claimant provide a narrative report from a doctor that specifically explains how the compensable injury causes a total inability to work, the question remains as to whether another record shows that the claimant had some ability to work. The carrier offered a report from a required medical examination (RME) doctor appointed by the Texas Workers' Compensation Commission (Commission) as just such a record. In a report dated April 11, 2003, Dr. O, the Commission RME, opined that the claimant "has the ability to work in at least a sedentary position and, in fact, could function in a light sedentary position, as she appears under video surveillance to be quite capable of standing and walking and using both of her extremities." In addition Dr. O concluded that, "it is safe to assign [claimant] to a sedentary category of work with limited use of her left upper extremity." Dr. O examined the claimant, sent her out for a functional capacity evaluation (FCE), and reviewed medical records and video surveillance of the claimant. The FCE report concludes that the "maximum capability at which [claimant] can function according to the US Department of Labor standards is Sedentary." In his report, Dr. O stated:

I am quite concerned about the disparity that I see between the video surveillance and the patient's examination in my office. The posturing that she does with her left arm and left leg are totally not present during the video surveillance activities approximately one month prior to my examination. Furthermore, when asked question what she does, whether or not she drives the car, whether or not she leaves the home, and whether or not she does the grocery shopping, she appears to have blatantly misrepresented herself in that what she says she doesn't do, she clearly does on the video surveillance.

In addition, Dr. O notes in reviewing the claimant's FCE results that she was only able to generate three pounds of pushing force and yet she was able to do more on the surveillance video. Dr. O concluded that "[a]gain, it appears that the patient is greatly misrepresenting her actual abilities." In rejecting Dr. O's report as another record showing that the claimant had an ability to work, the hearing officer stated that the doctor's "conclusions based on the surveillance video are inappropriate in that they fail to provide a balanced and complete depiction of Claimant's ability to function." We note initially, that the hearing officer's premise that Dr. O's conclusions were "based on the surveillance video" is flawed in that Dr. O examined the claimant and also referred her to a physical therapist for an FCE. Very clearly, Dr. O's opinion that the claimant had some ability to work was based upon his consideration of the results of his examination of the claimant, the FCE, and the surveillance video, and more specifically, the disparity between the abilities demonstrated on the surveillance video and during his examination and in the FCE. The hearing officer wholly failed to articulate a rational basis for rejecting Dr. O's report as another record showing that the claimant had some ability to work in the qualifying period for the sixth quarter. In the absence of such an explanation, we believe that his determination that the claimant satisfied the good faith requirements of Rule 130.102(d)(4) is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, that determination, and the determination that the claimant is entitled to SIBs for the sixth quarter, are reversed and a new decision rendered that the claimant is not entitled to sixth quarter SIBs.

The hearing officer's determination that the claimant is entitled to SIBs for the sixth 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 **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JAMES H. MOODY, II
901 MAIN STREET
DALLAS, TEXAS 75202.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Panel
Manager/Judge

Margaret L. Turner
Appeals Judge