APPEAL NO. 041240
FILED JULY 14, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 4, 2004. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the second quarter.

The appellant self-insured (referred to as the carrier) appealed, contending that the claimant had some ability to work, that the hearing officer's findings were inadequate, that the claimant's unemployment was due to something other than her compensable injury, and that the carrier was disputing that the compensable injury included the cervical spine and it was error for the hearing officer to consider the cervical spine as part of the compensable injury. The claimant responds, urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The carrier appeals both the direct result requirement of Section 408.142(a) and Rule 130.102(b)(1) and the good faith requirement of Section 408.142(a)(4) and Rule 130.102(b)(2). The claimant proceeds on a total inability to work theory.

The claimant, a clerical worker, apparently sustained a compensable repetitive trauma injury. The treating doctor, whose impairment rating (IR) was adopted, diagnosed the claimant with "Enthesopathy hand/wrist bilateral[,] Epicondylitys elbows [and] Cervical syndrome with C5 radiculopathy" also referred to as a cervical disc herniation. Although the claimant made some 17 job contacts during the qualifying period, she made clear that she was proceeding on a total inability to work basis. The carrier paid the first quarter of SIBs.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with his or her 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. While the hearing officer did not reference this rule in his decision and did not make findings on the elements, our review of the record indicates the reports of the treating doctor, Dr. RW, before, during, and after the qualifying period, taken together, provide a narrative which specifically explains how the compensable injury causes a total inability to work. Also in evidence is a report dated during the qualifying period from the carrier's required medical examination doctor, which concludes that the claimant "is functionally

[not] able to do any type of work at the present time." A functional capacity evaluation performed more than three months prior to the qualifying period concludes that although the claimant "appeared to have tried her best" she "[d]id not meet these maximum SEDENTARY level DOL requirements." Based on this evidence the hearing officer could conclude that the claimant met the requirements of Rule 130.102(d)(4). Consequently, we find no reason to remand the case for additional findings.

The claimant testified, apparently for the first time, that she has been diagnosed with lupus and that condition has had a debilitating effect on her. The carrier argues that the claimant's unemployment is due to her lupus rather than the compensable injury. We have noted that a finding that the claimant's unemployment or underemployment is a direct result of the impairment is sufficiently supported by evidence if the injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. In this instance, there is evidence from which the hearing officer could determine that the claimant's injury resulted in permanent impairment and that as a result thereof, the claimant could no longer reasonably work in her preinjury position. The Appeals Panel has also held that a claimant's unemployment and underemployment must be a direct result of the impairment from the compensable injury, but the impairment from the compensable injury need not be the sole cause of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996.

The carrier, both at the CCH and on appeal, contends that it never accepted a cervical injury and that the hearing officer erred in considering the cervical injury in the claimant's final IR. First we will note that extent of injury was not an issue before the hearing officer and the hearing officer accepted the parties stipulation that the claimant had an IR of 15% or greater. The claimant cited Texas Workers' Compensation Commission Appeal No. 040150-s, decided March 8, 2004, which recites Rule 130.102(g) concerning maximum medical improvement (MMI) and IR disputes and states:

> If there is no pending dispute regarding the date of [MMI] or the [IR] prior to the expiration of the first quarter [of SIBs], the date of [MMI] and the [IR] shall be final and binding.

The Appeals Panel in Appeal No. 040150-s, *supra*, applied Rule 130.102(g) holding the extent of the compensable injury cannot be challenged because the first quarter had ended. The carrier asks us to reverse Appeal No. 040150-s asserting that it is improper rule making. We decline to do so and note that Appeal No. 040150-s (and we in this case) are merely applying the duly promulgated rule. We would also note that the only Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence is dated January 7, 2004, after the qualifying period at issue.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are 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).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

**RON JOSSELET, EXECUTIVE DIRECTOR**
**STATE OFFICE OF RISK MANAGEMENT**
**300 W. 15TH STREET**
**WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR**
**AUSTIN, TEXAS 78701**.

For service by mail the address is:

**RON JOSSELET, EXECUTIVE DIRECTOR**
**STATE OFFICE OF RISK MANAGEMENT**
**P.O. BOX 13777**
**AUSTIN, TEXAS 78711-3777**.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge