

APPEAL NO. 050626  
FILED MAY 2, 2005

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 February 24, 2005. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first and second quarters. The appellant (carrier) appealed, disputing the determination of entitlement to SIBs for both the first and second quarters. The claimant responded, urging affirmance of the disputed determinations.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, with an impairment rating of 15% or more; that the claimant has not commuted any portion of impairment income benefits; and that the qualifying periods for the first and second quarters are from March 31 through June 29, 2004, and from June 30 through September 28, 2004, respectively. A Benefit Dispute Agreement (TWCC-24) dated October 23, 2003, was in evidence, which reflected that "all parties agree the compensable injury does extend to and include the depression and anxiety disorder as it relates to the compensable injury."

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 SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the first and second quarters. The claimant contends that she has a total inability to work. 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.

In his discussion of the evidence, the hearing officer noted that "[t]he reports of [(Dr. G)] set out that the psychological and pain behavior from the \_\_\_\_\_ injury prevented [the] [c]laimant from returning to work in any capacity." While that may arguably be the case, it is on the basis of the other record criteria set forth in Rule 130.102(d)(4) that we reverse this case. The hearing officer acknowledged in his discussion of the evidence that "[t]he medical reports of [(Dr. K)] based on an examination on March 25, 2004, and a [functional capacity evaluation (FCE)] states that [c]laimant was not prevented from working." However, the hearing officer failed to make a finding about the credibility of such records. 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.

In a medical report dated March 25, 2004 (just prior to the qualifying periods at issue), Dr. K, in answering a specific question about a return to work stated, "she certainly is able to go back to work" acknowledging that the claimant "will have trouble doing heavy overload work on the left side." Dr. K ordered an FCE which was performed on March 26, 2004. In a supplemental report after reviewing the FCE Dr. K noted "very poor effort" by the claimant and commented that the claimant "refused to do any activity with the arm inspite of having a significant amount of ability to work very actively, at least to the waist level." The hearing officer, in neither his Background Information nor findings, failed to indicate why those reports were not other records which show that the claimant is able to return to work in at least some kind of limited or light duty capacity or were somehow not credible. We hold that the claimant did not meet the requirements of Rule 130.102(d)(4) in that there were other records which showed that the claimant was able to return to work. Therefore, we reverse the hearing officer's finding that during the qualifying periods for the first and second quarters, the claimant attempted in good faith to obtain employment commensurate with the claimant's ability to work.

We reverse the hearing officer's decision that the claimant is entitled to SIBs for the first and second quarters and render a new decision that the claimant is not entitled to SIBs for the first and second quarters.

The true corporate name of the insurance carrier is **ARGONAUT SOUTHWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH A. YURKOVICH  
1431 GREENWAY DRIVE, SUITE 450  
IRVING, TEXAS 75038.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge