

APPEAL NO. 050709
FILED MAY 18, 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 March 14, 2005. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter, November 23, 2004, through February 21, 2005. The appellant (carrier) appealed, arguing that the hearing officer ignored the videotape in evidence which showed the claimant performing activities that are wholly inconsistent with someone who was unable to perform any type of work in any capacity. The carrier additionally argues that the claimant failed to provide a narrative, which specifically explained how his compensable injury caused a total inability to work. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated that the claimant on _____, sustained a compensable injury that resulted in an impairment rating of 16%; that the claimant's date of maximum medical improvement was June 23, 2003; that the claimant did not elect to commute any portion of his impairment income benefits; and that the qualifying period for the third quarter of SIBs began on August 11 and continued through November 9, 2004. 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 his ability to work during the qualifying period for the third 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 found that the claimant provided a narrative from his treating doctor that specifically explained how the injury prevented the claimant from performing any work. The carrier contends that there was not a narrative in evidence, which specifically explained how the injury caused a total inability to work. Assuming, without deciding, that the report from the claimant's treating doctor satisfies 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.

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 the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. However, "[t]he 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." However, in the instant case, we cannot agree that no other record showed that the claimant had an ability to work during the relevant time period. The test is not whether the claimant can obtain and retain gainful employment or full-time employment. Texas Workers' Compensation Commission Appeal No. 031089, decided June 23, 2003.

A surveillance videotape was in evidence which showed the claimant during periods of the qualifying period. The videotape shows the claimant walking and standing without any apparent distress. The videotape also shows the claimant throwing unidentified items for a distance and other activities which would be inconsistent with both the claimant's testimony regarding his restricted motion and pain as well as his claim of a total inability to work. Rule 130.102(d)(4) only specifies "no other records show that the injured employee is able to return to work." There is no requirement that it be a "medical record" and in fact surveillance videotapes have been used as such other records. See Texas Workers' Compensation Commission Appeal No. 041485, decided July 26, 2004, and Texas Workers' Compensation Commission Appeal No. 001723, decided September 8, 2000. In correspondence dated November 17, 2004, (Dr. B), a required medical examination doctor, after examining the claimant, opined that the claimant could return to work with restrictions concerning overhead work and reaching.

The hearing officer wholly failed to articulate a rational basis for rejecting the videotape and Dr. B's letter of November 17, 2004, as other records showing that the claimant had some ability to work in the qualifying period for the third quarter. In the absence of such explanations, we believe that her 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 third quarter, are reversed and a new decision rendered that the claimant is not entitled to third quarter SIBs.

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

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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge