

APPEAL NO. 061505  
FILED AUGUST 16, 2006

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 June 1, 2006. With regard to the only issue before him the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the seventh quarter.

The appellant (carrier) appeals, contending both that the claimant did not meet the direct result criteria of Section 408.142(a)(2) and 28 TEX. ADMIN. CODE § 130.102(c) (Rule 130.102(c)) or the requirements of Section 408.142(a)(4) and Rule 130.102(d)(4). The claimant responds, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on \_\_\_\_\_, with an impairment rating of 15%; (2) that no portion of impairment income benefits were commuted; and (3) that the qualifying period for the seventh quarter of SIBs began on December 16, 2005, and ended on March 16, 2006.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states that the [Texas Department of Insurance, Division of Workers' Compensation] (Division) Commissioner by rule shall adopt compliance standards for SIBs recipients. In that no such rules have been implemented as of this date, we refer to the eligibility criteria for SIBs entitlement in Rule 130.102. Commissioner's Bulletin No. B-0058-05 dated September 23, 2005, provides that until new SIBs rules are adopted, the Division's Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.

The carrier appealed the hearing officer's determination that the "Claimant's unemployment during the qualifying period was a direct result of the impairment from the compensable injury" as being against the great weight and preponderance of the evidence. We hold the hearing officer's determination on the direct result criteria is supported by the evidence.

The claimant contends that he has a total inability to work in any capacity. 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 carrier contends that the hearing officer's finding that the reports of Dr. P specifically explain how the claimant's injury caused a total inability to work is against the great weight and preponderance of the evidence. We hold that Dr. P's reports do constitute a narrative report which specifically explains how the injury causes a total inability to work.

The carrier also contends that there is another record that shows the claimant is able to return to work. The claimant was examined by Dr. H, a carrier required medical examination doctor, on February 3, 2006 (which was during the applicable qualifying period). Dr. H reviewed the claimant's medical history, commented on diagnostic tests and listed the claimant's current complaints. In response to a specific question regarding restrictions and "work tasks that he or she should not engage in." Dr. H stated that the claimant:

"could at this time do primarily sedentary type work activity at best. He would be limited in regards to frequent grasp, repetitive motion, and reaching and working overhead. He would also be limited to the amount of sitting, standing, or walking that he could perform with his radiculopathy in his left lower extremity."

Dr. H recommended consideration for a microdiscectomy at L5-S1 on the left to eliminate the radicular complaints but recommended against cervical spine surgery. Dr. H noted that some "form of some median level of opioid medication would be reasonable several times a day."

Dr. H, in the February 3, 2006, report was also asked to perform a functional capacity evaluation (FCE), which he did. The raw figures of that testing, to include two comments of "submaximal effort," are part of the report. The history and physical exam portion of the report lists the medication that the claimant was taking. In conclusion Dr. H stated that the claimant has the "ability to climb stairs without change in his pain input" and that the claimant on isometric testing "gives very little effort, and he does so consistently." Those comments are based on evidence that the claimant's heart rate "does not change sufficiently to indicate significant stress or pain . . . ." Dr. H concludes that "[b]ased on the modified Canadian Aerobic Fitness Testing he can work at a Light to Moderate level over an 8-hour day." Dr. H discusses various tests performed during the FCE, consistently noting that heart rate and physiological parameters do "not show good effort or consistent effort." Dr. H again concludes:

[Claimant] can work in **Sedentary** to **Light** category jobs based on the Dictionary of Occupational Titles. He can sit, stand, and walk for short periods of time. He can take rest breaks every 1-2 hours and should be allowed some freedom of movement. He can lift approximately 15 lbs frequently and 20 lbs. occasionally. I would not recommend frequent

squatting, bending, twisting, pulling, or overhead work. He should not climb ladders or work at heights.

Dr. H concludes his report by attaching a Work Status Report (DWC-73) releasing the claimant to work with restrictions, assessing restrictions as described in his narrative with a sit/stretch break of "1 break every 1-2 hours" and assessing "Sed-Light work."

The hearing officer addresses Dr. H's report, emphasizes the statement that claimant could "do primarily sedentary work **at best**," (emphasis in the hearing officer's comment) does not address the notations of submaximal effort in the FCE, and only emphasizes the restrictions listed on the DWC-73. The hearing officer comments that Dr. H's "estimation that Claimant could return to sedentary work 'at best' is not seen as a credible indication that claimant is capable of sedentary work." The hearing officer remarks that Dr. H's "statements indicate that Claimant would be limited to 'less than sedentary' or 'modified sedentary' work, which has been held in such cases as APD 001360 and APD 002971 not to meet the standard of 'other evidence' showing an ability to work under Rule 130.102(d)(4)." We hold that comment to be against the great weight and preponderance of the evidence.

It is clear that Dr. H did a thorough examination, performed an FCE and noted the results of the testing. The FCE and testing clearly showed submaximal effort as demonstrated objectively by the heart rate and "physiological parameters." Dr. H initially said sedentary type work at best but in discussing the FCE testing Dr. H wrote that the claimant could work "Light to Moderate" work using the "modified Canadian Aerobic Fitness Testing" and sedentary to light work based on the "Dictionary of Occupational Titles." At all times Dr. H states that claimant can at least work at the sedentary level and depending on which standard (Canadian Aerobic or Dictionary of Occupational Titles) is used, the claimant can work at anywhere from sedentary to moderate level over an eight hour day with sit/stretch breaks every one to two hours. To categorize those extensive findings as being less than sedentary or modified sedentary is factually inaccurate. Further, the claimant's testimony that he can drive, can walk unassisted, answer the telephone, alternate standing and sitting for short periods and assist his wife, who works, with housework supports Dr. H's assessment of at least sedentary work.

We hold that the hearing officer's finding that "[n]o other credible record showed that claimant was able to return to work during the qualifying period for the 7th quarter" (Finding of Fact No. 5) is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We hold that the claimant has not met the requirement of Rule 130.102(d)(4) that there are no other records which show that the claimant is able to return to some level of work. Accordingly, we reverse the hearing officer's decision that the claimant is entitled to SIBs for the seventh quarter and render a new decision that the claimant is not entitled to SIBs for the seventh 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.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge