

APPEAL NO. 061662
FILED SEPTEMBER 27, 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 26, 2006. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter, February 25 through May 26, 2006. The appellant (self-insured) appealed, disputing the determination of SIBs entitlement for the fourth quarter. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The sole issue in dispute at the CCH was entitlement to SIBs for the fourth quarter. The parties stipulated in part that on _____, the claimant sustained a compensable injury, which resulted in a final impairment rating of 18%; that the claimant did not elect to commute any portion of impairment income benefits; and that the qualifying period for the fourth quarter began November 13, 2005, and ended February 11, 2006. The record reflected that the claimant had spinal surgery on October 27, 2005.

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 28 TEX. ADMIN. CODE § 130.102 (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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation.

It is undisputed that the claimant did not perform a job search in every week of the qualifying period. The claimant contended that she was entitled to SIBs for the fourth quarter based on a total inability to work. A claimant can satisfy the good faith requirement by demonstrating that she had no ability to work for part of the qualifying period and by conducting a good faith job search in the other part of the qualifying period, but in order to prevail, the claimant must produce evidence that establishes the requirements of Rule 130.102(d)(4) for the period of time that no ability to work was asserted and evidence that meets the criteria of Rule 130.102(e) for the period of time wherein a good faith job search was claimed. Appeals Panel Decision (APD) 002428, decided December 1, 2000. 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 the Background Information portion of the decision the hearing officer noted that:

“[T]he [self-insured] points out that the claimant lacks a narrative report explaining how her injury caused a total inability to work As a result, the claimant has failed to meet her burden to prove entitlement to SIB's. Ordinarily, this [h]earing [o]fficer would agree. But it is irrefutable that any person who undergoes invasive spinal surgery will need a recovery period and require some physical rehabilitation. The Appeals Panel has held that if a claimant's total disability is so obvious as to be irrefutable, then the claimant would not have to look for work to qualify for SIB's.”

The hearing officer correctly noted that there are some decisions that held that if the claimant's total inability to work is so obvious as to be irrefutable, then the claimant would not have to look for work to qualify for SIBs. However, those cases dealt with SIBs quarters prior to the effective date of Rule 130.102(d). APD 013090, decided January 24, 2002, held that the adoption of Rule 130.102(d)(4) reflects a Division intent that the determination is to be made primarily with medical evidence, and that a finding of inability to work can no longer be based upon a subjective determination that asserted inability to work is “so obvious as to be irrefutable.”

A review of the exhibits in evidence reflects that there is no narrative report from a doctor that specifically explains how the claimant's compensable injury caused a total inability to work during the relevant qualifying period. Conclusory off-work slips or Work Status Reports (DWC-73) without further explanation do not provide the specific narrative required by Rule 130.102(d)(4). APD 040805, decided May 24, 2004.

We hold that the claimant did not meet the requirements of Rule 130.102(d)(4) in that there was no narrative report from a doctor in the record, which specifically explained how the compensable injury causes a total inability to work. Accordingly, the hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter is reversed and a new determination rendered that the claimant is not entitled to SIBs for the fourth quarter.

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

**JC OR SJ
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge