APPEAL NO. 080850
FILED AUGUST 5, 2008

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 May 7, 2008. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter (November 2, 2007, through January 31, 2008) and the second quarter (February 1 through May 1, 2008). The appellant (carrier) appealed, arguing that the hearing officer's findings of fact and conclusions of law are not supported by the evidence presented. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that: (1) the claimant sustained a compensable injury on _____, and has a 15% impairment rating or higher; (2) the claimant did not commute any portion of the impairment income benefits; (3) the qualifying period for the first quarter is July 21 through October 19, 2007; and (4) the qualifying period for the second quarter is October 20, 2007, through January 17, 2008. 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Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation. We note that Rule 130.110 relating to the role of the designated doctor in return to work disputes during SIBs was repealed effective December 31, 2006.

The claimant contended that he was entitled to SIBs for the first and second quarters based on 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.

The hearing officer specifically found that the claimant's treating doctor and the designated doctor provided narrative reports, which specifically explained how the injury caused a total inability to work during the qualifying periods for the first and second

quarters. In evidence is a medical report from the claimant's treating doctor which stated the degenerative changes in the claimant's knee joints are linked to the accident in question and that since the accident, the claimant has been unable to be gainfully employed because of his problems. The designated doctor, appointed by the Division to determine the claimant's ability to return to work, opined in a medical report on October 22, 2007, that the claimant "is not able to return to work at this time." The designated doctor noted that the claimant was planning a total knee replacement of the left knee in approximately one month and noted the claimant's continuing right knee pain. The claimant testified that he canceled the total knee replacement of the left knee "because [he] had other complications." A letter of clarification was sent to the designated doctor and he responded on March 24, 2008. In his response, the designated doctor stated if the claimant was not willing to proceed with the recommended surgery, the claimant may then proceed to look for employment within the limitations of his current condition. The designated doctor went on to explain that he thought a current functional capacity evaluation would be useful to determine if the claimant is able to return to "gainful employment" and if so to help determine the limitations that would be present. Based on the evidence in the record, we cannot agree that the claimant's treating doctor and the designated doctor provided narrative reports, which specifically explain how the compensable injury causes a total inability to work. A recitation of medical conditions and treatment followed by a simple statement that the claimant could not work is inadequate under Rule 130.102(d)(4). Appeals Panel Decision (APD) 031682, decided August 12, 2003.

We note that in APD 022604-s, decided November 25, 2002, the Appeals Panel held that when the designated doctor is properly appointed under Section 408.151 and Rule 130.110 to consider the issue of whether the claimant's medical condition has improved sufficiently to allow the claimant to return to work, the procedures under Section 408.151 and Rule 130.110 control over the provisions of Rule 130.102 pertaining to entitlement to SIBs. As previously noted, Rule 130.110 was repealed effective December 31, 2006. Section 408.151(a) provides that on or after the second anniversary of the date the Commissioner makes the initial award of SIBs, an insurance carrier may not require an employee who is receiving SIBs to submit to a medical examination more than annually if, in the preceding year, the employee's medical condition resulting from the compensable injury has not improved sufficiently to allow the employee to return to work. Section 408.151(b) provides that if a dispute exists as to whether the employee's medical condition has improved sufficiently to allow the employee to return to work, the Commissioner shall direct the employee to be examined by a designated doctor chosen by the Division. The report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee's medical condition has improved sufficiently to allow the employee to return to work on that report unless the preponderance of the other medical evidence is to the contrary. In addition, we note that Section 408.0041(a) provides in pertinent part that at the request of an insurance carrier or an employee, or on the Commissioner's own order, the Commissioner may order a medical examination to resolve any question about: (5) the ability of the employee to return to work, and that Section 408.0041(e) provides that the report of the designated doctor has presumptive weight unless the

preponderance of the evidence is to the contrary. *See also* Rule 126.7. In the instant case, the designated doctor in his response to a letter of clarification stated the claimant may proceed to look for employment within the limitations of his current condition.

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 first and second quarters is reversed and a new determination rendered that the claimant is not entitled to SIBs for the first and second quarters.

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
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge