APPEAL NO. 010617-S

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 January 8 and March 5, 2001, in _____, Texas, with (hearing officer) presiding as the hearing officer. The record closed on March 5, 2001. At the January 8, 2001, setting, a continuance was granted to permit the claimant to obtain counsel. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 2nd quarter. In its appeal, the appellant (carrier) asserts error in the hearing officer's determinations that the claimant satisfied the good faith requirement and that he is entitled to SIBs for the 2nd quarter. Specifically, the carrier contends that there was insufficient documentation to support the hearing officer's determination that the claimant had no ability to work from June 12 to June 21, 2000, and further notes that during the week of May 18 to May 24, 2000, the claimant did not document a job search effort.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____. The parties stipulated that the claimant reached maximum medical improvement on May 4, 1999, with an impairment rating of 16%; that the 2nd quarter of SIBs ran from July 5 to October 3, 2000; that the qualifying period for the 2nd quarter ran from March 23 to June 21, 2000; that the claimant did not commute his impairment income benefits; and that during the qualifying period for the 2nd quarter, the claimant "never earned wages for at least 90 days that were at least 80% of [his] average weekly wage." Although the parties stipulated to the date of the qualifying period at the hearing, it is important to note that when the carrier sent the Application for [SIBs] (TWCC-52) to the claimant for the 2nd quarter, it listed the dates of the qualifying period, in accordance with the requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(b)(2) (Rule 130.104(b)(2)), as March 22 to June 21, 2000. Those dates for the qualifying period were not correct and the dates stipulated to at the hearing were the correct dates of the qualifying period as that phrase is defined in Rule 130.101(4). The significance of the difference in the dates of the qualifying period becomes apparent when the claimant's job contact information accompanying his TWCC-52 is considered. If the dates of the qualifying period provided by the carrier are used, then the claimant documented a job contact in each week of the qualifying period except the 13th week. However, if the dates of the qualifying period to which the parties stipulated are used, then the claimant did not document a job search in either the 9th or 13th week of the qualifying period.

The hearing officer determined that the claimant was entitled to SIBs for the 2nd quarter, because he sought employment commensurate with his ability to work and documented his job search efforts in each week of the qualifying period except the period from June 12 to June 21, 2000, and the medical documentation showed that the claimant had no ability to work in that period. The hearing officer further found that there was a narrative that specifically explained how the injury caused a total inability to work for the period from June 12 to June 21, 2000, and that no other records for the period show an

ability 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." Rule 130.102(e) provides in part that, "[e]xcept as provided in subsection (d)(1), (2), (3), and (4) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

On March 29, 2000, the claimant was referred for a functional capacity evaluation (FCE) by his treating doctor, Dr. M. The FCE report states that the claimant qualifies for the medium work category "within the restricted work plane" and the light work category in the "competitive unrestricted vertical and horizontal work planes." In a report dated April 27, 2000, Dr. M stated that the claimant "may return to work with restrictions as per FCE . . . ." In a "To Whom it May Concern" letter of June 10, 2000, Dr. M stated:

> I am the [claimant's] treating doctor . . . . Due to chronic pain and continual loss of use [of claimant's] right shoulder, he has been referred to [Dr. D] for a consultation. [Dr. D] recommends further diagnostic testing and possible further surgical intervention.
>
> At this time I have taken [claimant] off work due to increased pain and symptoms with loss of range of motion [ROM] and strength.

In a July 3, 2000, letter to the claimant, Dr. D noted that in his initial evaluation, the claimant showed "marked limitation of [ROM]," "very positive impingement signs," and "is tender both over his A-C joint and his scar." Dr. D concluded his letter by stating that he suspected "incomplete release of [claimant's] impingement with the prior arthroscopic acromioplasty and that [claimant] has continued A-C joint arthritic changes with incomplete resection of his distal clavicle." On September 5, 2000, Dr. D performed surgery on the claimant's right shoulder.

The hearing officer determined that Dr. M's June 10, 2000, letter satisfied the requirement of a narrative that specifically explained how the injury caused a total inability to work for the period from June 12 to June 21, 2000. The questions of whether a narrative exists and whether another record shows an ability to work are fact questions for the hearing officer. Texas Workers' Compensation Commission Appeal No. 002428, decided December 1, 2000; Texas Workers' Compensation Commission Appeal No. 002498, decided November 30, 2000. The hearing officer was persuaded that Dr. M's statement that the condition of the claimant's shoulder had progressed such that a surgical consultation was required due to the loss of use of the shoulder in conjunction with increased pain and significant ROM restrictions provided sufficient explanation of the claimant's inability to work for the period from June 12 to June 21, 2000, the last portion of the qualifying period. The hearing officer also determined that no other records show an ability to work in that period, apparently discounting the earlier FCE results and release

from Dr. M based upon the evidence that the claimant's condition had deteriorated. The hearing officer was acting within his province as the fact finder under Section 410.165(a) in making those determinations. We cannot agree that the hearing officer's determination that the claimant had no ability to work for the portion of the qualifying period from June 12 to June 21, 2000, is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. As such, we will not disturb that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer awarded SIBs for the 2nd quarter without specifically considering whether the claimant had documented a job search in the 9th week of the qualifying period. As we noted above, if the correct dates of the qualifying period are considered, the claimant did not document a job search in the 9th week, but he did document a search in the 9th week of the qualifying period if the dates of the qualifying period provided by the carrier on the TWCC-52 are used. Rule 130.104(b) requires that the carrier complete the blanks on the TWCC-52 providing the number of the applicable quarter, the dates of the qualifying period, the dates of the quarter, and the deadline for filing the application with the carrier before providing that form to the claimant. It is axiomatic that accuracy on the part of the carrier in providing that information is required. Where, as here, the carrier provides inaccurate dates, we hold that the carrier is precluded from benefitting from having done so. A carrier will not be permitted to attempt to defeat a claimant's good faith showing by arguing that the claimant did not document a job search in each week of the qualifying period when the claimant can demonstrate that he or she documented a weekly job search using the dates of the qualifying period the carrier provided on the TWCC-52. That is, as a prerequisite for advancing the argument that the claimant failed to document a weekly job search in accordance with Rule 130.102(e), the carrier is first required to comply with its obligation to accurately provide the information required in Rule 130.104(b) on the TWCC-52. This outcome is consistent with our decision in Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992, where we determined that we would not impose the five-day, deemed date of receipt provision because the Texas Workers' Compensation Commission (Commission) failed to mail a copy of the hearing officer's decision and order to the claimant at the last known address. Appeal No. 92199 reasoned that the Commission should not impose the requirements of a rule against a party unless the Commission has complied with its own duties relative to that rule. By analogy, the same reasoning applies to the carrier in this instance. Thus, we affirm the hearing officer's determination that the claimant is entitled to SIBs for the 2nd quarter based on the proposition that the judgment of the fact finder should be affirmed if it can be sustained on any reasonable theory supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Judge

DISSENTING OPINION:

I respectfully dissent because I believe the parties and the hearing officer are bound by the stipulated dates of the 2nd quarter qualifying period. It is undisputed that the Application for Supplemental Income Benefits [SIBs] (TWCC-52) provided to the claimant by the carrier misstated by one day the starting date of the qualifying period and that this one day is crucial in determining whether the claimant looked for work during the 9th week of the qualifying period. Using the qualifying period start date on the TWCC-52, March 22, he did look for work during the 9th week of the qualifying period and the hearing officer's decision can be affirmed; using the stipulated start date, March 23, he did not and the hearing officer's decision must be reversed. There is no information in the record to suggest that the misstatement of the qualifying period start date was anything other than inadvertent error.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(4) (Rule 130.101(4)) provides that the qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks. The parties are presumed by law to know of this provision.

Through his attorney the claimant stipulated to the qualifying period start date of March 23. Section 410.166 provides that a written stipulation or agreement of the parties that is filed in the record, or an oral stipulation or agreement of the parties that is preserved in the record, is final and binding. *And, see,* Rules 140.1 and 142.9. In Texas Workers' Compensation Commission Appeal No. 92109, decided May 4, 1992, the Appeals Panel reversed the hearing officer's decision for failure to give effect to a stipulation in the record as to which of two businesses was the employer of the claimant in that case. That decision stated the following, concerning the effect of a stipulation:

> A stipulation is an agreement, a concession made by parties respecting some matter incident to a judicial proceeding. National Union Fire Insurance Co. v. Martinez, 800 S.W.2d 331 (Tex. App.-El Paso 1990, no writ). They are generally received as judicial admissions in the absence of allegations and proof of fraud, mistake, or lack of authority. Thompson v. Graham, 318 S.W.2d 102 (Tex. Civ. App.-Eastland 1958, writ ref'd n.r.e.). Parties cannot stipulate to legal conclusions to be drawn from the facts of a case; such stipulations are without effect and bind neither the parties nor the courts. City of Houston v. Deshotel, 585 S.W.2d 846 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ).

However, parties may agree on truth of specific facts by stipulation and by this method limit the issue to be tried. Geo-Western Petroleum Development Inc. v. Mitchell, 717 S.W. 2d 734 (Tex. App.-Waco 1986, no writ). Such stipulations are binding on the parties, on the trial court, and the appeals court. Id. Evidence conflicting with an agreed stipulation is generally not admissible until the contrary stipulation is nullified by consent or order of the court. Allen v. Allen, 704. S.W.2d 600, 605 (Ted. App.-Fort Worth 1986, no writ); Wilson v. West, 149 S.W.2d 1026 (Tex. Civ. App.-San Antonio 1941, writ dism'd judgm't. corr.). . . . Disregarding a proper stipulation can be the basis for reversible error. *See* Jeter v. Radcliff Finance Corp., 247 S.W.2d 186 (Tex. Civ. App.-Galveston 1952, no writ).

And, see, Texas Workers' Compensation Commission Appeal No. 960637, decided May 13, 1996, where the carrier attempted to obtain relief, from the Appeals Panel, from a stipulation of the dollar amount of the monthly SIBs payments on the basis that the amount stipulated had been misstated by an employee of the Texas Workers' Compensation Commission.

In my opinion, the hearing officer erred in finding that the claimant looked for work each week of the qualifying period between March 23 and June 21, 2000, because he, and the parties, were bound by the stipulated start date for the qualifying period. Applying that date, the claimant did not look for work during the 9th week of the qualifying period and, therefore, is not entitled to SIBs for the 2nd quarter.

_____
Philip F. O'Neill
Appeals Judge