APPEAL NO. 002724

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 October 24, 2000. With regard to the only issue before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the second compensable quarter based on "no ability to work in any capacity."

The appellant (carrier) appealed citing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102), as well as several Appeals Panel decisions, and asserting that the claimant had not met the requirements of Rule 130.102(d)(4). The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The claimant sustained a compensable low back injury on _____, and had spinal surgery in October 1997. The parties stipulated that the claimant sustained a compensable injury on _____; that he has an impairment rating (IR) "of 15% or greater"; that impairment income benefits (IIBs) have not been commuted; that the Texas Workers' Compensation Commission made an initial determination of entitlement to SIBs; and that the second quarter qualifying period was from April 20, 2000, through July 19, 2000. The claimant contends that he has a total inability to work in any capacity.

Sections 408.142(a) and 408.143 and Rule 130.102 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether the claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The hearing officer's finding in favor of the claimant on direct result has not been appealed and will not be addressed further.

The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work is addressed in Rule 130.102(d)(4), which provides that the statutory good faith requirement may be met if the employee:

> (4) 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[.]

Dr. S, the claimant's treating doctor, ordered a functional capacity evaluation (FCE) in July 1999. The FCE, dated July 16, 1999, concluded that the claimant "is able to work at the light PDL for an 8 hour day," but that the claimant cannot return to work at his preinjury job of a refrigeration technician which is "a heavy physical demand level of work." A report dated July 20, 1999, from Dr. S does not comment on ability to work. The next, and only other medical evidence, is a progress note dated June 19, 2000, of a June 12, 2000, office visit which states, in its entirety:

> Patient back for follow-up today with a herniated nucleus pulposus. Patient on a biofeedback program, which he says has about four weeks left and that he wants to continue. He hurts in his lower back in the right sciatic notch area into the right posterior thigh. Straight leg raising on the right side is positive at 30 degrees. There are no bowel or urinary complaints. We renewed his medication today. See back for follow-up in four weeks or on a p.r.n. basis. Patient is off of work at this time he is not able to perform any type of work at this time.

The Appeals Panel has encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(4) when that rule is applicable. *See* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999 and Texas Workers' Compensation Commission Appeal No. 000525, decided April 24, 2000. In this case, the hearing officer did not even reference the rule and only found that the claimant "had no ability to work in any capacity." Arguably, this meets the first element of Rule 130.102(d)(4); however, there is no reference to any "narrative report from a doctor which specifically explains how the injury causes a total inability to work." Dr. S's progress note of June 19, 2000, which is roughly two-thirds of the way through the qualifying period only, states that the claimant "is off work" and that "he is not able to perform any type of work at this time." We hold that note to be insufficient to constitute a narrative report which specifically explains how the injury causes a total inability to work. Similarly, the hearing officer makes no reference at all to the FCE ordered by Dr. S in 1999 which shows an ability to work at light duty eight hours a day. In the absence of any finding of why that FCE is not such an "other record" which shows the claimant is able to perform some light duty, we hold that the hearing officer's decision does not comply with the requirements of Rule 130.102(d)(4).

Accordingly, we reverse the hearing officer's decision and render a new decision that the claimant is not entitled to SIBs for the second compensable quarter.

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

A hearing officer is presumed to know and properly apply the law. We should affirm a hearing officer's decision if:

- it can be upheld on any legal theory supported in the evidence;
- the legal and factual issues raised by the evidence support the decision;
- the evidence will support implied findings to affirm the decision; or
- findings susceptible to different constructions, can be construed in a manner which supports the decision.

However, if the findings do not support the decision, the decision should be reformed to conform to the findings, or reversed.

In this case, the evidence supports an implied finding that no "other records show that the injured employee is able to return to work." With respect to the functional capacity evaluation (FCE), the evidence establishes:

- the FCE was done nine months before the beginning of the qualifying period;
- the claimant's condition had worsened from the date of the FCE;
- the FCE does not address the effects, if any, of the medication the claimant was taking during the qualifying period; and
- the FCE report was signed by an "LPT."

Based on this evidence, and taking these factors together, the hearing officer could conclude the FCE was not sufficiently credible to constitute "other records show that the injured employee is able to return to work."

In this case, the evidence clearly would not support an implied finding that there is "a narrative report from a doctor which specifically explains how the injury causes a total inability to work." The narrative report under this rule must:

- be from a doctor;
- contain information giving the nature of the compensable injurious condition, and
- explain why the compensable injurious condition causes the injured worker to be unable to work.

To determine if the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) for a doctor's narrative report are met, the following will be considered:

- amendments;
- supplements, including contested case hearing testimony from the doctor;
- information incorporated in the report by reference; or
- information from a doctor's medical records in evidence that can be reasonably incorporated in the doctor's narrative report by inference based on some connection between the report and the information in the medical records.

The only information from a doctor that could possibly be interpreted to indicate that the claimant had no ability to work during the qualifying period was contained in two brief "follow-up" notes for appointments on June 12, 2000, and June 19, 2000. There is no indication that these notes were even intended to be a narrative report to show the claimant had no ability to work. The information in the reports does not cover the entire qualifying period, and gives no indication that all possible types of employment were considered by the doctor, and the doctor gives no explanation of "how the injury causes a total inability to work."

Robert E. Lang
Appeals Panel
Manager/Judge

Gary L. Kilgore
Appeals Judge