APPEAL NO. 050895
FILED MAY 27, 2005

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 March 17, 2005. With regard to the only issue before her the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the third quarter.

The claimant appealed, contending that there was no duty to seek employment outside of his limitations, that the hearing officer utilized the wrong legal standard in deciding the case and that he had made a good faith effort to obtain employment commensurate with his ability to work. The respondent (carrier) responded that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Reversed and remanded.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). At issue in this case is good faith effort to obtain employment commensurate with the ability to work requirement of Section 408.142(a)(4) and Rule 130.102(b)(2). The claimant contends that he has met the good faith criteria for the third quarter by making a good faith job search pursuant to Rule 130.102(e). The claimant's Application for [SIBs] (TWCC-52) indicates that he made 26 job contacts and documented at least 1 contact every week of the qualifying period.

The parties stipulated that the claimant sustained a compensable neck, back and left knee and arm injury on _____; that the claimant's impairment rating is 19%; that impairment income benefits were not commuted; and that the third quarter qualifying period was from August 25 through November 23, 2004. In an unappealed finding, the hearing officer determined that the claimant had some ability to work but that he was unable to meet "the physical demands of his preinjury job." The treating doctor in two brief reports states that the claimant "was only capable of working 1-2 hours a day, as a direct result of his medical condition." The carrier's required medical examination doctor in a five page report concludes, regarding the claimant's restrictions:

> I would put him on sedentary work because of his neck surgery. He needs a sit/stand option and lifting less than 25 pounds.

The claimant testified, and there is no contradictory evidence, that when he applied for work he told potential employers that he was seeking part-time work without mentioning the number of hours that he could work. There is some testimony that the claimant's job search resulted in a job working about 10 hours a week. When the claimant

obtained this job is not clear (the claimant said it was about "three weeks ago," meaning three weeks prior to the March 17, 2005, CCH). A check stub in evidence indicates the claimant worked 10 hours for "week ending 03/04/05." There is no evidence that the claimant worked during the qualifying period.

Rule 103.102(d)(5) 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 provided sufficient documentation as described in subsection (e) of Rule 130.102 to show that he or she has made a good faith effort to obtain employment. Rule 130.102(e) provides that except as provided in subsection (d) (1), (2), (3), and (4) of Rule 130.102, 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. Rule 130.102(e) then lists information to be considered in determining whether a good faith effort has been made.

The hearing officer, in the Background Information section of the decision made the following commentary:

> In reviewing the medical evidence, it is noted that the only record from [the treating doctor] that speaks to the Claimant's work ability during the qualifying period is a 2-sentence letter that states the claimant's limitation of working one to two hours a day due to his injury. There is no explanation from [the treating doctor] for his limitation, and as such, it is conclusory. In a situation like that of the Claimant, where there is a dispute regarding the Claimant's limitations, medical evidence is needed to specifically explain the need for limiting the Claimant's work ability. The need for a narrative report specifically explaining why the Claimant was limited to working no more than two hours per day in this case is no different than the need in other cases for a specific explanation when a Claimant is asserted to have a total inability to work. While the Claimant's testimony was generally credible at the bearing, [*sic*] it is not medical evidence and, thus, it is insufficient to provide an explanation on why he was limited to a maximum of two hours of work per day. Consequently, since the claimant only sought part-time work during the qualifying period, he did not meet his burden of proof to show that he made a good faith effort to obtain work that he could do. He, therefore, is not entitled to 3rd quarter SIBs.

We hold that the hearing officer erred by impermissibly imposing a new requirement that "medical evidence is needed to specifically explain the need for limiting the Claimant's work ability." The hearing officer goes on to comment "this case is no different than the need in other cases for a specific explanation when a Claimant is asserted to have a total inability to work." We disagree. In order to prove a good faith effort to obtain employment in cases where the injured worker is claiming a total inability to work in any capacity, Rule 130.102(d)(4) requires, among other things, "a narrative report from a

doctor which specifically explains how the injury causes a total inability to work." That provision is not present in Rules 130.102(d)(5) and (e). We hold that the hearing officer erred in imposing such an additional requirement. Where there is conflicting medical evidence, the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), may give greater weight and credibility to one report or the other, but in applying Rules 130.102(d)(5) and (e) the hearing officer may not impose a requirement of a narrative specifically explaining why the doctor limited the number of hours the worker could work or why the doctor imposed certain restrictions.

We reverse the hearing officer's decision that the claimant is not entitled to SIBs for the third quarter and remand the case for further consideration and application of the correct legal standard. No additional evidentiary hearing is to be held. The hearing officer may allow additional written and/or oral comment or argument regarding the remanded point and then issue a new decision on the issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge