APPEAL NO. 020041-s
FILED FEBRUARY 28, 2002

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 December 14, 2001. The hearing officer resolved the disputed issue by concluding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the sixth quarter. The appellant (self-insured) appealed. No response was received from the claimant.

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). The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has an impairment rating of 27%; that the claimant has not commuted impairment income benefits; that the sixth quarter was from September 18, 2001, through December 17, 2001; and that the qualifying period for the sixth quarter was from June 1, 2001, through September 4, 2001.

The claimant contended that he had no ability to work during the qualifying period for the sixth quarter. It is undisputed that the claimant did not work or look for work during the qualifying period for the sixth quarter. As a result of his compensable injury, the claimant has had two cervical spine surgeries, one in July 1998 and the other in December 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. Rule 130.102(e) provides in part 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.

Dr. B, the claimant's treating doctor, reported on June 14, 2001, that the claimant is unable to work due to stiffness and severe pain in his neck, with numbness and tingling in the right upper extremity. Dr. C, the required medical examination doctor, examined the claimant in January 2000 and reported at that time that the claimant could not return to his previous occupation, but that the claimant could return to a medium work category position. Dr. C reexamined the claimant in June 2001 and stated in a report dated June 19, 2001, that "I would not suggest anything above a 'light work' category. . . ." In the same report, in response to the question "In your opinion, is the claimant's current inability to work due to the initial accident/injury?", Dr. C answered "Yes."

In a letter dated September 6, 2001, the Texas Workers' Compensation Commission (Commission) notified Dr. BO that a dispute exists as to whether the claimant's medical condition had improved sufficiently to allow the claimant to return to work, and that, under the provisions of Section 408.151, Dr. BO is designated to examine the claimant to resolve the dispute. Dr. BO examined the claimant on September 11, 2001, and reviewed medical records, and in a report dated September 13, 2001, which was after the qualifying period for the sixth quarter had ended, opined that he does not believe that the claimant is able to be employed because of the extensive surgery of the cervical spine, which would place the claimant at risk, and because of the claimant's continued pain. It is not apparent from the record when Dr. BO's report was initially received by the Commission, but it must have been on or after the date of the report, which would have been after the qualifying period had ended. In an addendum dated September 24, 2001, Dr. BO stated that the claimant is not able to work and has not been able to work at any time from June 19, 2001, through September 13, 2001.

Section 408.151 pertains to medical examinations for SIBs. In reaching his decision that the claimant is entitled to SIBs for the sixth quarter, the hearing officer states in his decision that he gave presumptive weight to the report of Dr. BO under Section 408.151(b), and that Section 408.151(a) does not provide a limitation on the appointment of a designated doctor. The self-insured contends that the hearing officer erred in giving presumptive weight to Dr. BO's report and cites Rule 130.110, which pertains to return to work disputes during SIBs; designated doctor. According to the preamble to Rule 130.110 at 24 Tex. Reg.10339 (1999), this rule was adopted in response to the enactment of Section 408.151. Section 402.061 provides that "The commission shall adopt rules as necessary for the implementation and enforcement of this subtitle." Rule 130.110 implements Section 408.151.

We agree with the self-insured for two reasons. First, Rule 130.110(a) provides, in part, that "This section only applies to disputes regarding whether an injured employee whose medical condition prevented the injured employee from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured employee's initial entitlement to [SIBs]." The preamble to Rule 130.110 states: "New § 130.110(a) establishes that if a dispute exists regarding whether an injured employee's medical condition has improved sufficiently to allow the injured employee to return to work after the second anniversary of the injured employee's initial entitlement to [SIBs], the Commission, when requested or on its own motion, shall select a designated doctor to resolve the dispute and that the report of the designated doctor has presumptive weight." In Texas Workers' Compensation Commission Appeal No. 011564, decided August 21, 2001, the Appeals Panel noted that pursuant to Section 408.151 and Rule 130.110, the opinion of a designated doctor selected to determine if a claimant's condition has improved sufficiently to permit a return to work is entitled to presumptive weight unless the great weight of the other medical evidence is to the contrary, but that the designated doctor's report in that case was not entitled to presumptive weight for two reasons, one of which was that "the dispute as to whether the claimant's condition had improved sufficiently to allow him to return to work

arose prior to the 'second anniversary of the injured's employee's initial entitlement to SIBs.'" Likewise, in the instant case, although there is no determination as to the date of the claimant's second anniversary of his initial entitlement to SIBs, since the case involves entitlement to SIBs for the sixth quarter, with each quarter being 13 weeks, it is clear that the dispute regarding the claimant's work status arose prior to the second anniversary of the claimant's initial entitlement to SIBs. Thus, in accordance with our decision in Appeal No. 011564, Dr. BO's report is not entitled to presumptive weight for the sixth quarter.

Second, Rule 130.110 provides, in part, that "The presumptive weight afforded the designated doctor's report shall begin the date the report is received by the Commission. . . ." The preamble to Rule 130.110 states: "The rule also establishes the starting date of the presumptive weight afforded the designated doctor's report as the date the Commission receives the designated doctor's report and also establishes the timeframe that the presumptive status continues. By establishing the starting date of the presumptive weight afforded the doctor's report, the presumptive weight will only be applicable to the qualifying period in which the report was received by the Commission." In Appeal No. 011564, *supra*, the other reason that the Appeals Panel held that the designated doctor's report was not entitled to presumptive weight was that it was received by the Commission after the qualifying period for the quarter in issue in that case. Appeal No. 011564 referred to Texas Workers' Compensation Commission Appeal No. 002327, decided November 20, 2000, for a discussion of Section 408.151 and Rule 130.110 and the prerequisites for giving a designated doctor's report on ability to work presumptive weight. *See also* Texas Workers' Compensation Commission Appeal No. 002788, decided January 11, 2001, which held that the hearing officer in that case was correct in not giving presumptive weight to the designated doctor's report because it was not filed with the Commission until after the end of the qualifying period for the quarter in issue. In the instant case, since Dr. BO's report was written after the end of the qualifying period for the sixth quarter, it could not have been received by the Commission until after that qualifying period ended, and thus the hearing officer erred in giving it presumptive weight for the sixth quarter.

The hearing officer's decision reflects that his decision in favor of the claimant was based on affording presumptive weight to Dr. BO's report. Although Dr. BO's report is not entitled to presumptive weight with regard to the sixth quarter, it can be considered under Rule 130.102(d)(4) in determining SIBs entitlement for that quarter. Appeal No. 002327, *supra*.

The hearing officer's decision is reversed and the case is remanded for the hearing officer to make findings of fact regarding the elements in Rule 130.102(d)(4), conclusions of law, and a decision on whether the claimant is entitled to SIBs for the sixth quarter. We note that in Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000, the Appeals Panel stated that "in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record."

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 Commission's Division of Hearings, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

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

JUDGE
(ADDRESS)
(ADDRESS), TEXAS (ZIP CODE).

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge