APPEAL NO. 022604-s
FILED NOVEMBER 25, 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 (CCH) was held on September 13, 2002. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 15th quarter. The claimant appeals that determination and the respondent (carrier) responds, urging affirmance.

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 qualifying period for the 15th quarter was from January 10 through April 11, 2002, with the 15th quarter running from April 25 through July 25, 2002. The claimant contended that he had no ability to work during the qualifying period for the quarter. It is undisputed that the claimant did not work or look for work during the qualifying period.

This case involves the interpretation and application of Section 408.151 and Rule 130.110. Section 408.151 of the 1989 Act provides in part:

> (b) If a dispute exists as to whether the employee's medical condition has improved sufficiently to allow the employee to return to work, the [Texas Workers' Compensation Commission (Commission)] shall direct the employee to be examined by a designated doctor chosen by the [C]ommission. The designated doctor shall report to the [C]ommission. The report of the designated doctor has presumptive weight, and the [C]ommission 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 great weight of the other medical evidence is to the contrary.

Rule 130.110 implements Section 408.151. The pertinent portions read:

> (a) This section applies only 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 supplemental income benefits (SIBs). Upon request by the injured employee or insurance carrier, or upon its own motion, the [C]ommission shall appoint a designated doctor to resolve the

dispute. The report of the designated doctor shall have presumptive weight unless the great weight of the other medical evidence is to the contrary. The presumptive weight afforded the designated doctor's report shall begin the date the report is received by the [C]ommission and shall continue:

(1) until proven otherwise by the great weight of the other medical evidence; or

(2) until the designated doctor amends his/her report based on newly provided medical or physical evidence.

(b) A dispute exists if there is conflicting medical or physical evidence that has not been previously considered in a prior dispute under this section that indicates the injured employee's medical condition has improved sufficiently to allow the injured employee to return to work. Medical evidence consists of medical reports or records that are generated as a result of a hands-on examination of the injured employee. Physical evidence may consist of, but is not limited to, videotaped activities, evidence of wage earning capabilities (i.e., payroll information), or reports from a private provider of vocational rehabilitation services or the Texas Rehabilitation Commission.

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(j) The designated doctor shall review all medical and physical evidence provided by the insurance carrier and treating doctor and shall perform a hands-on examination. The designated doctor shall give the evidence reviewed the weight he/she feels is appropriate. Following the examination, the designated doctor shall prepare a report, in the form and manner prescribed by the [C]ommission, of his/her findings regarding whether the injured employee's medical condition has improved sufficiently to allow the injured employee to return to work.

Apparently Dr. P was appointed as the designated doctor for purposes of Rule 130.110. The evidence in this case does not contain information about who requested the appointment of the designated doctor, nor what the basis for the request was. The hearing officer did question whether either party was arguing that it was wrong to have appointed the designated doctor in the circumstances of this case, and there was no such argument. The hearing officer noted in the Statement of the Evidence that Dr P's "appointment appears to have been appropriate, and neither side argued to the contrary." Our decision in Texas Workers' Compensation Commission Appeal No. 002327, decided November 20, 2000, dealt with the applicability of Rule 130.110, and also outlined detailed findings that may need to be made by the hearing officer,

depending on the type of dispute involved. In this case, there was no dispute about whether it was appropriate to apply Rule 130.110.

Dr. P addressed his report of November 8, 2001, to the dispute resolution officer in the Commission field office where the CCH was held. Dr. P's report concludes with the following statements:

> At the present time, I would have to say that he is temporarily totally disabled from viable functional activity in the workplace. . . . After an appropriate period of vocational rehabilitation, he should be capable of working in a modified, light duty capacity. Initially, I would start him at no more than 4 hours a day, with position rotation per his requirements for pain relief, and with a primarily sedentary capacity with no lifting requirements. This would be, however, after at the very least, a 6-8 week vocational rehabilitation program focusing on improvement of basic work skills, position tolerance training, and mobilization, endurance training to some degree. **As of now**, and without this additional rehabilitation, **he is currently unable to work.** [Emphasis added.]

Pursuant to Rule 130.110(a), the designated doctor's report "shall have presumptive weight unless the great weight of the other medical evidence is to the contrary." The designated doctor's report has presumptive weight beginning on the date the report is received by the Commission. *See* Rule 130.110(a) and Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. The parties stipulated that the report was provided to the Commission prior to the qualifying period for the 15th quarter; consequently, the report in this case is entitled to presumptive weight for the 15th quarter.

The hearing officer noted that he had previously determined that the claimant was not entitled to 11th, 12th, and 13th quarter[1] SIBs, based on pretty much the same evidence as was presented at this CCH, with the exception that the report of Dr. P was not afforded presumptive weight at that hearing, as it was received by the Commission after the last day of the qualifying period for the 13th quarter. The hearing officer analyzed the issue before him as being whether the designated doctor's report has presumptive weight, unless the great weight of the other medical evidence is to the contrary, concerning inability to work as a whole, or just as to the third portion of Rule 130.102(d)(4), that there must be no other records which show that the claimant is able to return to work.

Finding no precedent from the Appeals Panel, the hearing officer decided that the appropriate course of action was to give the designated doctor's opinion presumptive weight only as to whether the claimant's condition has improved sufficiently to allow him to return to work. He then went on to apply Rule 130.102(d)(4) and discussed that neither Dr. P nor anyone else opined that the claimant was unable to

[1] The transcript of the CCH indicates that the carrier paid SIBs for the 14th quarter, but does not provide any further information about the circumstances under which payment was made.

perform any type of work in any capacity, and that no one "explains in a narrative how the injury caused a total inability to work." He states that the "credible evidence supports the conclusion that Claimant is capable of doing some work." We hold that the hearing officer erred in interpreting the rules.

This is a significant case because there have not been any previous decisions by the Appeals Panel which address the exact rule interpretation required in this case. Texas Workers' Compensation Commission Appeal No. 021439, decided July 24, 2002, provides some guidance. In that case, the designated doctor initially submitted a report that was qualified, in that the report contained the opinion that "with his education, training, and experience, the claimant was not capable of performing any job in a light or sedentary capacity." A functional capacity evaluation (FCE) was later performed, indicating that the claimant was capable of sedentary work. The designated doctor was asked to comment on the FCE and whether the claimant could perform work, irrespective of his educational level and training. The designated doctor did not answer the latter question, but said that, as indicated in the FCE, the claimant could perform sedentary work. The first report of the designated doctor was not given presumptive weight because it was qualified, and the amended report was not given presumptive weight because it was not timely received by the Commission. We affirmed the hearing officer's action in relying on a Rule 130.102(d)(4) analysis when the designated doctor's Rule 130.110 report could not be given presumptive weight.

To decide the case, we first review the chronology of the origin of the rules involved in this case. The rule pertaining to no ability to work in a SIBs case was effective January 31, 1999, as Rule 130.102(d)(3), and was amended effective November 28, 1999, as Rule 130.102(d)(4), with no change to the wording of the rule. Subsequently, Section 408.151 (pertinent portion set forth above) was enacted by the 76th Legislature, effective September 1, 1999, and Rule 130.110 (pertinent portions also set forth above), effective November 28, 1999, was promulgated soon after. From this chronology, we discern that the intent of the statutory provision and the ensuing Rule 130.110 was to provide for a designated doctor to resolve the difficult issue of whether the claimant's medical condition has improved sufficiently to allow the claimant to return to work, that this rule calls for the designated doctor to determine whether the claimant has any ability to work in any capacity, and that when a designated doctor is called upon to make this determination, this provision would take precedence over the earlier rules pertaining to this same subject. This provision parallels the use of the designated doctor for the also difficult issues of maximum medical improvement (MMI) and impairment rating (IR), and provides for presumptive weight to be given to the report of the designated doctor.

We hold 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. Use of the designated doctor for return to work determinations gives presumptive weight to the designated doctor's opinion over

other evidence normally used to decide the Rule 130.102(d)(4) issues of inability to work, narrative report, and "other records." The hearing officer erred in applying the considerations found in Rule 130.102(d)(4) to the report of the designated doctor when the designated doctor's opinion had presumptive weight on the question of whether the claimant had any ability to work in any capacity. The check and balance built into Section 408.151 and Rule 130.110 is that the designated doctor's report has presumptive weight "unless the great weight of the other medical evidence is to the contrary." This concept is well known from its application to issues of MMI and IR, and should be easily understood and applied.

We reverse the determination of the hearing officer that the claimant is not entitled to SIBs for the 15th quarter, and remand the case to the hearing officer to apply Section 408.151 and Rule 130.110 as we have outlined above, giving presumptive weight to the designated doctor's report "unless the great weight of the other medical evidence is to the contrary." We note that the presumptive weight afforded the designated doctor's report begins when the report is received by the Commission and continues until proven otherwise by the great weight of the other medical evidence or until the designated doctor amends his or her report based on newly provided medical or physical evidence. In this regard, the designated doctor provided a road map for what it would take to persuade him that this claimant's medical condition has improved sufficiently to allow him to return to work.

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 which was amended June 17, 2001, to exclude Saturdays, 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 **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

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Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

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Gary L. Kilgore
Appeals Judge