APPEAL NO. 040219-s
FILED MARCH 17, 2004

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 15, 2004. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 12th quarter. The claimant appeals this determination. The appeal file contains no response from the respondent (carrier).

DECISION

Reversed and a new decision rendered that the claimant is entitled to SIBs for the 12th quarter.

Section 408.151 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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.110 (Rule 130.110), which implements Section 408.151, provides, in pertinent part:

> (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 [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.

The parties stipulated that the qualifying period corresponding to the 12th SIBs quarter began on July 4 and ended on October 2, 2003. The evidence reflects that pursuant to Rule 130.110, the Commission appointed Dr. P to serve as the designated doctor to resolve the dispute as to whether the claimant's medical condition had improved sufficiently to allow her to return to work. Dr. P examined the claimant on April 8, 2003. Dr. P apparently requested that a Functional Capacity Evaluation (FCE) be performed prior to rendering an opinion regarding the claimant's ability to return to work. The FCE was performed on May 14, 2003, and, according to Dr. P, there was a delay in the receipt of the results. After receiving the results, Dr. P issued a letter dated June 10, 2003, which was received by the Commission on June 12, 2003, indicating that the claimant was not capable of "being gainfully employed at this particular time."

In deciding that the claimant was not entitled to SIBs for the 12th quarter, the hearing officer relied on the fact that Dr. P's report was not received by the Commission within seven days after his examination of the claimant and, consequently, the report was not entitled to presumptive weight. Pursuant to Rule 130.110, the presumptive weight afforded the designated doctor's report begins on the date 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 report based on newly provided medical or physical evidence. *See* also Texas Workers' Compensation Commission Appeal No. 022604-s, decided November 25, 2002. While Rule 130.110(k) requires that the designated doctor file his report with the Commission "not later than the seventh day after the completion of the examination of the injured employee," there is no corresponding provision in that subsection providing a penalty for noncompliance. There certainly is no provision stating that if the report is not filed with the Commission within seven days of the designated doctor's examination, the report is not entitled to presumptive weight. In fact, in response to a comment to the proposed adoption of Rule 130.110(l), which pertains to referrals by the designated doctor to other health care providers, the Commission clarified that when the designated doctor deems it necessary to seek a referral to another doctor in order to make a finding regarding the injured employees medical condition, "the doctor should be allowed to have the examination even though it may delay the final resolution." The Commission further clarified that "[t]o require the designated doctor to issue a finding without the benefit of the testing or referral he/she feels is necessary, is to promote the issuance of incomplete and potentially incorrect findings." In the absence of a penalty provision for the failure of a doctor to provide the report within seven days of the examination of the claimant and given the clarification provided by the Commission outlined above, the hearing officer erred in not granting presumptive weight to Dr. P's opinion that the claimant could not return to work.

The hearing officer cited Texas Worker's Compensation Commission Appeal No. 022717, decided December 6, 2002, in support of the position that a report not received within seven days is not entitled to presumptive weight. In that case, it was noted that the designated doctor's report was not entitled to presumptive weight because "the doctor believes an FCE is required and further, the report was not sent to the Commission within seven days of the exam date." To the extent that Appeal No. 022717, *supra*, can be interpreted as holding that a designated doctor's report is not entitled to presumptive weight simply because it was received by the Commission later than seven days after the doctor's examination of the claimant, that interpretation would be an incorrect application of Rule 130.110. Dr. P's report was entitled to presumptive weight from the time the report was received by the Commission and the presumptive weight continues until proven otherwise by the great weight of the other medical evidence or until Dr. P amends his report based on newly provided medical or physical evidence. In this case, the designated doctor's report was received prior to the beginning of the 12th quarter qualifying period and is entitled to presumptive weight. When a designated doctor's opinion is entitled presumptive weight pursuant to Rule 130.110, it is not necessary to consider other evidence pertaining to Rule 130.102(d)(4). Appeal No. 022604-s, *supra*. For these reasons, the hearing officer's decision that the claimant is not entitled to SIBs for the 12th quarter is reversed and a new decision rendered that in accordance with the opinion of Dr. P, whose report was received by the Commission on June 12, 2003, the claimant is not capable of returning to work and is entitled to SIBs.

The true corporate name of the insurance carrier is **THE CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Edward Vilano
Appeals Judge