APPEAL NO. 94188

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 12, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) had good cause for not timely filing his claim and that he was entitled to supplementary income benefits for the second compensable quarter. Appellant (carrier) asserts that claimant did not timely file because he did not know he was supposed to file, which is not good cause for late filing, and that claimant should not be paid supplementary income benefits for this quarter because he did not seek work and filed his request for payment late. Claimant asks that the decision be upheld and questions whether the appeal was timely.

DECISION

We affirm.

Claimant began work for (employer) in 1990, at the age of 79. Working as a night watchman, on (date of injury), he fell descending steps and hurt his back. He was found to be at maximum medical improvement (MMI) in November 1991, with 25% impairment. He received 75 weeks of impairment income benefits, and then received supplementary income benefits for the first compensable quarter.

The carrier now raises the issue of whether claimant filed a claim within one year of injury, or had good cause for delay. *See* Sections 409.003 and 409.004. Claimant testified that "they filed the report of injury down at the office." He was then asked if he meant that his notice of injury had been filed, and he said yes. He added that he realized that his employer had not filed his notice at the benefit review conference on September 14, 1993; he filed his notice and claim on September 16, 1993. While the testimony did not go into great detail as to why claimant thought employer filed his notice, the evidence did show that carrier's action in paying benefits throughout two years period of time was not inconsistent with claimant's belief. The evidence was sufficient to raise a fact issue for the hearing officer to consider. *See* Pan American Fire & Cas. Co. v. Hill, 586 S.W.2d 187 (Tex. Civ. App.-El Paso 1979, writ ref'd n.r.e.).

The carrier also asserted that claimant did not timely file his request for supplementary income benefits for the quarter in question. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(c) (Rule 130.104(c)) specifies no time limit on a claimant; rather, it tells the claimant, "to ensure no lapse in benefits, the statement should be filed no later than the 15th day after receipt of the statement." In addition, carrier asserts that claimant did not seek work. (Dr. T) on November 1, 1993, estimated that he could determine within six months whether claimant will be able to return to work. No medical statement indicates that he can work. The medical evidence sufficiently supports the hearing officer's determination that claimant has not been released to return to work and is entitled to supplementary income benefits. (*See* Section 408.142(a)(4) which requires an employee to attempt in good faith to work "commensurate with the employee's ability to work.") With

no ability to work, no attempt to seek employment is required. *See* Texas Workers' Compensation Commission Appeal No. 93636, decided September 3, 1993, which said that a claimant's physical condition could obviate any effort to obtain employment.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge