APPEAL NO. 980042

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 December 1, 1997. With respect to the only issue before him, the hearing officer determined that appellant's (claimant) underemployment was a direct result of his impairment, that claimant had some "capability" to work during the applicable "qualifying" (filing) period, but that claimant had not made a good faith effort to obtain employment commensurate with his ability to work and that claimant was not entitled to supplemental income benefits (SIBS) for the 13th compensable quarter.

Claimant contends that he was unable to work pursuant to his doctor's orders during the filing period and that when he did work he had to stop because of pain. Claimant contends that he has not been released to work by his treating doctor. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) urges affirmance.

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable low-back injury, on _____, which resulted in a 16% impairment rating (IR), that claimant had not commuted impairment income benefits (IIBS), that the filing period for the 13th compensable quarter began on April 8th and ended on July 7, 1997 (all dates are 1997 unless otherwise noted), and that during the applicable quarter claimant earned $708.00 which was less than 80% of his AWW.

Claimant testified that (Dr. G) is his treating doctor and that he has had back surgery. The medical records establish that claimant was initially treated conservatively and that "he eventually underwent disc excision at L4-L5 and L5-S1 with a posterior lumbar interbody fusion . . . with segmental fixation and iliac crest graft . . . in June of 1993." Claimant testified that he has continued to have constant pain. Claimant also testified that during part (perhaps two-thirds) of the filing period he worked two or three hours a day, three days a week, as a meat cutter at a taco restaurant but that he had to quit because the work and standing on his feet aggravated his back condition. Claimant also testified, and listed on his Statement of Employment Status (TWCC-52), that he had applied for "several" (at least three) jobs as a truck driver. The hearing officer noted that these jobs "appeared to be beyond [claimant's] physical capabilities."

Claimant was apparently examined by Dr. G on June 10th and in a "Return to Work Certificate," Dr. G checked "Unable to Work." On another note dated July 9th, Dr. G checked "No duty" and on a Specific and Subsequent Medical Report (TWCC-64) dated July 16th, Dr. G noted "off work 1 month" with a diagnosis of low-back pain and a clinical assessment of "chronic arachnoiditis." By letter dated November 17th, claimant's attorney wrote Dr. G and requested a more complete explanation of the doctor's "no-duty" order. Dr. G replied by letter dated November 14th, stating:

> He has been noted to have continued pain despite spinal fusion and we have noted evidence of arachnoiditis on his latest studies, the CT myelogram which was done in July of 1997. Based on this, we have had him off work. He does have a basis for his pain and he is going to be evaluated for implantation of a spinal cord stimulator in an effort to relieve the discomfort in his legs.

Carrier submits a report dated October 7th, from (Dr. S), a required medical examination (RME) doctor, who had examined claimant. Dr. S notes a functional capacity evaluation (FCE) which "was performed on October 17, 1997 [sic--note Dr. S's report of October 7th refers to an FCE which had not yet been performed--probably Dr. S meant the FCE was performed on October 7th]" demonstrated claimant could not return to work as a "mixer/driver" and had certain lifting restrictions. Dr. S noted "inconsistencies" and "self-limiting behaviors" in claimant's work capacity assessment. Dr. S concluded:

> Due to apparent inconsistencies and effort, including the demonstration of self-limiting pain behavior, the validity of the results derived from the work capacity assessment on October 17, 1997, is somewhat speculative. Given however, the extent of original injury and the complexity of the subsequent surgery, and including the results of recent diagnostic studies, the patient's present condition would consider him to be incapable of performing job tasks beyond the light level of physical demand.

Also in evidence were RME reports and an FCE of 1996 indicating claimant, at that time, had an ability to perform light or sedentary duties.

The hearing officer noted, in his Statement of the Evidence, that Dr. G had failed to "elaborate on what [claimant's] functional limitations were as a result of his back pain" and that pain "isn't, in and of itself, determinative of a no work condition."

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

In this case the hearing officer clearly considered the medical evidence and determined that claimant had some ability to work during the filing period and that claimant had made only nominal efforts to seek employment for jobs for which he was not physically qualified. As Dr. S mentioned, claimant should seek retraining and seek light to sedentary employment which allows him to change positions from standing to sitting and back.

We find the hearing officer's determinations sufficiently supported by the evidence and not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Accordingly, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Christopher L. Rhodes
Appeals Judge

DISSENTING OPINION:

Because the decision herein is manifestly unjust and against the great weight and preponderance of the evidence, and because it further runs afoul of the still viable legal doctrine of liberal interpretation accorded to the workers' compensation laws in not only Texas but essentially every jurisdiction, I would reverse and render the opinion that claimant was entitled to supplemental income benefits.

In this case, the claimant was actually employed for the first nine weeks of the filing period. He was taken off work by his doctor, who subsequently found that claimant had an additional and painful follow-on to his injury and surgery. In short, the pain which caused him to quit standing on his feet for two to three hours a day, three days a week, in fact was objectively verified. In the interim period, claimant nevertheless applied for jobs, but this, instead of being counted in his favor, is in fact held against him by the hearing officer, based in large part on a functional capacity evaluation done in October 1997, or three months after the end of the filing period, which looks back and says that the claimant really could not have worked those jobs. I am hard-pressed to search around for ways to justify a decision which finds that a good faith search for employment was not met in a filing period for which a claimant actually worked most of the weeks involved, and then actually looked for jobs that are second-guessed several months after the fact.

This is strict construction of the statutory requirement of a good faith search for employment commensurate with the ability to work, not the liberal interpretation which has been the rule in Texas since the 1920's. As articulated in Hargrove v. Trinity Universal Insurance Company, 256 S.W.2d 73, 75 (Tex. 1953), a basis for liberal construction of the

act in favor of injured workers was the denial of common law rights as part of the "bargain" under workers' compensation laws for the exclusive remedy of compensation benefits. This was still true of the 1989 Act, and, more to the point, there is no express statutory provision in the 1989 Act acting to repeal decades of case law. Because the hearing officer's resolution of the facts in this case is based upon a strict interpretation of "good faith," I would reverse it as a matter of law, as well as contrary to the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

Susan M. Kelley
Appeals Judge