APPEAL NO. 980190
FILED MARCH 19, 1998

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 January 13, 1998 with hearing officer. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 11th compensable quarter and whether the appellant (carrier) waived its right to contest the entitlement. The hearing officer determined that the claimant was entitled to SIBS for the 11th quarter and that the carrier did not waive its right to contest the entitlement by not timely requesting a benefit review conference since the claimant was not awarded SIBS for the ninth and 10th quarters. The Texas Workers' Compensation Commission's review of employment status dated September 9, 1997 determined that the claimant was not entitled to SIBS. The carrier appeals only on the issue of the claimant's entitlement to 11th quarter SIBS urging that the hearing officer's findings of fact and conclusions of law are against the great weight and preponderance of the evidence and manifestly unjust.

DECISION

Reversed and a new decision rendered.

The claimant sustained injuries, including a cervical injury, in a motor vehicle accident on _____. He also had a shoulder injury from a work-related accident in 1989 for which he underwent surgery at the time and subsequently. Medical reports show that the claimant had fusion surgery at C5-6 and a partial clavicle resection on his shoulder in 1992. He has not returned to work and is seeking SIBS for the 11th quarter. That filing period runs from May 15 to August 13, 1997. The claimant asserts that he was not able to work during the filing period, but, that alternatively, he made a good faith effort to obtain employment commensurate with his ability to work.

There are a number of medical records in evidence showing long standing treatment including physical therapy and documenting a series of cervical epidural blocks administered by his current treating doctor, (Dr H), running through the first half of 1997. Dr. H also wrote a note dated April 2, 1997, indicating his opinion that the combination of the 1989 and 1991 injuries have made "him totally disabled and unable to work at this time" and states in a brief certificate "unable to return to work . . . indefinitely." Other medical evidence concerning the claimant's ability to work includes a functional capacity evaluation (FCE) of February 6, 1997, which states the opinion that the claimant "has some ability to work" and that "he is best suited for a sedentary to sedentary-light work classification"; a letter dated February 12, 1996, from his former treating doctor who states "he is released to go back to work as of 2/13/96 as per the FCA" (apparently an earlier FCE). A note from (Dr. W) dated February 7, 1997, states that he had reviewed a video of the claimant from October 1996 showing him in activity that lead him to conclude that the claimant "is definitely capable of returning to the work that he was doing at the time of the accident,

namely, driving a car and delivering pizza." In a subsequent report dated November 11, 1997, Dr. W answers specific questions and states that "my restrictions would be sedentary work only" and that "due to distraction from pain, I do not believe the patient can work at all and the request for [FCE] is unnecessary as he has had an adequate [FCE] previously."

The claimant testified that during the filing period he continued to experience considerable cervical pain and some numbness, that he was getting weekly injections, that he was on a number of medications that made him feel "fuzzy, dizzy, sleepy" but that he could function with medication but limited in driving and doing things around the house. He stated that his doctor has not released him to work and says he has gotten progressively worse. He states that pain keeps him from working, but that he looked for some jobs during the filing period without success. He stated he had gone to the Texas Rehabilitation Commission and the Texas Workforce Commissions but they could not do anything since he was not released to work.

There is a letter from the claimant's employer which indicated that a possible position in their "phone center" but that the claimant did not feel he would be able to sit for long periods of time and would have difficulty with the focus required by the job. They both apparently agreed the position would not be suitable. A "Job Search Documentation" form in evidence showed that the claimant contacted five (other than the employer) prospective employers in "5-97" and "6-97." The notations indicated "would not hire" or "would not take application" because of restrictions and "nothing available."

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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" (here from May 15 to August 13, 1997). Regarding the statutory requirement that a good faith effort be made to seek employment commensurate with the ability to work, 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. However, a total inability to work will rise only rarely as opposed to limited or a restricted ability to work. Texas Workers' Compensation Commission Appeal No. 960714, decided May 20, 1996. 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,

and Texas Workers' Compensation Commission Appeal No. 951798, decided December 13, 1995. 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*. Medical evidence to support a total inability to work must affirmatively show total inability and should be more than a single, merely conclusory notation of not able to work indefinitely. *See* Texas Workers' Compensation Commission Appeal No. 961918, decided November 7, 1996; Texas Workers' Compensation Commission Appeal No. 972709, decided February 13, 1998 (Unpublished); Appeal No. 951798, *supra*.

Regarding the requirement for a good faith attempt to obtain employment commensurate with the ability to work, the Appeals Panel has indicated that good faith is an intangible and abstract quality, encompassing honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage and that a person's overt actions are factors to be considered. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995. And while the specific number of jobs sought is not *per se* the determinative factor in establishing good faith (Texas Workers' Compensation Commission Appeal No. 941168, decided October 14, 1994), factors such as the timing of a job search (Texas Workers' Compensation Commission Appeal No. 941639, decided January 20, 1995), and whether there was generally job seeking activity during the whole filing period may be considered. The Appeal Panel has held the requirement generally spans the entire filing period and has reversed in situations where a job search was undertaken only during a portion of the filing period. Texas Workers' Compensation Commission Appeal No. 971184, decided August 1, 1997; Texas Workers' Compensation Commission Appeal No. 970046, decided February 20, 1997; and Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996.

Although not entirely clear from his Decision and Order, the hearing officer apparently based his decision on an inability to work, and alternatively, on the claimant having made a good faith job search. From our review of the evidence of record, the award of SIBS for the 11th compensable quarter is not supported by the evidence. To the contrary, determinations that the claimant had no ability to work at all and that he made a good faith effort to obtain employment commensurate with his ability to work are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The overwhelming weight of the evidence shows some ability to work although there is no doubt that the claimant is suffering lingering effects from his injury and is significantly restricted in his physical activity. This evidence includes the prior FCEs; the statements from his former treating doctor releasing him to work; the statements of Dr. W who viewed videos in February 1997 inconsistent with no ability to work and his November 1997 statement which, although mentioning distraction from pain as impacting his abilities, again indicates work capability at the sedentary level; and, the acknowledgment by the claimant in his testimony of his ability to engage in restricted daily activity which establishes some ability to work triggering the requirement to seek employment commensurate with that

limited ability. The short, conclusory note from his current treating doctor "stating unable to return to work indefinitely" is not sufficient under these circumstances to establish a total inability to work and thus satisfying the statutory work search requirements. While it may constitute some evidence of some probative force, it is factually insufficient when weighed against the overwhelming evidence of some ability to work. Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ).

In a like vein, the evidence is insufficient to show that a good faith effort to find employment commensurate with the ability to work was made by the claimant. While the evidence was somewhat vague on the job search efforts, perhaps because the main thrust was no ability to work at all, it is clear from the evidence that the five jobs listed covered only a minute portion of the filing period in issue and failed to satisfy the statutory requirements. From our review of the evidence we conclude that the determination that the claimant made a good faith effort to obtain employment commensurate with the ability to work is so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

For the foregoing reasons, so much of the decision and order as determines the claimant is entitled to SIBS for the 11th compensable quarter is reversed and a new decision and order rendered that the claimant is not entitled to SIBS for the 11th compensable quarter.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would first point out that, had I been the hearing officer in this case, I would not have awarded supplemental income benefits (SIBS) to the claimant. However, I am not the hearing officer and, given our standard of review, I would affirm if I were writing the decision on appeal.

I will not review the issue of whether claimant had "no ability to work." The hearing officer did not find that claimant had no ability to work. Therefore, I will address whether

the hearing officer could have found that claimant acted in good faith in searching for five jobs.

The majority states that the hearing officer's decision is "against the great weight and preponderance of the evidence." However, from the record, I believe the hearing officer could find that claimant had numerous physical problems from his 1991 compensable injury (and from other injuries and ailments), that he had a limited ability to work because of pain, weakness, and the effects of his medications, and that the five job contacts he made constituted a good faith job search *under the circumstances of this particular case.*

I first note the following evidence: (1) in April 1997, about a month before the filing period, (Dr. H) said claimant is "totally disabled and unable to work" due to a combination of two injuries (including the 1991 injury); (2) in a November 1997 report, (Dr. W) said claimant wears a TENS unit, claimant has been having one epidural steroid block (ESB) per week, and that claimant is having to take more and more medications because his ESBs have been "cut off"; (3) in a July 23, 1997, letter, (Dr. NO) said claimant has undergone bilateral decompressions, three rotator cuff surgeries on the right, two left shoulder procedures, and a cervical fusion, and that his ESBs relieve pain for about four to five hours; (4) in a February 1997 report, (Dr. RA) noted that claimant said he broke the steering wheel with his shoulder during the motor vehicle accident (MVA) when he sustained his 1991 compensable injury; (5) in a September 1997 report, Dr. NO diagnosed claimant with myofacial syndrome and listed as a "primary problem," that "Pt. has difficulty with carrying out home care for self"; and (6) in an August 1997 report, Ph.D (Dr. C) said that claimant's pain is "unpredictable," that claimant demonstrated no significant pain behaviors, that he had difficulty focusing his concentration, that claimant was cooperative, that he has not had any formal pain management, and that it is recommended that claimant receive training regarding methods for adaptive activities of daily living and vocational exploration and counseling.

Claimant said his 1991 compensable MVA injury included a shoulder injury, a cervical injury, and carpal tunnel syndrome. Claimant said that, although he does not think he can work, during the filing period in question, he went to five potential employers seeking a job. He testified that some of them said he could not work without a release from his doctor and another said he would have to take a drug screen, which claimant said he could not pass. Claimant said that if the employers had offered him a job, he would have taken it. He also said he went to the Texas Workforce Commission.

I believe the hearing officer could find from this evidence that claimant has severe impairment from his compensable injury and that his job search capabilities are diminished because of it. Therefore, the hearing officer could find that five job searches for this particular claimant was sufficient to show good faith. It is not clear to me how the hearing officer's determination can be characterized as against the "great weight and preponderance of the evidence." The carrier introduced a functional capacity evaluation (FCE) that said claimant could not yet do light work, that he could do sedentary work only,

and that claimant appeared reasonably motivated. Carrier also introduced a series of letters from (Dr. MA), claimant's former treating doctor, who, after reviewing videotapes of claimant doing certain activities, stated that claimant is not disabled, that he may return to light-duty work, and that he does not wish to work with claimant any more because claimant underrepresented his physical abilities. Carrier also introduced a note from Dr. W stating that he changed his mind after viewing the videotape and that claimant can work.

It does not appear to me that carrier had the great weight of the evidence on its "side." Some of carrier's evidence still showed that claimant was impaired. The most I could say in carrier's favor, from an appellate standpoint, is that the evidence conflicted and the evidence then had to be weighed *by the hearing officer* not the Appeals Panel. I realize that an appellate reviewing body may substitute its judgment for the hearing officer's in cases where the great weight of the evidence is so contrary to the hearing officer's determination that it amounts to manifest injustice. However, in my opinion, this case did not rise to the level of manifest injustice. I, personally, disagree with the hearing officer and I would have given more weight to carrier's evidence in this case had I been the hearing officer. Again, however, I was not the hearing officer and I would affirm his determination of SIBS entitlement because it was the "hearing officer's call" and he decided what the evidence established, as was his province.

The Appeals Panel has affirmed other cases where a hearing officer found a claimant acted in good faith even though five or fewer job searches were made. The Appeals Panel has also stated many times that a hearing officer may choose to disbelieve any part of the evidence. Therefore, I do not understand why the majority does not recognize that the hearing officer could believe Dr. H (who said claimant could not even do **any** work), and decide that claimant's job search capabilities were greatly diminished. Despite the fact that there was some strong evidence that favored carrier and the fact that this was a later SIBS quarter, the standard of review remains the same.

I would also note that the hearing officer *could* find from the evidence that claimant could perform the activities in the videotape (which was not even in the record) because his admitted intermittent pain was diminished due to a steroid block or for other reasons. If one has debilitating impairment, it is reasonable to assume that, if there was a period of intermittent pain relief, the person would accomplish as much as possible in that time period. Again, these are things that the hearing officer *could* determine from the evidence.

I would also disagree that the Appeals Panel should reverse a SIBS award just because a medical opinion is "conclusory" or because the job search did not span the entire filing period. I would hold that these are merely factors for the hearing officer to consider. *See* Texas Workers' Compensation Commission Appeal No. 971790, decided October 24, 1997; Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997. Regarding direct result, the hearing officer could make this finding in claimant's favor given his continuing work restrictions.

In conclusion, I would affirm based on our appellate standard of review.

Judy L. Stephens
Appeals Judge