APPEAL NO. 990048

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 14, 1998. The issue at the CCH was whether the respondent, who is the claimant, was entitled to supplemental income benefits (SIBS) for her 14th quarter of eligibility.

The hearing officer found that the claimant's unemployment was the direct result of her impairment. She further found that claimant was "excused" from the work requirement because of a total inability to work during the applicable filing period.

The appellant (self-insured) has appealed. The self-insured briefly appeals based upon the opinion of its own doctor, which attributed claimant's inability to work to conditions other than the work-related injury. The self-insured argues that the injury was not the direct result of her unemployment and that she failed to seek employment commensurate with a sedentary level of work. The claimant responds that she is not required to prove that her injury was the "sole cause" of her unemployment. The claimant argues that the decision of the hearing officer is supported factually in the record.

DECISION

Affirmed as reformed.

The claimant, who was 64 years old at the time of the CCH, had been employed to assist patients at the (employer). On _____, she was injured twice in quick succession as she attempted to control a large, unruly, patient. First, she was grabbed around the neck and twisted, and then the patient fell on her, injuring her lower back. Claimant had multiple surgeries and was certified with a 32% impairment rating (IR), which incorporated specific ratings for cervical and lumbar injuries with residual effects, as well as IR for limitations on range of motion in those regions.

It was agreed that the filing period for the 14th quarter was January 23 through April 23, 1998. The claimant had looked for no work during this period.

The claimant testified in the CCH that she was in constant pain. Her current treating doctor for pain management, Dr. H, testified at the CCH that claimant was completely unable to work, even at a sedentary level; that she had to move around constantly; and that her chronic pain emanated from degenerative disc disease. Asked to comment on the relationship of this to her injury, however, Dr. H said he could not, as he had only treated the claimant since 1996. Dr. H was asked if her chronic pain could result from her cervical and lumbar surgeries and he responded by linking it to her degenerative disease.

A doctor for the self-insured, Dr. P, examined the claimant on December 9, 1997. He agreed that she was unable to work. However, Dr. P attributed the reasons to factors

that were not part of the claimant's injury, primary psychological and neurological factors. He advised testing for neurological/motor deficits that he did not believe were injury based. Dr. P noted that claimant had a functional capacity evaluation performed a few days earlier in which her symptom magnification indicators were high and she was not cooperative on performing all requested exercises. This evaluation found that based upon the evaluator's subjective evaluation (because objective determinations could not be made due to failure to perform all tasks), claimant had a sedentary work level. The evaluator also subjectively opined that claimant would have difficulty finding or sustaining gainful employment.

The legislature has required applicants for SIBS to demonstrate that they have made a good faith search for employment "commensurate with the employee's ability to work." Section 408.143(a)(3). In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated 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. We have held that 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 that a finding of no ability to work must be based on medical evidence. 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 injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. 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, although there was conflicting evidence, the hearing officer obviously chose to believe Dr. H's testimony that the claimant had an inability to work in any capacity during the filing period.

More arguably problematic is the finding that claimant's unemployment was the "direct result" of the impairment. Dr. H was unprepared to make this link and the report of Dr. P, while stating that claimant had inability to work, attributed this to matters not flowing from the injury. Against this, however, was the proof that the claimant received a 32% IR for whole body impairment reasonably presumed to be permanent and a component of both her cervical and lumbar impairment included consideration of "residuals." The hearing officer could believe that her chronic pain was one of these "residuals" and was a factor in her inability to work. To the extent that the self-insured sought to argue that claimant's inability to work was the direct result only of her subsequent degenerative disease or nonwork-related conditions, it had a burden to prove that they were the "sole cause." *See* National Farmers Union Property & Casualty Company v. Degollado, 844 S.W.2d 892 (Tex. App.-Austin 1992, writ denied). Although a fact finder could draw different inferences from the record here, we cannot say that the hearing officer's factual resolution of the "direct

result" provision was so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

In one regard, we must reform the decision of the hearing officer. In so doing, we stress, once more, that there is no statutory "excuse" from the required search for employment. The hearing officer's conclusion of law that the claimant was "excused from attempting to find work" is consequently incorrect, as a hearing officer may not "excuse" a worker from this requirement. Texas Workers' Compensation Commission Appeal No. 951745, decided November 30, 1995; Texas Workers' Compensation Commission Appeal No. 981971 (Unpublished), decided September 30, 1998. We strike this conclusion and reform the decision by adding a new conclusion of law in its place: "The claimant, by making no job search, made a search commensurate with her ability to work."

For the reasons stated, we affirm the decision (as reformed) and order of the hearing officer.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge