APPEAL NO. 990270

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 12, 1999. The issue at the CCH was whether the respondent, who is the claimant, was entitled to supplemental income benefits (SIBS) for his ninth quarter of eligibility.

The hearing officer found that the claimant's unemployment was the direct result of his impairment. He found that the claimant did not have any ability to work during the filing period; thus, no job search was a search commensurate with no ability to work.

The appellant (carrier) has appealed, arguing that the claimant was released to work by his treating doctor in May 1998, and that subsequent drug overdoses on pain medication have not altered this release. The claimant responds that he suffered from the effects of one drug overdose during the filing period, and that he overdosed after the filing period, which was evidence of his state of mind and inability to cope with back pain. The claimant asks that the decision be affirmed.

DECISION

Affirmed, according to our standard of review.

At the outset, we would note that the outcome reached in this case will be impacted in future quarters by the new SIBS rules, in which tighter restrictions have been implemented by the Texas Workers' Compensation Commission concerning contended "inability to work." It is worth restating that making efforts to return to work is especially important because income benefits for accidental injuries end absolutely at 401 weeks after the date of injury. Section 408.083. The legislature has imposed a requirement that an injured worker search for employment commensurate with his ability to work to continue to receive SIBS. Section 408.143(a)(3). "Commensurate with the employee's ability to work" will not mean, in every case, a return to 40-hour per week employment. And we have before stated that the existence of or lack of a "release" to work from a doctor is not dispositive of the ability to work. Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994.

The claimant injured his back on _____, while employed by (employer). He was, during the filing period, considered a failed back surgery. He did not search for work. To greatly summarize the evidence, the claimant, prior to the filing period (which ran from July 23 through October 22, 1998), had an accidental overdose of a narcotic pain killer, brought about when he applied two patches to himself instead of one. He was hospitalized through early June 1998 for this. To greatly summarize the medical evidence, claimant was in a "detox" program beginning in September with the contention of his medical center doctors being that he was not compliant with his contract, because he filled a prescription for Lorcet. Claimant said that when he questioned the prescription, it was changed in some regard but returned to him so he assumed it could be filled. After the filing period, claimant

had an overdose on Soma. Claimant did admit that because of the pain, he did not obey prescribed dosages of his medications.

In May 1997, claimant's doctor, Dr. H, had stated claimant could not work. A year later, in May 1998, Dr. H set out several restrictions that would govern any return to work that the claimant might attempt. He was proscribed from lifting more than 25 pounds, from any twisting, from repetitive bending, from any above-the-shoulder work, and from ladder work. Dr. H also stated that claimant's sitting and standing tolerance was a maximum of 30 minutes, and his walking tolerance 45-60 minutes. These restrictions were repeated on October 20, 1998, by Dr. D at the medical clinic where claimant was treated, but whom he subsequently left due to dissatisfaction with treatment. Although claimant contended he could not sleep more than occasionally at night, could rarely drive, and spent his days moving from his bed to the recliner chair because of excruciating pain, we note that a medical record dated April 20, 1998, noted that the claimant called in to his doctor in severe pain after breaking up a dog fight. A letter from the Texas Rehabilitation Commission (TRC) dated September 18, 1998, stated that claimant had been fully compliant with all recommendations but that TRC was currently unable to proceed with rehabilitation services, due to a cardiac problem. The counselor further stated that employment possibilities were not being pursued at this time.

Clearly, the evidence was conflicting on several points. The hearing officer could consider, however, that other factors involving medication and reactions to it were existent along with the time frame that Dr. H gave his release. While, as we stated, analysis of such matters must be different for future quarters when the new SIBS rules are effective, the hearing officer could choose to believe that the entire situation that claimant was in reflected an inability to work during the filing period due to his impairment.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that the hearing officer's decision is against the great weight and preponderance of the evidence, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge