

APPEAL NO. 990302

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 20, 1999, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the 12th and 13th compensable quarters because he had not made a good faith effort to seek employment commensurate with his ability. The hearing officer's findings that claimant's underemployment in the 12th quarter and unemployment in the 13th quarter were a direct result of claimant's impairment have not been appealed.

Claimant appeals, contending that he had made a good faith effort to seek employment, explaining why some of the job contacts did not result in employment and that he was employed during a portion of the 12th quarter filing period and had obtained employment shortly after the end of the 13th quarter filing period, having actually been hired during the filing period. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing 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 background facts, although not abundantly clear, are generally undisputed. Claimant was employed by (employer) apparently (although not clear) as a driver. Claimant sustained a compensable low back injury (a functional capacity evaluation (FCE) indicates claimant has a "disk bulge at L4/L5 as well as disk protrusion from L3 through S1 with right nerve root compression and some degenerative changes.") There is no indication that claimant had surgery. The parties stipulated that claimant "had at least a 15% impairment rating [IR]" (claimant testified that he had a 23% IR) and that IIBS had not been commuted. The parties appear to have agreed that the filing period for the 12th quarter was from April 30 through July 29, 1998, with the filing period for the 13th quarter being from July 30 through October 29, 1998. There are several medical status reports in

evidence which generally indicate that claimant is improving. The FCE, performed on November 23, 1998 (after the filing period for the 13th quarter), indicates that claimant had a medium workload capability. Again not clear, but it seems claimant returned to work for a different employer on March 30, 1998, and was employed at the beginning of the 12th quarter filing period. Claimant's employment with that employer ended on May 15, 1998. The circumstances of that job ending, and whether claimant quit because the employer required work that exceeded claimant's restrictions or whether claimant was fired for disciplinary problems, or was otherwise "laid off," are in conflict. In any event, claimant's Statement of Employment Status (TWCC-52) indicates wages through the week ending on May 22, 1998, and an explanation regarding what efforts he made to seek other employment. Claimant apparently only made one or two other job contacts during the 12th quarter filing period.

Claimant lists nine job contacts, including the Texas Workforce Commission (TWC) twice, during the filing period for the 13th compensable quarter. Claimant was apparently offered one job as a security guard but when he was assigned a shift it was determined that he had not received his orientation training, uniform, etc. Before that could be accomplished, claimant decided that that job was too far away and that he could not afford the transportation costs. On three other job contacts, claimant wrote, "[t]o [sic] far to drive." Claimant testified that some time in August 1998 he applied for and was hired by (Employer W) but before he could begin work, he was hospitalized for emergency gall bladder surgery (unrelated to the compensable injury) on _____. Claimant testified that he required a six-week recovery period and that during the recovery period, Employer W's store had burned and that he had to begin the work application all over again. Claimant testified that he again applied to Employer W in mid-October 1998, and that he took the drug screen test again and was eventually able to begin work in mid-November 1998.

Carrier's vocational rehabilitation counselor testified that she had been unable to confirm some of claimant's 13th quarter job contacts, that claimant was not always prompt in returning her calls and that she periodically provided claimant with job leads. The hearing officer, in his Statement of the Evidence, commented that claimant made only two documented job searches in the 12th quarter filing period, approximately nine contacts in the 13th quarter filing period and that claimant subsequently "was successful at finding employment." The hearing officer further commented:

Claimant declined employment of one job offer because of transportation and hourly rate considerations. Claimant was unable to work during portions of the qualifying periods for health reasons unrelated to impairment for the compensable injury. Claimant made a very limited number of attempts to seek employment and did not make sufficient effort to exhibit a good faith effort to seek employment commensurate with his ability to work even at a sedentary or light duty level.

While claimant may have made only a limited number of attempts to seek employment, it is undisputed that claimant was, in fact, employed during the first two weeks of the 12th quarter filing period. Even more cogent is the fact that claimant apparently

made nine job searches in the first month of the 13th quarter filing period and actually was hired by Employer W as a result of one of those job contacts. Claimant then, through no fault of his own, had gall bladder surgery with a six-week recovery period. In the meantime, Employer W's store had burned and claimant had to begin the employment process anew, which did result in claimant's subsequent employment by Employer W. The Appeals Panel has held that the fact that an injured worker accepts employment that results from a search makes a prima facie case that the search leading to the offer was made in good faith, absent evidence of collusion between the worker and the prospective employer, in this case, Employer W. Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997; Texas Workers' Compensation Commission Appeal No. 982880, decided January 21, 1999. Consequently, we reverse and remand the case to the hearing officer to consider cases where the search and obtaining of employment was considered prima facie evidence of good faith and consider the instant case in that context. We further point out that the hearing officer's findings of direct result were not appealed.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge