APPEAL NO. 990555

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 2, 1999, a contested case hearing was held. With respect to the issues before her, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the fifth, sixth, seventh and eighth compensable quarters because his unemployment during the filing periods for those quarters was due to claimant's incarceration and not as a direct result of his impairment.

Claimant appealed, contending that the respondent (carrier) submitted no medical evidence that he had an ability to work, that he was pending surgery before his incarceration and that his unemployment was due to his pending surgery and "subsequent medical condition." Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, urging affirmance.

DECISION

Affirmed.

It is undisputed that claimant sustained a compensable low back injury on _____, that claimant had spinal surgery in the form of a fusion at L4-5 and eventually attained maximum medical improvement with an 18% impairment rating. Carrier paid SIBS for the first four compensable quarters, apparently on a total inability to work basis. Based on the testimony, the hearing officer commented, in the Statement of the Evidence, that apparently claimant's "back surgery was not successful" and the treating doctor, Dr. J, "determined further surgery was necessary" and the second opinion spinal surgery process "was initiated in the Fall of 1997 [sic, 1996]."

The hearing officer made unappealed findings that the filing period for the fifth compensable quarter began on "February 4, 1997," with the filing period for the eighth compensable quarter ending on "February 22, 1998." Claimant testified (as supported by the records) that he was incarcerated from January 5, 1997, through October 7, 1998. Claimant was incarcerated throughout all four filing periods. Claimant did not file for SIBS for the fifth and sixth compensable quarters.

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 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.

Claimant is proceeding on a total inability to work theory. 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." 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. 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 light duty 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*.

Claimant's medical evidence of a total inability to work consists of 1996 chart notes from Dr. J regarding claimant's medical condition, including second opinions for surgery, the fact that claimant "has been on a methadone program," and the planned surgical exploration. The last chart note prior to claimant's incarceration was on November 7, 1996. Claimant was incarcerated in three different locations. Claimant testified that in the last location in which he was incarcerated he worked two hours a day in the prison laundry folding socks and that occasionally he worked as a "hall porter" (sweeping floors) in exchange for ice water. Upon his release, claimant again saw Dr. J, who, in a report dated November 2, 1998, reviewed claimant's absence during the last two years, noted that claimant gets up and walks "very slowly," and concluded, "[a]t this point, he is not released to any form of work." Also in evidence are several sick call requests claimant made while in prison.

The hearing officer made appealed findings that claimant "was capable of working in a light to sedentary duty capacity" during the filing periods, that claimant was prevented from seeking employment due to his incarceration, that claimant had not made a good faith effort to seek employment during the filing periods and that claimant's unemployment during the filing periods was due to his incarceration and not as a direct result of his impairment. Claimant appeals, contending that carrier had submitted no evidence that he was capable of light work. As noted previously, the burden is firmly on the claimant to prove a total inability to work and carrier is not required to prove any level of ability or inability to work. We reject claimant's contention on this point.

Claimant further contends that he was pending surgery prior to his incarceration and that was the reason for his unemployment. Claimant's own testimony indicates some kind

of ability to do light work, such as folding socks and sweeping floors, even though he might be pending surgery. We find the hearing officer's decision on claimant's ability to do light to sedentary work supported by the evidence.

Fairly early on, the Appeals Panel defined the direct result requirement, noting that evidence of a serious injury with lasting effects together with an inability to return to the preinjury job will satisfy the direct result requirement in the "absence of any evidence of an intervening cause for the unemployment, such as . . . incarceration, is sufficient to support a finding of direct result." Texas Workers' Compensation Commission Appeal No. 960873, decided June 8, 1996. In Texas Workers' Compensation Commission Appeal No. 951487, decided October 19, 1995, the Appeals Panel held that there was sufficient evidence to support the hearing officer's decision "that it was the incarceration which was the reason for claimant's unemployment [during the filing period]." More recently, in Texas Workers' Compensation Commission Appeal No. 982198, decided October 30, 1998, we noted an affirmation of "a hearing officer's determination that an employee's incarceration during the entirety of a SIBS filing period was evidence that [the employee's] unemployment was not a direct result of the impairment from a compensable injury." It is undisputed that claimant, in this case, was in prison throughout the filing periods at issue and it is equally clear, as found by the hearing officer, that the reason for claimant's unemployment was not any pending surgery, which had been postponed, but because claimant was incarcerated and that claimant's unemployment was due to the incarceration rather than as a direct result of claimant's impairment.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge