APPEAL NO. 990613

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 5, 1999. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the eighth quarter. The claimant appeals this determination, expressing her disagreement with it. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable bilateral knee injury on _____. She has undergone arthroscopic surgery in both knees and a total replacement of the right knee, which she believes, was not successful. Further left arthroscopy is planned and she has so far declined a left knee replacement. She reached maximum medical improvement on March 3, 1996, and has a 19% impairment rating.

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." 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 eighth SIBS quarter was from January 7, 1999, to April 7, 1999, and the filing period for this quarter was from October 8, 1998, to January 6, 1999.

The only issue in this case was whether the claimant made a good faith job search effort commensurate with her ability to work. The hearing officer found that she had some ability to work and did not make the required good faith job search. The position of the claimant was that she had no ability to work and, alternatively, if she had some ability, she made a good faith job search commensurate with that ability.

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. 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. We have also stressed the need for

medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. *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 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*. 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.

The claimant stressed that she was not released to return to work and that she is in chronic pain, which interferes with her ability to sleep. In a note of July 11, 1998, Dr. G, a treating doctor, wrote that the claimant was "to consider finding a light duty job in the future." On January 5, 1999, Dr. G issued an off-work statement which contained restrictions of no lifting in excess of 10 pounds, no walking up and down stairs, and no squatting or deep knee bending. His examination notes of the day before reflect that the claimant was "active ambulatory" and that the claimant was looking for a job. In a report of December 9, 1998, Dr. L, a carrier-selected independent medical examination doctor, wrote that "[a]t this time, [claimant] is appropriate for sedentary duties at work." He further stated that employment should be within 15 minutes of her home "to facilitate a comfortable trip." As noted above, whether the claimant had some ability to work is essentially a question of fact for the hearing officer to decide. That determination is subject to reversal on appeal only if it is against the great weight and preponderance of the evidence as to be clearly wrong or manifestly 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). The medical evidence of Dr. G and Dr. L is sufficient to support the hearing officer's finding of some ability to work and we decline to reverse that finding on appeal.

The claimant testified that, although she was not released to return to work, she was advised that she had to look for a job in order to receive SIBS. In her Statement of Employment Status (TWCC-52) for eighth quarter SIBS, she listed 10 employment contacts during the filing period and added further documentation of six more job contacts. Her job search consisted of looking for jobs in various newspapers and sending resumes to potential employers. Of the 10 job contacts listed on the TWCC-52, seven consisted of sending resumes to employers who were not advertising for help wanted. She said she obtained these names from the telephone book. Two contacts were visits to the Texas Workforce Commission (TWC) to update her file and one resume was sent in response to an ad in the newspaper. Of the six employers listed in the supplemental information, three contacts consisted of telephone "cold calls" to employers not hiring. Two were resumes sent in response to newspaper ads and one was a contact with the TWC, which was unable to refer the claimant because, she said, she had not worked in the prior six months. The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation

Commission Appeal No. 93181, decided April 19, 1993. Whether the required good faith job search has been undertaken is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have also cautioned that good faith is not established simply by some minimum number of job contacts, but a hearing officer may consider the manner in which the job search is undertaken "with respect to timing, forethought and diligence." Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996. In this case, the hearing officer considered the evidence and commented that the claimant's efforts "appear perfunctory and inadequate." He questioned why, if the primary search method was to send out resumes, more were not sent out, and why she sent the bulk of her resumes to doctors offices, albeit for receptionist positions, if she had no medical training. In her appeal, the claimant commented that the positions sought did not require medical training and that she was making a good faith effort commensurate with her worsening medical condition and her restrictions. The resolution of the good faith job search question involved an evaluation of the claimant's credibility and her assertion of good faith in light of her demonstrated job search activities. The hearing officer was not satisfied that her actions established good faith. Under our standard of review, we decline to invade the fact-finding authority of the hearing officer, but find the evidence sufficient to support his determination of a no good faith job search and that the claimant is not entitled to eighth quarter SIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge