APPEAL NO. 990803

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 22, 1999, a contested case hearing (CCH) was held. With regard to the two issues, the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the third compensable quarter and that "[c]arrier [self-insured] is excused from liability for benefits for the period from October 23, 1998 to October 29, 1998." With regard to the second issue, the issue was framed whether carrier was relieved of liability because of claimant's failure to timely file his Statement of Employment Status (TWCC-52). There was no evidence, other than the TWCC-52, reference or agreement made regarding this issue, nor did claimant appeal that issue, therefore the hearing officer's decision on that issue that carrier is excused from liability for six days of the compensable quarter has become final. *See* Section 410.169.

The self-insured school district, also referred to as carrier, appealed, contending that claimant's medical evidence does not support a finding of a total inability to work, that there were indications of symptom magnification by claimant at a functional capacity evaluation (FCE) ordered by the Texas Workers' Compensation Commission (Commission), that claimant's treating doctor's reports were "clearly to secure the claimant's disability payments" and that claimant has some ability to work as documented by his use of the computer and internet. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

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.

The parties stipulated that claimant sustained a compensable (low back) injury on _____, that claimant has an impairment rating of 15% or greater and that impairment income benefits have not been commuted. The hearing officer found, and the parties have accepted, that the filing period for the third compensable quarter was from July 24 through October 22, 1998. It is undisputed that claimant had been employed as an emergency

response electrician for the self-insured school district at the time of his injury. The history given at an FCE indicates that claimant "hurt his back when he was trying to lift a tool box lid off his work van . . . [and] he felt a pop, and instantaneous low back pain . . . ." It is undisputed that claimant has not had surgery. Claimant testified, and the medical records reflect, that claimant has been referred for spinal surgery but apparently no second opinion referral doctor has agreed surgery is necessary. Although Dr. J, the treating doctor, and testimony at the CCH, as well as carrier's appeal, refer to a Dr. B, no reports or medical evidence from Dr. B are in the record.

This is a total inability to work case. Claimant testified that he has difficulty standing or walking, that he has radiating back pain, numbness and muscle spasms, which are only partially relieved by medication. Claimant says that he takes pain medication and muscle relaxers for his back and antidepressants Zoloft and/or Prozac for depression due to his back injury. Claimant testified that the medication makes him drowsy, that he cannot do any work, that he cannot stand, sit, sleep, bend or stoop and that he is in severe pain most of the time. Claimant states that he walks on a treadmill, dresses himself, drives a vehicle and uses the computer, has a web page, chats on the internet, and plays games on the computer "for maybe an hour a day" a few days a week. 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, 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 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.

In evidence are a number of reports from Dr. J during the filing period. In an undated report, Dr. J comments on claimant's medications, stating the "medication will cause drowsiness which will not permit him to do any type of job" as work activities would "aggravate his back." In a report dated August 10, 1998, Dr. J notes follow up for "severe pain," muscle weakness and muscle spasms. Other reports merely note "off work" and severe pain in the lumbar area. A report dated October 15, 1998, again notes severe lumbar pain, and that the "pain increases with prolonged walking, standing, or even sitting

for long period of time." Dr. J, in that report, noted that claimant's "condition is getting worse and worse by time."

On June 29, 1998, an FCE was performed, apparently at the request of the Commission, which stated: "Inconsistencies noted throughout testing, it is impossible to determine accuracy of his work level at this time." Claimant was noted as having "at least five" Waddell signs for inappropriate behavior indicators. The FCE concluded that claimant has a sedentary work level. The narrative portion of the report confirms that claimant cannot return to his preinjury occupation; however, claimant had "expressed interest in finding a job that would require him to work with computers." No evidence was developed as to any attempts to rehabilitate claimant and/or retrain claimant with the Texas Rehabilitation Commission to do computer work.

We do note that claimant criticizes the FCE because it was signed by a licensed physical therapist rather than a doctor and suggests that the FCE should not be considered because of that fact. In Texas Workers' Compensation Commission Appeal No. 970845, decided June 23, 1997, citing Texas Workers' Compensation Commission Appeal No. 970730, decided June 9, 1997, we stated that medical evidence may be generated by a number of sources, other than individuals who are defined as "doctors" in Section 401.011(17), to include physical therapists' reports and notes. However, the weight to be given such medical evidence is in the province of the hearing officer.

The counsel offered in a concurring opinion by Judge Kelley in Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996, is particularly appropriate here. That opinion stated in part:

> SIBS is intended to provide a safety net for the gradual and limited reentry into the job force. Because the job search requirement is geared to the worker's post-injury capabilities, it may be that there are only a few jobs, or only part-time jobs, that the injured worker can realistically perform. The fact that such jobs may be few, however, does not mean that they need not be sought. To this end, injured workers must work with their doctors to solicit recommendations of what they can do, not what they are unable to do. (Emphasis in original.)

We will reverse a factual determination of a hearing officer only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and 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). In this case, the hearing officer evaluated the evidence and concluded that the evidence was sufficient to establish a total inability to work. Although another fact finder may have found otherwise, under our standard of review, we decline to reverse that determination. *See* Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Finding the evidence minimally sufficient to support the hearing officer's decision, that decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge