APPEAL NO. 991040

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 19, 1999, a contested case hearing was held. With respect to the only issue before him, the hearing officer determined that appellant's (claimant) unemployment/underemployment was a direct result of his impairment but that claimant had not in good faith attempted to obtain employment commensurate with his ability to work and, therefore, was not entitled to supplemental income benefits (SIBS) for the third compensable quarter. The direct result findings have not been appealed.

Claimant appeals, contending that he had made a good faith effort to find work within his restrictions and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) 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 was assessed as having a "15% or greater" impairment rating (IR) (claimant testified that he had a 29% IR); that impairment income benefits have not been commuted; and that the filing period for the third compensable quarter was from November 13, 1998, through February 11, 1999. Claimant testified how he was injured and the extent of treatment by several doctors. Dr. P is claimant's current treating doctor. A functional capacity evaluation (FCE) performed on June 25, 1998, suggested "less than maximal effort" and rated claimant to be able to do sedentary work with restrictions. In a report dated July 7, 1998, Dr. P apparently reviewed the FCE; stated, "[b]asically if I were him, I probably would not put out a whole lot of effort either on [an FCE]"; and released claimant to sedentary duty. The report indicates surgery was being considered. Claimant testified regarding a surgical procedure and Dr. P, in a report dated August 3, 1998, referenced the surgery, stating "the patient is categorically unable of [sic] work." Claimant testified that

Dr. P had a heart attack and, therefore, the surgery had to be delayed. A note dated November 2, 1998, again discusses a proposed surgical procedure, stating:

> [U]ntil such time as that surgery has been accomplished and the patient rehabilitated from his surgery, in my medical opinion he is no longer capable of working . . . . However, the patient is not capable of working and has not been capable of working ever since the decision was made to look into carrying out surgery.

That position is essentially repeated in a note dated November 18, 1998. In a letter dated December 7, 1998, Dr. P comments "that the surgery that [claimant] 'chickened out of' may very well have to be done," and that claimant was "capable of OSHA sedentary tasking . . . ." Claimant took the position that he was totally unable to work until he was released to sedentary work on December 7, 1998. No surgery has been performed and apparently none is presently contemplated. Claimant indicated he did not want surgery at this time. The hearing officer commented:

> The medical evidence does not support Claimant's contention of no ability to work. Claimant's physical condition was essentially unchanged throughout the time periods where surgery was contemplated. There is nothing, other than the notations regarding pending surgery, that indicate a change from his status of sedentary work capacity.

Claimant testified that he began an active job search on December 7, 1998, by contacting temporary placement services and searching the newspaper help wanted ads daily. Attached to his Statement of Employment Status (TWCC-52) are the names of four temporary employment services plus the client company where he was working when he was injured. Claimant testified that he had orally contacted two other employers (apparently convenience store/gas stations) which were not listed on the TWCC-52. Claimant testified that he accepted a job offer from a landscaping company and began work on February 5, 1999, approximately one week before the end of the filing period. Claimant testified that he "had to" take this job because he was no longer receiving income benefits. The hearing officer, in his Statement of the Evidence, commented:

> Claimant indicated he only reported those contacts resulting in the completion of an application. Claimant testified that he began to look for work only because he was receiving no benefits. He further testified that he does not believe he is capable of sedentary work, but went to work because he "had no choice." Further, the contacts listed appear to have been for positions exceeding Claimant's restrictions.

The hearing officer also commented that despite the fact that claimant was offered a job at the end of the filing period, the evidence was insufficient to establish that claimant was entitled to SIBS for the quarter at issue.

Claimant appeals, contending that he had made a good faith effort within his restrictions. Whether good faith was shown is usually a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. Consideration can be given to the manner in which a job search is made and timing, forethought, and diligence may be considered in determining whether a good faith job search was made. Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. In Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel stated that the trier of fact, in determining whether the claimant in good faith sought employment commensurate with the ability to work, sometimes assesses whether undeniable contacts made with prospective employers constitute a true search to reenter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS. In this case, the hearing officer apparently considered claimant's testimony that he obtained employment, only when he "had no choice," in a position which, at least according to the limitations listed by Dr. P, exceeded his restrictions.

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:

_____
Alan C. Ernst
Appeals Judge

CONCUR IN THE RESULT:

_____
Judy L. Stephens
Appeals Judge