APPEAL NO. 991287

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 990572, decided May 3, 1999, we reversed the determination of the hearing officer that the appellant (claimant) was entitled to 10th quarter supplemental income benefits (SIBS) and remanded for further consideration. No hearing on remand was held, but the hearing officer allowed the parties to submit additional matters for her consideration on the dispositive questions of whether the claimant made the required good faith job search and whether he established that his underemployment was a direct result of his impairment. In a decision on remand, the hearing officer determined that the claimant was not entitled to 10th quarter SIBS. The claimant appeals, expressing his disagreement with this determination. The respondent (carrier) replies that the decision is correct and should be affirmed.

DECISION

Reversed and a new decision rendered that the claimant is entitled to 10th quarter SIBS.

The background facts of this case and applicable law are contained in Appeal No. 990572 and need not be repeated here. The primary focus of the prior hearings was whether the claimant, who worked part time during the filing period for 10th quarter SIBS, made a good faith effort to obtain employment commensurate with his ability to work. In our initial decision in this case, we addressed the question of whether the claimant was essentially self-limiting his employment or whether his limitations had a basis in the medical evidence and wrote:

> In the case we now consider, and given that the issue of good faith was actually litigated in these terms, we are concerned that the hearing officer did not make an express finding, based on the medical evidence, of the claimant's work restrictions expressly in terms of the number of hours in a given time period he can work. Because of the importance of such a finding to a determination of a good faith job search and the state of the evidence, we are unwilling to imply a finding to this effect. *See* Appeal No. 972349 [Texas Workers' Compensation Commission Appeal No. 972349, decided December 31, 1997], *supra*, and cases cited therein. For this reason, we reverse the hearing officer's finding that the claimant made a good faith effort to obtain employment commensurate with his ability to work and remand this issue for further express findings of the claimant's physical and hourly restrictions during the filing period.

We did not limit the proceedings on remand to the evidence already submitted and the parties were given the opportunity to make additional submissions.

In her decision and order on remand, the hearing officer commented regarding the good faith standard that the claimant had only a "very limited capacity for employment" and that this limited capacity "was documented in the record." She then stated that the medical evidence was otherwise limited and did "not establish that Claimant is not able to work more hours than he already is working." She then concluded in her discussion that his evidence failed to address our concerns on remand and wrote:

> Therefore, although the Hearing Officer is of the opinion that Claimant already is working commensurate with his ability to do so, the law of the case as set forth in the Appeals Panel's Order of Remand mandates a decision in Carrier's favor, since Claimant has been unsuccessful in demonstrating that he is medically restricted from working more than the number of hours he currently works in an average week. (Emphasis added.)

The hearing officer made the following finding of fact:

> Although Claimant was working within the physical activity restrictions imposed by his treating doctor during the filing period . . . , Claimant failed to make a good faith search for employment commensurate with his ability during that time frame.

Finding of Fact No. 10. When this finding of fact is considered in light of the hearing officer's discussion of the evidence, we can only speculate as to whether the hearing officer found the treating doctor's evidence of restrictions unpersuasive or lacking in credibility (in which case the Appeals Panel would not overturn her factual finding) or whether she felt the doctor's evidence did not meet the perceived remand requirements. The former interpretation is seemingly contrary to the discussion which stated that the claimant was actually working up to his ability. Unfortunately, we have no remands left to

seek clarification from the hearing officer. We conclude that Dr. K letters of January 25, 1998, and February 9, 1999, sufficiently establish the claimant's work restrictions in terms of the number of hours he can work and his physical abilities. Under these circumstances, we determine that Finding of Fact No. 10, to the extent it finds no good faith effort to obtain employment commensurate with the ability to work, is contrary to the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company,715 S.W.2d 629, 635 (Tex. 1986). We reverse that finding and render a decision that the claimant made the required effort and is entitled to 10th quarter SIBS.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I dissent. The hearing officer stated in her discussion of the evidence that the Appeals Panel "mandated" a specific result in this case. This conclusion is indisputably wrong. We simply remanded for further development of the evidence and findings of fact consistent with applicable law. She also stated in her discussion of the evidence that the "Claimant already is working commensurate with his ability to do so. . ." but then makes a formal finding of fact that he "failed to make a good faith search . . . commensurate with his ability. . . ." Finding of Fact No. 10. I consider these statements inherently contradictory. Because we have no more remands left, I would simply ignore the comments in the discussion and take Finding of Fact No. 10 at face value to reflect the hearing officer's evaluation of the evidence. Certainly, there is nothing in the timing or the contents of Dr. K writings of January 25 and February 9, 1998, that would dictate a contrary finding. In fact, in the February 9, 1998, letter, Dr. K says the claimant cannot hold gainful or normal employment while at the same time he refers to the claimant actually working part time. In accepting Finding of Fact No. 10 at face value, I assume that the hearing officer is simply rejecting these two documents as not persuasive.

We are not fact finders. The majority, in my opinion, rejects our traditional standard of review to become fact finders solely because we have no more remands. Clearly, the majority would not have reached this result had there been another remand. More than likely the majority would have affirmed if Finding of Fact No. 10 had been made in the first instance even had Dr. K's two writings been in evidence at the first contested case hearing. To excuse such fact finding by the majority on the basis that there was no evidence to refute these two writings ignores all the other medical evidence in the record. I can only attribute the majority opinion to a dislike of the hearing officer's analysis or dispositive finding, not to any sound legal theory.

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Alan C. Ernst
Appeals Judge