APPEAL NO. 991411

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 11, 1999, a contested case hearing (CCH) was held. With regard to the only issue before him, the hearing officer determined that respondent (claimant) had made a good faith effort to look for work (seek employment) commensurate with her ability, that claimant's unemployment was a direct result of her impairment and that claimant was entitled to supplemental income benefits (SIBS) for the fifth compensable quarter.

Appellant (carrier) appeals, contending that claimant had not met her burden of proof, that she had not given maximum effort at a functional capacity evaluation (FCE) and that claimant's job contacts were not made in good faith but rather just to qualify for SIBS. 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 (right arm, both legs and low back) injury on _____, that impairment income benefits have not been commuted and that the fifth compensable quarter was from March 24 through June 22, 1999.[1] The filing period for the fifth quarter was from December 23, 1998, through March 23, 1999. The hearing officer found that claimant's impairment rating (IR) was 15% or greater; however, carrier noted that the IR was on appeal to the district court.

Claimant testified through a translator that she had been a sewing machine operator,

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[1]The hearing officer's Stipulation E showing that the fifth quarter began "March 24, 1998 and terminated on March 23, 1999" and Finding of Fact No. 2 showing that the filing period for the fifth quarter began "March 24, 1999 and terminated on June 22, 1999" are incorrect and apparently the result of a clerical or administrative error. That stipulation and finding has not been challenged and the correct dates were used at the CCH, therefore no further comment is necessary.

had fallen and sustained the claimed injuries. Claimant testified that she sought light work with various potential employers and that some friends and family had referred her to some employers who had job openings but that she had not received any interviews or job offers. Attached to claimant's Statement of Employment Status (TWCC-52) is a list of some 24 or 25 job contacts that claimant made during the applicable filing period. Although there was some communication problem regarding whether claimant applied for a job as a manager or applied for a job with the manager, the TWCC-52 and claimant's testimony indicated that she sought sales, cashiering and other light-duty positions. Claimant testified that she has contacted and is cooperating with the Texas Workforce Commission.

The medical evidence indicates that claimant has had two surgeries on her right knee. An FCE conducted on January 6, 1999, indicates that claimant "did not give a consistent effort" and that testing was "inconsistent and invalid." The FCE notes that claimant "is unlikely to return to any type of gainful employment in the foreseeable future." (Claimant is, however, not pursuing a total inability to work theory.)

The hearing officer found that claimant continued to suffer from the effects of her compensable injury, that her unemployment "was a direct result of her impairment rating [sic]" and that claimant "made good faith efforts to look for work [sic] commensurate with her ability to work." Carrier completely misinterprets our decisions in its appeal, stating:

> In the past, Appeals Panel decisions have placed stringent requirements on claimants in order to meet good faith. " . . . [I]njured workers must work with their doctors to solicit recommendations of what they <u>can</u> do, not what they are unable to do. If I [Judge] were asked to affirm a decision for SIBS in the future, I would expect the record to include evidence that the claimant has worked closely with [his] doctor to actually re-enter the job force, that [he] has sought and followed recent recommendations about [his] ability to perform <u>any</u> work (not just tasks [he] did on [his] previous job), and that [he] has searched for work within [his] restrictions. [Texas Workers' Compensation Commission Appeal No. 960714, decided May 20, 1996, citing Texas Workers' Compensation Commission Appeal No. 951999, decided January 4, 1996.]"

First of all, the Appeals Panel does not place requirements on claimants, stringent or otherwise. The requirements that a claimant must meet are those imposed by statute in Sections 408.142 and 408.143 and by Rule 130.104. Second, the oft-cited comments by Judge were comments and general suggestions in a concurring opinion in Appeal No. 951999, *supra*, and were not then, nor are they now, to suggest or establish some new nonstatutory requirement. Further, in Appeal No. 960714, *supra*, we preface our citation of Appeal No. 951999, *supra*, as noting "the advisory comments" in Appeal No. 951999. Finally, those comments are usually used in cases where the injured employee is contending that there is a total inability to work at all and, consequently, are not applicable in this case.

As for carrier's contentions regarding claimant's failure to give maximum effort at the FCE, the quality and quantity of the job search, and claimant's testimony regarding her job

search efforts; these were all factors that the hearing officer could consider. We have frequently noted that there is no "magic number" of job searches which would qualify a claimant for SIBS. We also note that whether good faith in seeking a job commensurate with the claimant's ability to work 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 search was made. Texas Workers' Compensation Commission Appeal No. 961195, decided August 5, 1996. In this case, the hearing officer was satisfied that the 24 or 25 job contacts made during the filing period constituted a good faith effort to seek employment commensurate with claimant's ability to work. We decline to substitute our judgment for that of the hearing officer, particularly where the hearing officer has had the benefit of observing the claimant's demeanor and testimony. We note that carrier cites Texas Workers' Compensation Commission Appeal No. 972100, decided December 3, 1997, a case where the injured employee had made 20 job contacts "because the ombudsman told him he had to," and "the Appeals Panel found he did not make a good faith effort." In that case, for much the same reasons as the instant case, the Appeals Panel merely affirmed the hearing officer's decision as being sufficiently supported by the evidence and not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, citing Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Finally, carrier makes a flat statement that claimant presented no credible evidence that her unemployment was a direct result of her impairment. The medical evidence supports the hearing officer's finding of direct result in that claimant sustained a serious injury with lasting effects and that claimant could not reasonably perform her preinjury work. Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

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.

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Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge