APPEAL NO. 991570

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 July 1, 1999. With respect to the sole issue before her, the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first compensable quarter. The appellant (carrier) appeals, challenging the hearing officer's determinations on direct result and good faith. The claimant responds that the evidence is sufficient to support the determinations of the hearing officer and the decision should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant reached maximum medical improvement on May 18, 1998, with a 16% impairment rating (IR); that the claimant has not commuted any portion of the impairment income benefits (IIBS); that the first compensable quarter began on April 20, 1999, and ended on July 19, 1999; and that during the filing period for the first compensable quarter, the claimant earned no wages. The claimant testified that he injured his right knee on _____, while working as a route salesman for the employer and has had five knee surgeries as a result of the injury.

The underlying facts are not in dispute. The claimant entered a retraining program through the Texas Rehabilitation Commission (TRC) to learn computer programming and enrolled in three computer classes which began on January 12, 1999, and ended on May 16, 1999. The claimant testified that in January 1999 his right knee condition continued to deteriorate, and he was told by his treating doctor, Dr. S, that he was going to need a fifth knee surgery, a total knee replacement. According to the claimant, he was already registered for school, it was paid for by TRC, and he wanted TRC to see that he was going to utilize their assistance. The claimant discussed the retraining program with Dr. S, they decided that surgery could wait until he finished his first semester, and surgery was tentatively scheduled for May 27, 1999, two weeks after the end of the semester. The claimant underwent a total knee replacement on May 27, 1999.

Dr. S, on March 17, 1999, indicates that the claimant is unable to work at any job, except sedentary labor. On April 28, 1999, Dr. S indicates that he has been preparing the claimant for a total knee arthroplasty since February 1999. Dr. S states:

> I have scheduled [the claimant] for surgery on 5/27/99 as to not interfere with his retraining program. He is currently attending school and I wanted him to complete the semester before proceeding with surgery.

The claimant testified that during the filing period for the first compensable quarter, January 20 through April 19, 1999, he had some ability to work, but did not seek employment because he knew that he was going to undergo another surgery. The claimant testified that he could not, in good faith, obtain employment when he knew he was going to have another surgery in May 1999. According to the claimant, if he had searched for employment, he would not be able to indicate a start date or that he was ready to go to work. The carrier asserts that the law places a requirement on injured workers to search for employment commensurate with their ability, and does not indicate that a job search is to take place only where circumstances indicate a likely or even reasonable chance of finding employment. It is the carrier's position that the claimant's admitted ability to work and lack of any job search results in the claimant being not entitled to first quarter SIBS.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the IIBS period, the employee: has an IR of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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 Appeals Panel has stated that it is appropriate to consider pending surgery on both the direct result and good faith criteria concerning entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 951682, decided November 27, 1995 (Unpublished). In Texas Workers' Compensation Commission Appeal No. 962495, decided January 22, 1997, the Appeals Panel reversed the hearing officer's decision that the claimant was not entitled to SIBS and rendered a decision, stating:

> Even if claimant had undergone a search for employment, a truthful disclosure of pending surgery and the need for recuperative time off could well have impacted the ability of claimant to accept offered employment. We believe that the hearing officer's decision that claimant had some ability to work and therefore did not undertake a bona fide search is against the great weight and preponderance of the evidence, as well as not sufficiently supported by the record. We hold the same to be true of the "direct result" holding, as there appears to be nothing but the injury in this case which resulted in unemployment.

The Appeals Panel has stated that a claimant with pending surgery should not be put to a meaningless job search exercise when surgery has been accepted as an option, and is, in fact, pending, such that a claimant would know going into an interview or when filling out an application that he or she would have to start the job only to take leave time. Texas

Workers' Compensation Commission Appeal No. 990940, decided June 17, 1999; Texas Workers' Compensation Commission Appeal No. 982569, decided December 17, 1998.

The hearing officer found that the claimant made a good faith effort to return to the workforce and obtain employment commensurate with his ability to work, and that his unemployment was a direct result of his impairment. The hearing officer states in the Statement of the Evidence that she found the claimant credible and sincere in his attempt to reenter the workforce by attending the TRC retraining program and that he could not seek employment, in good faith, knowing that he was scheduled for surgery. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that the claimant is entitled to SIBS for the first compensable quarter.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

In my opinion, what was initially only a factor that could properly be considered in determining a claimant's ability to work and thus whether a good faith attempt to obtain employment commensurate with the ability to work, has now been extended to an absolute. Clearly, Section 408.142 sets out as one of the requirements to qualify for supplemental income benefits (SIBS) that the employee must have attempted in good faith to obtain employment commensurate with the employee's ability to work. Early on we held that if it is proven by medical evidence that there is no ability to work at all, then the good faith requirement can be met, although no work was sought. Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994; Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. Later, we also stated that

pending surgery was a factor that could appropriately be considered in determining both the direct result and the good faith requirements. Texas Workers' Compensation Commission Appeal No. 951682, decided November 27, 1995 (Unpublished) . In that case, as opposed to the case under review, the claimant made a number of job contacts during the filing period and there was a finding of fact at the contested case hearing that several prospective employers declined to hire claimant due either to his injury-induced impairment or the fact that he was pending another surgery. In Texas Workers' Compensation Commission Appeal No. 962495, decided January 22, 1997, as opposed to the case under review, the claimant who had surgery pending asserted that he had no ability to work at all and did not look for work. In reversing the hearing officer's finding of some ability to work and a no good faith job search, and without any factual finding or evidentiary basis, the observation was made in that decision that even if the claimant had undergone a job search, a truthful disclosure of pending surgery and the need for recuperative time off could well have impacted the claimant's ability to accept offered employment. An extension, in my opinion, without justifiable legal basis, although a future case appears to embrace it. In Texas Workers' Compensation Commission Appeal No. 982569, decided December 17, 1998, a case unlike the case under review, the claimant, who had surgery pending, asserted no ability to work at all. While in that case there was considerable medical evidence concerning the claimant's condition, including the insertion of a morphine pump, the hearing officer found some ability to work during part of the filing period and no ability to work during part of the filing period and determined no entitlement to SIBS. The decision was reversed and the Appeals Panel stated "we find it fundamentally unfair and unjust to require a claimant scheduled for surgery to make a job search." This seems to me to be far removed from the statutory and regulatory requirements.

And now we come to the case under review where the claimant does not claim an inability to work; to the contrary, claimant testified that he was able to work during the filing period in issue, which started in January 1999. He states that he, in fact, made no job search at all and was undergoing retraining and taking classes during the filing period. Knee replacement surgery was indicated and it was delayed until a couple of weeks after his classes to accommodate his completion of the courses and more than a month after the ending of the filing period in issue. The majority would now seem to hold that any pending surgery at any time in and of itself would somehow fulfill the statutory and regulatory requirements to attempt in good faith to obtain employment commensurate with the ability to work, and thus to qualify for SIBS. This, to me, creates an exception to the requirements of the statute, the very thing firmly rejected by the Supreme Court of Texas in Rodriguez v. Service Lloyd Insurance Co., 42 Tex. Sup. Ct. J. 900 (July 1, 1999). I would reverse and render a new decision that the good faith job search requirement has not been shown and thus the claimant is not entitled to SIBS for the quarter in issue.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge