

APPEAL NO. 991873

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 9, 1999, a contested case hearing (CCH) was held. With regard to the only issue before him, the hearing officer determined that appellant's (claimant) unemployment was a direct result of his impairment but that claimant had not attempted in good faith to obtain employment commensurate with his ability to work and that claimant was not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter. The direct result finding has not been appealed and will not be discussed further.

Claimant appeals, contending that he had a total inability to work as supported by his treating doctor's reports and his testimony; that despite his treating doctor's orders, he had sought employment with 20 potential employers; and that since claimant had not been afforded an opportunity to view a surveillance videotape, the hearing officer's consideration of the video was improper. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds to the points raised and urges 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 (left upper extremity including hand) injury on _____, that claimant has a 25% impairment rating, that impairment income benefits have not been commuted, and that the filing period for the fifth compensable quarter was from December 20, 1998, through March 19, 1999. Claimant's primary focus was on his asserted total inability to work.

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 or "be so obvious as to be irrefutable." 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.

Claimant testified that he is left-handed, that he cannot lift his left arm over his head, that he is unable to grasp any object or make a fist with his left hand and that he is in constant pain and takes medication for his pain. Claimant's treating doctor is Dr. S, who in a report dated February 2, 1998, stated that claimant "is unable to work in his usual and customary work . . . (moderate to heavy labor)." In a report dated March 8, 1999 (the only report during the filing period), Dr. S comments on claimant's "deteriorating condition" and that claimant "is considerably disabled and likely depressed" In a report dated April 27, 1999, Dr. S writes:

[T]his patient is unable to work in any type of employment for gain. He has developed progressive atrophy of the left upper extremity and it is also visible on the left scapula, the left neck area, the left shoulder and proximal trapezius areas. He has almost zero strength on the left hand and even though I have tried to help this patient, rehabilitate him and advise him, he has not been able to perform any duties that are meaningful in any way where he could sustain a job or even obtain a job because he is not physically able to perform any duties that are required for employment. [Emphasis in the original.]

A functional capacity evaluation of February 20, 1998, appears to indicate (handwritten notation is not clear) that claimant can do some duties with restrictions. In a report dated December 16, 1998, Dr. C (Dr. C's status is unclear) is of the opinion that claimant's condition "is compatible with a release to work at a light duty level with no repetitive lifting greater than 20 lbs." The diagnosis in that report was amputation of the left index and middle fingers and a left shoulder sprain/strain. Other documentary evidence indicates claimant "underwent acromioplasty and repair of the rotator cuff of the left shoulder and revision of the left middle finger" on April 29, 1996.

The hearing officer found that claimant had "some ability to work" and commented in his Statement of the Evidence:

Claimant has full use of his right arm, wrist and hand. Claimant can stand, stoop, lift with his right hand (Claimant is left hand dominant), walk, drive etc.

The medical report and letter submitted by Claimant's treating doctor and the testimony of the Claimant does not support Claimant's contention that he has a total inability to work and is, therefore, excused from looking for work.

Attached to claimant's Statement of Employment Status (TWCC-52) is a list of some 20 job contacts claimant said he made between January 25 and March 19, 1999. Most of those contacts were for cleaning or maintenance positions. Carrier's "Disability Management" company confirmed eight of the applications, confirmed that claimant had not made any contact with eight of the employers and that one employer was listed twice. Carrier pointed out that no contacts had been made from December 20, 1998, through January 24, 1999. Claimant testified that he made the job contacts only because carrier's adjuster had told him he had to do so in order to qualify for SIBS. Claimant testified that he contacted the Texas Rehabilitation Commission (TRC) on two occasions but that they were unable to help him. Carrier noted that claimant's first contact with TRC was three days after a CCH for a prior quarter of SIBS.

In evidence is a surveillance videotape taken on April 14 and 15, 1999, offered by carrier. At the time it was offered, and at the conclusion of the CCH, claimant objected to the admission of the video on the basis that it was after the filing period at issue, that it was not relevant to the filing period for the fifth quarter and that it had no probative value. The hearing officer admitted the video, saying that he would give the video the weight he felt it deserved. The first part of the video showed a male lifting the hood of a car (using his left arm), checking the oil and walking in and out of a house. The second part showed what appeared to be a male getting in and out of a car and driving. The video contradicted much of claimant's testimony. No objection was raised that the video had not been properly exchanged or that one or both of the figures in the video were not the claimant. Fairly clearly from claimant's attorney's questioning and comments was that at least the attorney had seen some or all of the video.

Claimant appealed the hearing officer's finding that he had some ability to work, citing the report of Dr. S that he "was considerably disabled and likely depressed" and that Dr. S had told him not to work. We have frequently noted that the total inability to work at all will arise in only rare and unusual cases, as opposed to the fairly common situation where a seriously injured employee cannot return to his previous employment. Texas Workers' Compensation Commission Appeal No. 962447, decided January 14, 1997. In this case, while it may be undisputed that claimant cannot return to his preinjury heavy manual labor job, claimant clearly has the use of his right (nondominant) arm, can walk, can drive a car, etc., which would not impair claimant's ability to work a light-duty or part-time job. The hearing officer, finding that claimant has some ability to work, is supported by the evidence.

Claimant next contends that even though his doctor had ordered him "not to seek employment," claimant had in fact "sought employment with twenty (20) different employers without success." Whether good faith is shown is generally a factual issue for the hearing officer's resolution. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. We have repeatedly held that the pattern of a search with regard to timing, diligence, and forethought is pertinent and a matter to be considered in addressing this issue. Texas Workers' Compensation Commission Appeal No. 982987, decided February 4, 1999; Texas Workers' Compensation Commission Appeal No. 982210, decided November 4, 1998. From our review of the record, we cannot conclude that the findings and conclusions of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, our standard of review on evidence sufficiency issues. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Claimant asserts that the videotape was inappropriately considered by the hearing officer because it had not been viewed at the CCH. Our review of the record indicates that the only objection claimant had to the video was one of relevance in that it was taken after the filing period. Claimant did not request that the video be shown at the CCH nor did he object to the hearing officer's statement that he would review the exhibits after the CCH. Claimant does not object that the video was not properly exchanged and carrier represents that claimant had the video in his (or his attorney's) possession for 38 days prior to the CCH. Claimant cannot now, on appeal, claim that he did not have ample opportunity to view the video. Claimant also on appeal, for the first time, alleges one or both males on the video were not the claimant. That objection was not made to the hearing officer and, consequently, was not preserved for appeal. The hearing officer was in a much better position, having the claimant in the hearing, to determine whether the individuals in the video were the claimant or not. We find no merit in claimant's appeal on this point.

Lastly, we feel compelled to comment on the hearing officer's phrasing of the claimant's contention, both in his Statement of the Evidence and Finding of Fact No. 3, that claimant was "excused from looking for work." While we realize that this may be an exercise in semantics, we point out that neither the hearing officer nor the Texas Workers' Compensation Commission have the authority to "excuse" a party from a statutory requirement. See Texas Workers' Compensation Commission Appeal No. 990048, decided February 18, 1999. What we have said is that a total inability to work meets the good faith requirement in Sections 408.142 and 408.143.

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:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge