

APPEAL NO. 992762

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 October 18, 1999. He (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the third quarter. The appellant (carrier) appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Reversed and remanded.

The claimant sustained a compensable neck and shoulder injury on _____. She reached maximum medical improvement on March 10, 1998, and was assigned a 16% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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 "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The third SIBS quarter was from August 11 to November 9, 1999, and the qualifying period was from April 28 to July 27, 1999.

The claimant apparently returned to working light duty with her employer, but quit sometime in the summer of 1998 because she felt she could not continue the work. She described her work restriction as no lifting over 20 pounds and no repeated bending or twisting. No medical evidence was introduced to confirm these restrictions. She submitted a Statement of Employment Status (TWCC-52) for the third quarter on which she listed some 18 job contacts, none of which were successful, and, according to her testimony, most of which were not hiring. The first contact was on May 6, 1999, some nine days into the filing period. Also attached to the TWCC-52 were pay stubs and copies of four checks paid to her as wages during the filing period. It is impossible to tell from this information what days the work was performed. The hours per pay period ranged from approximately nine to 19. The claimant said she did office cleaning work for this pay and would work two to three hours per day when called in to clean. Also in evidence, though apparently not attached to the TWCC-52, were statements of people who said they occasionally hired the claimant to do housecleaning and child care. One statement reflected payments of \$18.00 on three days of the qualifying period, another on two days, for a total of \$45.00. She said she just cleaned houses "once in a while" and took GED classes (on the advice of the Texas Rehabilitation Commission) in the evening until she started the job doing office cleaning.

Rule 130.102(d), in pertinent part, provides that an injured employee has made the required good faith job search effort if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work"¹ or has provided "sufficient documentation" to show a good faith effort to obtain employment. Rule 130.102(e) also states that an employee who is able to return to work in any capacity "shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts."

In support of his determination that the claimant made the required good faith job search commensurate with her ability to work,² the hearing officer made the following findings of fact:

FINDINGS OF FACT

4. Claimant can perform light duty work with limited lifting and twisting with no overhead work.
5. Claimant worked part time cleaning a business office and two residences during the qualifying period for the 3rd quarter.
6. During the qualifying period, Claimant contacted eighteen prospective employers in the _____ area and was unable to find additional employment.
7. Claimant lives in _____, a small community . . . where light duty employment is limited.

In its appeal of the good faith determination, the carrier stresses that the evidence did not establish that the claimant's employment activities were actually limited by her physical restrictions from her compensable injury; that the claimant did not establish that she looked for work during each week of the qualifying period; and that the hearing officer improperly considered the job market in _____ as part of the evaluation of the claimant's good faith.

We note initially that the claimant was somewhat vague in her testimony about when she engaged in employment as an office cleaner and self-employment as a house cleaner. In a case such as this where the claimant concedes she has some ability to work, the Appeals Panel has stressed the requirement to evaluate a good faith job search both in terms of the type of work and the number of hours in which work can be performed. Texas Workers' Compensation Commission Appeal No. 992605, decided January 6, 2000. In this

¹The preamble places the emphasis on the nature of the work, not the hourly wage rate.

²We note that Finding of Fact No. 8 inadvertently omits the phrase "good faith," which we imply.

case, there was evidence supporting a finding of physical work restrictions. No findings, however, were made as to whether there were limitations on the number of hours a week the claimant could work. We believe such findings are required in this case to properly evaluate whether the 18 job searches constituted the required good faith job search especially where, as here, from the limited evidence, the claimant arguably worked no more than 10 hours in any week of the filing period. Also, at least as regards the information on the TWCC-52, it does not appear that the claimant looked for work during every week of the filing period (it is unclear what some entries are). The hearing officer in this case did not make findings regarding a weekly job search or its documentation. Finally, there was no evidence whatsoever about the limited light-duty employment opportunities in _____. Such a finding goes beyond the boundaries of official notice. See Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994.

For these reasons, we reverse the good faith determination of the hearing officer and remand the issue of SIBS entitlement for further development of the evidence and consideration and express findings on the elements of Rule 130.102(d) and (e) set out above. Texas Workers' Compensation Commission Appeal No. 992612, decided January 3, 2000; Texas Workers' Compensation Commission Appeal No. 991598, decided September 10, 1999. See *also* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999. Given the absence of evidence of economic conditions in _____ for light-duty employment, the hearing officer should avoid making a finding on this point and not consider the matters reflected in Finding of Fact No. 7 in reaching a decision.³

The hearing officer also found that the claimant established that her unemployment was a direct result of her impairment. The carrier appeals this determination essentially on the basis that the claimant returned to work in 1998 and was working until she voluntarily terminated such employment. It attributed her inability thereafter to earn 80% of her AWW to this voluntary action, not to her impairment. The claimant testified that she stopped working because of the effects of her compensable injury and as suggested by her doctor and concurred in by the company nurse. Such evidence found credible by the hearing officer was sufficient to support his determination that her impairment was at least a cause,

³While the carrier also alleges that the TWCC-52 was so defective in the information it contained that it did not constitute a filing, we decline to address this question because it was not an issue formally raised at the benefit review conference.

if not the only cause, of her underemployment. See Rule 130.102(c). For these reasons, we decline to reverse that determination. On remand, the issue of third quarter SIBS entitlement will depend solely on further findings of the existence or not of the required good faith job search.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge