APPEAL NO. 000085

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 17, 1999, a contested case hearing (CCH) was held. At issue was the entitlement of the respondent, Pennie Peterson, who is the claimant, to her fourth, fifth, and sixth quarters of supplemental income benefits (SIBS), and whether the appellant (carrier) was relieved of liability due to the failure to timely file a Statement of Employment Status (TWCC-52) for the fourth quarter.

The hearing officer agreed that there was a late filing of the fourth quarter TWCC- 52 for the period from March 17 until April 22, 1999. She found that claimant had the inability to work for all periods of time in question, but had also made a good faith search for employment for all periods under review. She further found that claimant's unemployment or underemployment for all quarters was the direct result of her impairment.

The carrier has appealed, arguing that claimant's evidence does not prove an utter inability to work, and that she is not entitled to SIBS for the fifth and sixth quarters under the new SIBS rules. The carrier argues facts to support its argument. The claimant responds that the hearing officer is the sole judge of the facts in a case and argues facts that support the decision. The claimant argues that the doctor who evaluated her return to work agreed that as a practical matter it would be hard for the claimant to find employment that was sedentary and flexible.

DECISION

Affirmed in part, reversed and rendered in part.

At the beginning of the CCH, it was agreed that the periods for which claimant's activity and ability to work was reviewed ran from December 16, 1998, through August 30, 1999. The fourth quarter was considered under the previous rules, the fifth and sixth quarters under the "new" SIBS rules.

Given that the claimant's contention, and the hearing officer's finding, was that the claimant was unable to work at all, it is worth reciting the version of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d) (Rule 130.102(d)) that was in effect at the time of the filing periods for the fifth and sixth quarters:

> (d) Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;

(2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission [TRC] during the qualifying period;

(3) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or

(4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

Further, according to Rule 130.102(e), an employee who searches for work shall look for work every week of the qualifying period. The purpose of SIBS is to support efforts to return to the workplace, on a part-time basis to start, if need be, if that is what is commensurate with the physical ability to work; the inability to work at all should be found only rarely.

The claimant was injured on _____, lifting a heavy patient while employed as a nurse's aide; she had two lumbar surgeries on April 30, 1996, and on August 5, 1997. She said she had physical therapy following the last procedure. She said that she took Tegretol for a nerve condition not related to her employment, and Motrin, Valium, and hydrocone. On July 29, 1999, Dr. E wrote that hydrocone or diazepam could cause sedation and claimant should not drive "nor should she attempt to do any sort of work." Because of these medications, claimant was refused services in September 1999 at the TRC.

The claimant said no doctor had released her to work. It was her feeling that she could not hold down a job. She had gone to both the Texas Workforce Commission and the TRC. For three days during the sixth quarter qualifying period, she went to work as a pager at the local airport, and was permitted to both sit and stand, but said the pain was so great she could not continue to work. Thereafter, she did not seek employment, because she felt she could not get a job and because the effort of searching and catching a bus to do so caused pain. Claimant's testimony and her medical records indicated that she had used a cane to walk through 1998 and 1999.

The claimant's treating doctor beginning April 2, 1999, was Dr. E. His April 2 and April 23, 1999, reports described claimant as a "lumbar cripple" but otherwise makes no comment on whether she can work, and to what extent.

Claimant was referred by the Texas Workers' Compensation Commission on February 8, 1999, to Dr. D to assess her ability to work in a required medical examination. Dr. D indicated a history of continued back pain and right extremity radiculopathy after her surgeries. Dr. D also commented on a functional capacity evaluation (FCE) claimant had

on August 13, 1998, which concluded she could work at the sedentary level. At the time of his examination, he noted that claimant took Tegretol, Tylenol, and Flexeril. Claimant had a second FCE on February 2, 1998, and Dr. D noted that the results were essentially unchanged from the previous year. He noted that claimant exhibited symptom magnification. During a third FCE on February 2, 1999, inconsistent efforts were noted as well as magnified illness behavior on 13 out of 16 indicators. The claimant was quoted as saying she didn't intend to return to work until her pain was gone. The FCE recommended a flexible, sedentary work environment.

In accordance with these tests, Dr. D said he felt that claimant could tolerate sedentary work providing it was flexible. He suggested that she be free to change her position every 15 minutes. Dr. D said that claimant would be limited to lifting 10 pounds maximum from waist to shoulder, not on a repetitive basis, and no lifting at all from floor to waist. He suggested that she be limited to a sedentary desk job. He agreed she could not return to her job as a nurse's aide.

The claimant made 12 job contacts during the fourth quarter filing period. She made 26 for the fifth quarter, and seven for the sixth quarter, with no contacts at all being made after July 12th. The claimant testified that several of them were telephone contacts, made by talking to persons at the company or listening to the phone-in job line. The carrier presented verification attempts questioning whether some of these contacts were even made.

First of all, we will affirm the findings that claimant's unemployment or underemployment was the direct result of her impairment--she had a serious injury with lasting effects.

However, we cannot agree that the evidence supports the finding of inability to work for any of the quarters in question. Throughout the period of time in question, consistently on three FCEs, claimant was found to have a sedentary ability to work. Furthermore, for the fifth and sixth quarters, the requirements of Rule 130.102(d)(3) have not been met, as there are other medical reports showing an ability to work. Consequently, claimant's entitlement to SIBS depends upon the adequacy of her job search.

Although marginally adequate, the hearing officer's determination that claimant made a good faith search during the fourth quarter, which is covered by the previous SIBS rules, is sufficiently supported by the record, although another finder of fact could have weighed the efforts differently.

However, we reverse and render that the claimant did not make a good faith search for employment throughout the period under review for the fifth and sixth quarters, and is thus not entitled to SIBS. For the fifth quarter, we note that the hearing officer specifically commented in her discussion of the facts that claimant had not searched for work in every week of the fifth quarter. Because she believed that a weekly search had not been made, the hearing officer could not find that a good faith search in accordance with Section

130.102(e) had been made. For the sixth quarter, there was no evidence that the claimant sought to modify her job duties at the airport paging job prior to quitting, and it is unclear what she felt she was unable to do. Although her obtaining a job shows that her efforts up to that time were made in good faith, there must be good faith throughout the period, and the failure to search at all after quitting the job (with a substantial portion of the qualifying period left to go) negates a finding of good faith job search for that quarter. Her failure to search after she lost this job was, according to her own testimony, a matter of her intent not to look anymore. However, the fact that there may be few jobs that can be identified within one's capability does not mean that they should not be sought.

In summary, we reverse the finding that claimant had inability to work during any of the quarters in question, and we render the decision that she could work at the sedentary level, with restrictions. We affirm the hearing officer's determination that the claimant was entitled to SIBS for the fourth quarter (subject to the period of time for late filing of the fourth quarter application that the carrier was found not liable). We reverse the determination that claimant was entitled to SIBS for the fifth and sixth quarters, and render a decision that as she failed to make a good faith search for employment commensurate with her ability to work she is not entitled to SIBS for these quarters.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge