APPEAL NO. 000149

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 6, 2000, the hearing officer closed a record on remand. Texas Workers' Compensation Commission Appeal No. 992435, decided December 17, 1999, remanded the case for the hearing officer to make the necessary findings of fact and conclusions of law to resolve the disputed question of whether respondent (claimant) made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period in light of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) and to resolve the issue of whether claimant is entitled to supplemental income benefits (SIBS) for the sixth quarter based on the evidence admitted at the contested case hearing (CCH). In that case, we expressed concern with appellant's (carrier) contention, and the hearing officer's lack of findings, regarding whether claimant had looked "for employment commensurate with his . . . ability to work every week of the qualifying period and document[ed] his . . . job search efforts." Carrier contended that claimant had failed to do so "the week of May 14, 1999." The hearing officer apparently did not conduct any kind of a hearing on remand; considered the record made on October 12, 1999 (the only audiotape in the file is the CCH of that date); and amended her prior decision to include our direction on remand and recited that "remand hearing was closed on January 6, 2000. No further hearing was necessary and none was held." A copy of Appeal No. 992435 was admitted and official notice was taken of the hearing officer's decision and order dated October 12, 1999, and Appeal No. 992435. The hearing officer added a "Discussion Regarding Remand"; again recited our direction on remand; and, after pointing out that the Appeals Panel incorrectly referred to the qualifying period as the filing period, commented:

> Based on the evidence and testimony presented at the CCH on October 12, 1999, the Claimant did meet his burden of proving entitlement to SIBS as he met the criteria as set out in Rule 130.102(e) in proving that he [sic] did make a good faith effort to obtain employment commensurate with his ability to work.

The hearing officer amended her October 12, 1999, Finding of Fact No. 2 H to add the words "pursuant to Rule 130.102(e)."

Carrier again appealed, reurging "the arguments contained in its initial Request for Review. In particular the Carrier would again point out that the Claimant did not document a job search during the week of June 14th." Carrier requests that we reverse the hearing officer's decision and render a decision that claimant is not entitled to SIBS for the sixth compensable quarter. The file does not contain a response from claimant.

DECISION

Reversed and rendered.

The background facts are set out in Appeal No. 992435, *supra*, and the parties stipulated to the basic SIBS requirements of a compensable injury, that the impairment rating be greater than 15% and that impairment income benefits were not commuted. The parties appear to agree that the qualifying period was from March 22 through June 20, 1999. Claimant's Statement of Employment Status (TWCC-52) documented a list of 20 job contacts (the last of which was after the qualifying period). Claimant also testified that he had made some 10 to 15 other job contacts not listed on the TWCC-52. Also, the evidence developed that claimant may have spoken with Ms. B, carrier's vocational rehabilitation specialist, on June 7, 1999. Ms. B forwarded to claimant a list of five job leads (which were not listed on the TWCC-52) and claimant testified that he contacted those leads but it is not clear when he might have done so and those job contacts were not documented. Claimant also testified that he contacted (temporary service agency) at least once every week to see if they had work available; however, those contacts, for the large part, are also not documented. Claimant worked some part-time work in at least two separate weeks in April 1999 which is documented by pay stubs for that work.

Carrier contended that claimant had not looked for employment every week of the qualifying period and specifically cited "the week of May 14, 1999." (Apparently, carrier meant the week of June 14, 1999, as there was a documented job contact on May 13, 1999.) We asked the hearing officer to make a finding regarding the various weeks; however, she failed to do so. If the qualifying period began on Monday, March 22, 1999, the first week would be from Monday, March 22, through Sunday, March 28, 1999, and the 13th week would have been from Monday, June 14 through Sunday, June 20, 1999, with the qualifying period ending that date. Claimant documented a job search on Monday, June 7 and Tuesday, June 8, 1999. The June 7th documentation is a markover and may have originally been June 22, 1999. The next documented job contact is outside the qualifying period on Monday, June 28, 1999. There were no documented job searches or contacts listed on the TWCC-52 between June 8 and possibly June 22 or June 28, 1999.

Rule 130.102(e) deals with job search efforts and evaluation of a good faith effort and provides in pertinent part:

> (5) [A]n injured employee who has not returned to work and 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. (Emphasis added.)

Carrier contends that claimant identified no contacts whatsoever for the week of June fourteenth through the twentieth (carrier's original appeal). We requested the hearing officer to consider the weeks involved and to identify what she may have considered documentation of job contacts between June 8th and June 20th or, as carrier alleges, the week of June 14th through the 20th. The hearing officer only repeated her original finding (Finding of Fact No. 2C) that claimant looked for work every week of the qualifying period without addressing the requirement in Rule 130.102(e) to document the job search effort.

Judge Kelley, in her dissent in Appeal No. 992435, *supra*, suggests that claimant's testimony that he contacted the temporary agency on a weekly basis and his contacts with that agency are documented and that there are various forms of documentation. The hearing officer declined to follow up on that reasoning and in the decision on remand fails to even mention the documentation requirement. Texas Workers' Compensation Commission Appeal No. 992460, decided December 22, 1999, contains a discussion on what may document a job search. The hearing officer failed to make any findings on the elements in Rule 130.102(e) and we decline to infer any such findings.

Accordingly, we hold that the hearing officer's finding that claimant made a good faith effort to obtain employment commensurate with his ability to work, pursuant to Rule 130.102(e), is not supported by the evidence and we reverse that finding and the conclusion of law that claimant is entitled to SIBS for the sixth quarter as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust (Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)). We render a new decision that claimant is not entitled to SIBS for the sixth compensable quarter.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

Because I would have affirmed the hearing officer's decision and not remanded before, my position cannot change because of the hearing officer's perceived failure to act on the remand. I continue to dissent for the reasons indicated in my previous dissent. The claimant has found a job and that still stands as prima facie evidence of a good faith search. Tex. W.C. Commn, 28 TEX. ADMIN. CODE ' 130.102(d) should not be read in a nonsensical fashion that would elevate the mechanics of a job search over its results.

Susan M. Kelley
Appeals Judge