APPEAL NO. 000220

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 12, 2000. The appellant (carrier) and the respondent (claimant) stipulated that the qualifying period for the fourth quarter for supplemental income benefits (SIBS) ran from June 12, 1999, through September 10, 1999. The hearing officer made findings of fact that the claimant was underemployed during the qualifying period for the fourth quarter and that that underemployment was a direct result of the impairment from the compensable injury. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The hearing officer made Finding of Fact No. 4 that "[d]uring the qualifying period for the 4th quarter, the Claimant made a good-faith effort to secure employment, in addition to maintaining a part-time delivery service" and concluded that the claimant is entitled to SIBS for the fourth quarter. The carrier appealed, contended that the hearing officer erred in not excluding testimony of the claimant because he did not adequately respond to written interrogatories, argued that the claimant did not submit sufficient documentation with his Application for Supplemental Income Benefits (TWCC-52) to support the hearing officer's finding of "good faith" during the qualifying period, urged that the evidence is not sufficient to support the determinations of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBS for the fourth quarter. The claimant responded, stated that the carrier did not seek documents by a subpoena; argued that the carrier may not request documents by interrogatories and that he adequately responded to the interrogatories, contended that the hearing officer did not commit error in permitting and considering his testimony concerning the good faith requirement, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reverse and remand.

The carrier introduced into evidence 16 interrogatories to and answers from the claimant and related correspondence from the attorney representing the claimant dated January 7, 2000. The Decision and Order of the hearing officer lists the exhibit as "Claimant's Answers to Interrogatories (will supplement when received)." There were comments about pages not in evidence, but the record does not contain them. The exhibit contains eight standard interrogatories that are not numbered in sequence and will not be repeated in this decision. It also contains the following two standard interrogatories, five interrogatories that were specifically drafted for the disputed issue, and the answers to those seven interrogatories:

INTERROGATORY #10:

Please state the name, address, and phone number of:

(A) each individual who you know to have knowledge of the relevant facts related to the issue(s) in dispute; and

(B) each individual from whom you plan to submit testimony in your behalf.

Answer:

See claimants/carriers [sic] CCH Exchange.

INTERROGATORY #11:

Please state the source, nature, and the location of:

(A) every document you know of which is relevant to the issue(s) in dispute; and

(B) every document which you intend to introduce into evidence.

Answer:

See response to interrogatory number 10.

INTERROGATORY #12:

Please state each day you actually made deliveries during the qualifying period, June 12, 1999, through September 10, 1999, for the fourth quarter.

Answer:

See documents produced in CCH Exchange. I made deliveries each day, deliveries were available.

INTERROGATORY #13:

How many total days did you actually make deliveries during the qualifying filing period (June 12, 1999, through September 10, 1999.)

Answer:

See documents produced in CCH Exchange. See answer to interrogatory number 12.

INTERROGATORY #14:

Please identify any employer who you have received an interview from or call back for potential employment. Only identify those employers who expressed an interest in you during the qualifying filing period (June 12, 1999, through September 10, 1999).

Answer:

1) (employer); and
2) All potential employers contacted me acknowledging my request for employment except (employer).

INTERROGATORY:

Please identify and attach any documentation reflecting your business plan, business contacts, sales tax registration for your business during the qualifying period for the fourth quarter (June 12, 1999, through September 10, 1999) as outlined in TWCC [Texas Workers' Compensation Commission (Commission)] Rule 130.101(1)(D) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(1)(D)].

Answer:

I am not required by state law to charge sales tax. Also, I do not have a "formal business plan".

INTERROGATORY #16:

Please state exactly how many hours a week you worked, if any, during the qualifying filing period for the fourth quarter (June 12, 1999, through September 10, 1999).

Answer:

Claimant objects to this request as it is vague and overbroad.

Subject to the above objection: I don't know the "exact" number of hours as each job is different.

The claimant testified that he worked as a diesel mechanic when he was injured; that because of the compensable injury he could no longer do the heavy lifting required of a diesel mechanic; that he became a salesman at a fireplace company; that the carrier told him that he did not make enough money in that job and he should retrain for other work; that under a Texas Rehabilitation Commission program, he attended class and obtained an

insurance adjuster's license; that he applied for a number of jobs as an insurance adjuster; that he was not hired for any of the adjuster jobs for which he applied; that he was told that he either needed two or three years of experience, a college degree, or both. He said that as a result, he kind of gave up on obtaining a job as an adjuster; that he applied for management-type jobs in areas in which he had experience; and that after an interview, he thought that he had been hired by a prospective employer, but that he was not. The claimant stated that he looked for jobs in the Austin, Dallas, Houston, and New Orleans newspapers and used the Internet to try to find jobs. He testified that he used the Internet to apply for some jobs; that he pulled information out of his computer on five days; and that the pages he printed show the day that he got the information out of the computer, not the day that he sent the information to prospective employers. On the TWCC-52 for the fourth quarter the claimant did not indicate the day that he applied for jobs. He did indicate that he sought employment with four prospective employers in July, 11 prospective employers in August, and five prospective employers in September 1999. Printouts from a computer contain information about prospective employers. Some of the information is difficult to read because of stamps placed on the pages and problems with making copies. It appears that a page with the date July 11, 1999, contains information about one prospective employer; entries with the date of July 25, 1999, contain information about 19 prospective employers; an entry dated July 28, 1999, has information about one employer; an entry dated August 1, 1999, has information about two employers; entries dated August 3, 9, and 10, 1999, each contain information about one employer; entries dated August 8, 1999, have information about four employers; entries dated August 15, 1999, have information about five employers; entries dated August 17, 1999, have information about four employers; entries dated August 18, 20, 21, and 30, 1999, each have information about two employers; entries dated August 22, 1999, contain information about 15 employers; and entries dated August 30 and September 12 and 16, 1999, each contain information about one employer. Notes on those printouts indicate that a document was mailed on August 8, 1999; that one was sent by e-mail on September 9, 1999; and that one was sent by fax on September 12, 1999.

The claimant testified that he started a delivery business; that at first he delivered things for three companies; that after the carrier contacted two of the companies, they stopped giving him business and explained that they wanted a delivery person that would continue to make deliveries and they thought that his business was temporary; that he continued to make deliveries for an air conditioning and heating company; that he had two trailers; that he would go to the warehouse, a forklift would be used to place the equipment on a trailer; that he would drive to the location where the equipment was to be used; that personnel at the location would unload the equipment; that the personnel who unloaded the equipment did not work for him and were not paid by him; that sometimes he had to leave a trailer at a location to be unloaded later; that he was paid different for each job; that he also made deliveries of envelopes; that he made deliveries any time that he was provided the opportunity to do so; that he provided copies of invoices for each delivery with an application for SIBS for a prior quarter; that a carrier employee told him providing copies of invoices was confusing and to provide only copies of checks with future applications for

SIBS; and that he did so. The claimant also said that he was reimbursed for purchases that he made for the company. The record contains copies of 12 checks from (company) to (claimant's delivery company) and a listing indicates that the total amount is $2,265.64. Another listing indicates that the claimant was reimbursed $89.41 for purchases that he made. There is also a copy of a check for $50.00 from another company.

At the CCH, the carrier contended that since the answers to the interrogatories did not contain any supporting documentation and were not verified, the claimant should not be permitted to testify to any matters related to the questions in the interrogatories that were not completely answered with the requested documentation. The attorney representing the claimant said that the copy of the interrogatories and the answers to them that were sent to the carrier included a verification page that could be provided. Section 410.159 is entitled Standard Interrogatories. Section 410.161 provides:

> A party who fails to disclose information known to the party or documents that are in the party's possession, custody, or control at the time disclosure is required by Sections 410.158-410.160 may not introduce the evidence at any subsequent proceeding before the commission or in court on the claim unless good cause is shown for not having disclosed the information or documents under those sections.

Rule 142.12 is entitled Subpoena and Rule 142.13 is entitled Discovery, and addresses, among other things, exchange of documentary evidence, interrogatories, depositions, additional discovery, and sequence of discovery. There is no indication that interrogatories are to be used to obtain documentary evidence. In Texas Workers' Compensation Commission Appeal No. 952179, decided February 12, 1996, the carrier cited Texas Workers' Compensation Commission Appeal No. 92309, decided August 19, 1992, and argued that the proper remedy for failure to answer interrogatories was to exclude evidence not provided in the interrogatories. In the case before us, the carrier cited the same case and made a similar argument. In Appeal No. 952179, *supra*, the Appeals Panel cited Appeals Panel decisions; stated that interrogatories must be directed at information not exchanged or disclosed, that the failure to answer interrogatories could not be used to exclude evidence that was required to be exchanged, that it approved the hearing officer's finding of no good cause for failure to answer the interrogatories and in no way condoned the claimant's "cavalier" attitude; and held that under the circumstances of the case, it found any error not excluding all or part of the claimant's testimony to be harmless. In Texas Workers' Compensation Commission Appeal No. 94339, decided May 4, 1994, an unpublished decision, the Appeals Panel stated that Rule 142.13(d) provides that answers to interrogatories shall be made under oath, but it does not follow that a failure to attach an affidavit under oath to the answers to the interrogatories results in a party being estopped from presenting its case, particularly where the matter involved had been previously provided. A ruling by a hearing officer to admit or not to admit evidence is discretionary and will be overturned only when there is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. While we do

not necessarily agree with the hearing officer's statement that he was not aware that he could exclude testimony as a violation of discovery sanction, the hearing officer did not err in permitting the claimant to testify about his efforts to comply with the good faith requirement.

The carrier cited Rule 130.101 and argued that the claimant did not comply with it because he did not provide a business plan or a sales tax registration. Rule 130.101 is entitled Definitions and provides that words and terms when used in the chapter have the following meanings, unless the context clearly indicates otherwise. Rule 130.101(1) provides:

> Application for [SIBS] - The Commission form TWCC-52 containing the following information:
>
> (A) a statement, with supporting payroll documentation, that the employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury;
>
> (B) the amount of the employee's wages during the qualifying period;
>
> (C) a statement, with supporting information such as that outlined in §130.102(e) of this title (relating to Eligibility for [SIBS]; Amount), that the employee has in good faith sought employment commensurate with the employee's ability to work; and
>
> (D) for self-employed individuals, copies of all supporting documentation such as, business plans, contacts, sales tax registration, and other pertinent documentation to document all efforts to establish or maintain a self-employed enterprise during the qualifying period.

Rule 130.102(d), effective January 31, 1999, provides:

> 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 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.

Rule 130.102(e), effective January 31, 1999, provides in part:

> Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, an 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.

The claimant's answers to interrogatories and his testimony indicate that he was not required to charge sales tax for his services and that he did not have a business plan. Rule 130.101(1) contains a definition of Application for [SIBS]. As the claimant contended at the CCH, there is no requirement that he obtain and produce documents that do not exist. The provisions of Rule 130.102(e) do not apply to Rule 130.102(d). If they did, the Appeals Panel has held that documentation of good faith job search efforts is not limited to the TWCC-52. The record does not compel that the Appeals Panel hold that the TWCC-52 for the fourth quarter filed by the claimant does not meet the requirements of Rule 130.101(1)(D).

The parties stipulated that the qualifying period for the fourth quarter for SIBS began on June 12, 1999. The documentation in the record concerning job searches by the claimant is not very clear, but the first date on any of it is in July 1999. The claimant did not document any job searches in June 1999 and did not document a job search in every week of the qualifying period. In the statement of the evidence and discussion in his Decision and Order, the hearing officer stated that the carrier's argument centered primarily on the lack of documentation, that the claimant could have provided more documentation, and that the claimant met his burden despite the weakness of his documentation. The hearing officer did not make a finding of fact concerning the documentation required in Rule 130.102(d)(4) and Rule 130.102(e). He did make Finding of Fact No. 4 that "[d]uring the qualifying period for the 4th quarter, the Claimant made a good-faith effort to secure employment, in addition to maintaining a part-time delivery service." Finding of Fact No. 4

is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and is reversed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We render a decision that the claimant has not met his burden to prove that he is entitled to SIBS under the provisions of Rule 130.102(d)(4) and Rule 130.103(e). We also reverse the conclusion of law that the claimant is entitled to SIBS for the fourth quarter.

The hearing officer did not make a finding or finding of fact concerning Rule 130.102(d)(1). Based on the evidence before him, he should have done so. We remand for him to make findings of fact concerning Rule 130.102(d)(1), to conclude whether the claimant is entitled to SIBS for the fourth quarter, and to enter an appropriate decision and an appropriate order.

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 Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I agree with the majority in its upholding of the hearing officer's evidentiary rulings and commend the author judge on a well-written decision. However, I depart from my colleagues in their interpretation of what is required to "document" a job search and the evidence necessary to support a hearing officer's finding that a claimant made a good faith job search. In this regard, I dissent in the present case for much the same reason that I dissented in Texas Workers' Compensation Commission Appeal No. 992460, decided December 22, 1999. Just as I did in Appeal No. 992460, I wish to quote verbatim the hearing officer's statement of the evidence in the present case in which the hearing officer stated as follows:

> The Claimant testified that as a result of his compensable injury he was unable to return to his former occupation as a diesel mechanic. He stated that he had retrained through a Texas Rehab Commission (TRC) program and got an adjuster's license. During the qualifying period in issue, he indicated he had applied for positions as an adjustor or claims examiner as well as managerial type positions in the trucking industry. He stated that he uncovered the prospective Employers through a daily search of newspapers from Dallas, Houston, New Orleans, and Austin, as well as searching on the Internet. In addition to making such efforts, the Claimant described his self-employment as a delivery driver running parts and units for an air conditioning company.
>
> The Carrier's argument centered primarily on the lack of documentation submitted to the Commission [Texas Workers' Compensation Commission], and to the Carrier in response to discovery requests. Clearly, the Claimant could have provided more documentation to both entities. However, the Claimant's credible testimony sufficiently described a good-faith job search within the relevant qualifying period, (even without considering the self-employment) and is supported by such documentation as was provided. Overall the evidence presented a picture of a worker who has been prevented from performing his former trade (of 23 years) by a compensable injury, and has made significant efforts to re-train and re-enter the workforce. Conversely, the evidence fails to indicate that the Claimant is a malingerer, nor is he someone using the Carrier to subsidize some unrealistic, quixotic dream of self-employment. The Claimant, in short, has met his burden despite the weakness of his documentation here.
>
> Even though all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

The hearing officer has provided in his decision his reasoning for finding that the claimant made a good faith job search. I think the claimant evidenced that he met the requirement of making weekly job searches through his testimony that he daily searched for jobs through newspapers and the Internet. In this day and age of electronic communication, I can think of no better source of job information than the Internet, and, traditionally, almost any job search has begun with the newspaper want ads. It is obvious from the hearing officer's decision that he found the claimant's testimony credible that he searched daily for jobs through newspapers and the Internet. The credibility of the claimant was a question for the hearing officer as the finder of fact. He personally heard the testimony and viewed the witness.

I understand that the majority holds the opinion that the claimant's sworn testimony is insufficient as a matter of law to meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) that a claimant "document" his or her job search efforts. I addressed this same question in my dissenting opinion in Appeal No. 992460, *supra*, and the following language from that opinion expresses my current view of the matter:

> As far as the requirement that a job search be documented, I believe that the claimant's testimony documented his search. First, I would note that the word "document" in Rule 130.102(e) is used as a verb and not as a noun. As such, I would interpret it to mean to "provide evidence of" and not merely to mean a piece of paper. This view is further supported by the language in Rule 130.102(e) in which states "the reviewing authority shall consider the information from the injured employee." This language does not limit the requirement that the reviewing authority consider only written information. In fact, it would seem to me to be most incongruous that the rule would permit a job search to be evidenced by an unsworn writing by a claimant but could not be evidenced by sworn testimony. While the majority apparently cites Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, for proposition that Rule 130.102(e) requires a writing concerning a claimant's job search, I believe that to the degree Appeal No. 992321 [Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999] stands for this proposition this case is wrongly decided and violates the language of Rule 130.102(e) itself.

I am unable to accept that it was the intention of the commissioners to preclude a hearing officer from granting supplemental income benefits (SIBS) to a claimant like the one in the present case. I believe that reversal of the hearing officer's decision does violence to the language of Rule 130.102(e) when the rule is reasonably read as a whole. I also see no reason to strain the meaning of the rule or focus only on a portion of the language of the rule to reach a result which I view as contrary to the very purpose of the 1989 Act, which is to compensate injured workers. It is axiomatic that workers' compensation laws are to be interpreted liberally in favor of providing benefits. This principle was recently reaffirmed by the Texas Supreme Court in Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999). I believe that the reversal of the hearing officer in the present case is contrary to the principles of liberal construction of the Texas workers' compensation law. In the present case, the claimant is both working and seeking further employment. He has sought retraining and he has followed the suggestions of the carrier in how to get back into the workforce. To me, the claimant in this case is exactly the type of injured worker for whom SIBS was designed. I would affirm the decision of the hearing officer, and I can only hope that on remand the hearing officer finds that this claimant met the requirements of Rule 130.102(d)(1) to establish that he has met the good faith job requirement by returning to work in a position which is relatively equal to his ability to work.

I will close my dissent with a caveat. While I believe that a writing is not required by Rule 130.102(e) to document a job search, my position is obviously a minority position in this case. I would not want anyone to rely on my view to his or her detriment. I think that in light of the majority opinion in the present case and other decisions a claimant would be well-advised to document a job search in writing as fully as possible and anyone advising a claimant should strongly urge a claimant to do so.

Gary L. Kilgore
Appeals Judge