APPEAL NO. 000224

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 January 13, 2000. The hearing officer determined that appellant (claimant) had an ability to work in a sedentary capacity and that neither the claimant's self-employment efforts, nor his other job search efforts were sufficient to show a good faith effort commensurate with his ability to work during the second quarter qualifying period and, therefore, the claimant was not entitled to supplemental income benefits (SIBS) for the second quarter, from August 18, 1999, through November 16, 1999. The claimant appeals, stating that although his doctors' reports showed his limited ability to work during the second compensable quarter, he did attempt to develop his own business and made contacts that, to him, demonstrated a good faith effort to seek employment. Although claimant mentions in his appeal the hearing officer's finding that his unemployment is a direct result of his impairment, we do not consider that finding, which is in claimant's favor, as having been appealed and that finding has become final. Section 410.169. The respondent (carrier) responds that the decision and order of the hearing officer is correct and should be affirmed.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable (low back and left knee) injury on _____; that impairment income benefits have not been commuted; that claimant has reached maximum medical improvement with a 15% or greater impairment rating; and that the qualifying period for the second compensable quarter was from May 5 through August 3, 1999. Although neither party nor the hearing officer reference the "new" SIBS rules, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100 *et seq.* (Rule 130.100 *et seq.*), they are applicable to this case. Claimant appears to proceed on a hybrid theory that he has a total inability to work as stated by Dr. S; that he attempted to start and "maximize" his own business, (Business E), during the qualifying period; and that he made sufficient other outside job contacts to demonstrate a good faith effort to obtain employment commensurate with his ability.

Claimant was a concrete truck driver and sustained his injury when one of the steps on the ladder of his truck broke causing the left knee and low back injuries. Claimant has a torn lateral meniscus of the left knee; surgery has been offered and declined on the left knee. Claimant was recommended for spinal surgery by Dr. S but apparently not approved by the second opinion spinal surgery process. Claimant has been undergoing conservative care and physical therapy. A report dated April 28, 1999 (just prior to the qualifying period) from Dr. S states that claimant cannot return to his preinjury work, that claimant "is presently a candidate to be retrained for sedentary activity" (claimant testified that he has not applied for retraining in sedentary activity other than a one-day seminar on how to start one's own business) and that claimant "is presently not a candidate for any type of gainful

employment to which he is civically trained or able to do." Dr. S does not explain why that may be so. In evidence is a functional capacity evaluation (FCE) dated February 4, 1999, performed by Dr. JS in which she concludes that claimant "has the ability to perform work in category 1" which is sedentary work that "allows for an occasional lift of a negligible weight." The hearing officer cites the FCE as establishing that claimant "had an ability to work at a sedentary capacity." We will further note that Rule 130.102(d)(3) then in effect and now Rule 130.102(d)(4) effective November 28, 1999, provided that the good faith requirement may be met if the employee:

> 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[.]

We hold that Dr. S's report of April 28, 1999, does not meet the requirements of a narrative report "which specifically explains how the injury causes a total inability to work" and we affirm the hearing officer's inferred finding that the FCE is such a record that shows claimant is able to return to sedentary work. In so far as claimant's appeal saying he "had no ability to work per two medical reports" and that he "had no ability to work" raises a contention of entitlement based on a total inability to work, we hold that claimant has not met the requirements of Rule 130.102(d)(3) and affirm the hearing officer's finding that claimant had some ability to work.

Claimant submitted two Application for Supplemental Income Benefits (TWCC-52) forms, both dated August 3, 1999. The testimony developed that the first was discussed at a benefit review conference. That TWCC-52 listed 14 job contacts, each about a week apart, with seven of the contacts being with Business E (*i.e.,* a contact with his own business). The testimony was that the carrier's attorney, the ombudsman and the benefit review officer explained to claimant what was necessary to document and prove self-employment. A second TWCC-52 was submitted which was substantially identical to the first TWCC-52 except that the contacts with Business E were replaced with names of individuals whom claimant indicated he contacted as a contractor. Business E has an Assumed Name Certificate of Ownership and claimant testified that Business E is in the business of laying cement for driveways, garages, patios, etc. (claimant would get the business, do the estimates and administration and actually hire out the physical labor). Claimant had receipts where he advertised his business in the newspaper in June and July. Neither the receipts nor claimant's testimony was clear whether this was for one ad per month (the cost was $55.00 each) or a series of ads. Claimant testified that he received seven inquiries for bids which he listed on the TWCC-52. It is not clear whether claimant actually made any bids and there was no other documentation. In addition to the seven inquiries for bids, claimant also documented seven other job contacts, six of which were by telephone. One employer was listed three times and two other employers were listed twice each. Claimant agreed that he was physically unable to perform the required duties but explained that he was responding to ads in the newspaper and he did not know exactly what the duties entailed until he called. It is not clear why claimant continued making

contacts after determining what the job entailed. The hearing officer, in Finding of Fact No. 8, found:

FINDING OF FACT

8. Neither Claimant's self-employment efforts, nor his other job search efforts nor the two combined, were sufficient to show a good faith effort commensurate with Claimant's ability to work, during the second quarter qualifying period.

Claimant, in his appeal, asserts that both Dr. S and Dr. JS indicate that he must be retrained for a sedentary position. While those reports could be interpreted that way, claimant agreed that he had made no effort to obtain the retraining for a sedentary job other than the one-day seminar on how to start a business. Consequently, even if claimant's contention is true that is not a basis on which to reverse the hearing officer's decision.

Sections 408.142 and 408.143 provide, among other things, that to be entitled to SIBS, a claimant must in good faith seek employment commensurate with his or her ability to work. We have many times commented on what good faith may entail and that whether a claimant has made a good faith effort to seek or obtain employment commensurate with his ability to work were questions of fact for the hearing officer to resolve. We have also previously recognized that self-employment may satisfy the SIBS good faith requirement. Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996. In doing so, we noted that in self-employment cases the claimant must establish that he made efforts to solicit business or customers in the filing period at issue in order to sustain his burden of proof. Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994; Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995; Texas Workers' Compensation Commission Appeal No. 950303, decided April 12, 1995. Under the "new" SIBS rules, the TWCC-52 is to contain the following information for self-employed individuals: copies of all supporting documentation such as business plans, contacts, sales tax registration, and any other pertinent documentation to document all efforts to establish or maintain a self-employed enterprise during the qualifying period. *See* Rule 130.101(1)(D), effective January 31, 1999. The only documentation claimant offers is the Assumed Name Certificate of Ownership, two receipts for ads and the listing on the TWCC-52. The hearing officer obviously did not find that documentation sufficient.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Accordingly, we affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge