APPEAL NO. 000233

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 20, 2000. The issues at the CCH were whether the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBS) for the first and second quarters, August 8, 1999, through November 6, 1999, and November 7, 1999, through February 5, 2000, respectively. The hearing officer determined that the claimant is not entitled to SIBS for the first quarter because the claimant did not make a good faith effort to obtain employment commensurate with his ability to work and that the claimant is entitled to SIBS for the second quarter based on a good faith effort to obtain employment commensurate with his ability to work. The appellant/cross-respondent (carrier) appeals, contending that the claimant is not entitled to SIBS for the second quarter and responds, requesting that the Appeals Panel affirm the hearing officer's decision concerning the first quarter. The claimant also appeals, contending that he is entitled to SIBS for the first quarter and requesting that the Appeals Panel affirm the determination on the second quarter.

DECISION

Affirmed.

The hearing officer has fairly and accurately summarized the facts brought out in the evidence and we will briefly repeat some of that summary here. The periods under review for the first and second quarters of SIBS ran from April 24, 1999, through November 6, 1999.

The claimant was employed by (employer) and installing a ceiling on _____, when an iron beam fell on his right leg. He sustained injuries resulting in at least four surgeries, with the possibility of more in the future. There are not many past medical records in evidence and, although there were pictures produced at the CCH of his leg following surgery, the attorney for the claimant expressed that he did not intend to put them into evidence but merely wanted to show them to the hearing officer.

Medical reports from 1999 from Dr. P, the claimant's treating doctor, describe the claimant's injury as involving a non-union of a tibial fracture, a healed fibular fracture, other fractures in the foot with hind-foot and mid-foot arthritis, and clawing of the toes post fusion. As the hearing officer stated in the summary of the evidence, the reports of Dr. P that were issued earlier during the time period under consideration stated that the claimant could work a job that involved sitting. (Contrary to what is argued in the appeal, these statements do not appear to have been responsively made to questions posed by the carrier.) However, in October 1999, Dr. P wrote that the claimant was not and had not been able to work since his injury, not even in a seated position.

The claimant stated that he had no permanent place of residence or telephone, and he did not drive. He was unable to stand for very long and walked with a cane. He spoke no English and had a sixth grade education in Mexico. The claimant said he sought employment during both quarters because he needed the money that work would provide. The claimant had gone to the Texas Rehabilitation Commission (TRC) but, because he had another surgery pending, TRC said it would not offer services until after surgery.

Mr. C, a vocational case manager for the carrier, stated that he had called (or attempted to contact) every employer that was listed on the claimant's Statement of Employment Status (TWCC-52) forms for the first and second quarters. While there were a few that could not be contacted because the phone numbers or names of companies was not viable, he contacted most. He said he found no employer that could verify that there was any application on file from the claimant. Mr. C testified and produced correspondence to show that when he asked the claimant's attorney about meeting with the claimant to assist him in identifying jobs that he could do and that were available, the attorney said that the carrier would have to pay the attorney for his time. Further assistance was not forthcoming as the carrier's position was that this amount could not be paid.

As stated by the hearing officer, the TWCC-52 for the first quarter shows that no contacts were made until after nearly a month of the first quarter qualifying period had gone by. The claimant recorded contacts for every week of the second period. The claimant said that he was willing to try whatever he would be offered. He had not considered that a position as a cashier might require staying on his feet all day. He said that the fact that most of his contacts were made with downtown employers was a function of the fact that he lived "here and there."

The hearing officer has, we believe, correctly applied the new Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) to the facts of this case. Rule 130.102(d) (the version in effect during the periods under consideration here) defines "good faith" as follows:

> 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 [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

(1) 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.

When a job search is undertaken, Rule 130.102(e) requires:

[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.

The rule goes on to provide that the Texas Workers' Compensation Commission may consider not only the number of searches made by the employee, but other factors such as potential barriers to successful employment, education, work experience, and types of jobs sought.

Plainly, the claimant had not searched for employment for a month of the first quarter filing period and, therefore, had not made a search during every week. Dr. P's early reports indicate that the claimant can work seated and, therefore, the hearing officer could determine that he did not have the complete inability to work as defined in Rule 130.102(d)(3). For the second quarter, the hearing officer was not required to believe that the fact that Mr. C could not verify applications meant that no contact with the listed employer had been made. Although the claimant did not have a clear plan of search other than the generalized desire to work at any offered job, the hearing officer could give more weight to some of the other factors evidently considered by her.

The hearing officer stated generally in her decision that, for the first quarter, the attorney had hindered the efforts of the vocational consultant in attempting to assist the claimant. The claimant has stated that the hearing officer erred in this assumption and should have proactively contacted the treating doctor to develop the facts of the case. As it is apparent that the claimant in this case is restricted in his ability to search and would greatly benefit from assistance, which was not forthcoming after the demand for payment was made, we cannot disagree with the conclusions of the hearing officer. Nor can we agree that the hearing officer is obligated, especially when parties are represented by counsel, to engage in investigation of the facts outside the CCH.

The decision and order of the hearing officer are affirmed on all appealed matters.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge