

APPEAL NO. 000281

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 December 16, 1999. The hearing officer determined that the claimant was entitled to SIBS for the 12th compensable quarter. The appellant (carrier) appealed, contending that this determination is contrary to the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Reversed and remanded.

The claimant sustained a compensable back injury on _____. He reached maximum medical improvement on September 12, 1995, and was assigned a 23% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The 12th quarter was from October 6, 1999, to January 4, 2000, and the qualifying period was from June 24 to September 22, 1999.

In January 1998 the claimant received his certification as a commercial truck driver after having completed a training program in cooperation with the Texas Rehabilitation Commission. He submitted an application for SIBS (TWCC-52) for the 12th quarter on which he listed some 31 job contacts. Not all the dates of the contacts listed fell within the qualifying period. The claimant explained this by saying they all occurred in the qualifying period, but he had lost some or all of his original notes and made up some or all of the dates. There was also extensive evidence of job leads provided by the carrier through an employment service. These efforts resulted in eight job interviews being scheduled for the claimant. The claimant did not attend these because, he said, he called in advance and was told the company was not hiring. According to the testimony of the employment specialist, his company would call the employer where the interview was scheduled within 24 hours to see how it went. These calls confirmed the no-shows, but the employers reported the jobs were open. The claimant also testified he worked three days for a trucking company in September 1999 but was let go when the company declined to continue the employment based on the claimant's medical condition. The hearing officer considered this evidence and determined that the claimant established the required good faith effort to obtain employment commensurate with his ability to work and was entitled to 12th quarter SIBS.¹

¹The direct result finding has not been appealed.

Rule 130.102(d)(4), in effect at all times relevant to this decision, provides in pertinent part that an injured employee has made the required good faith job search effort if the employee has provided "sufficient documentation" to show a good faith effort to obtain employment commensurate with the ability to work. Rule 130102(e) further provides that an employee who 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." In Texas Workers' Compensation Commission Appeal No. 992762, decided January 28, 2000, we commented that it did not appear at least from the TWCC-62 that a weekly job search was documented. Because the hearing officer did not make any findings regarding a weekly job search and its documentation, we reversed the finding of a good faith job search and remanded for ". . . express findings on the elements of Rule 130.102(d) and (e) . . ." See *also* Texas Workers' Compensation Commission Appeal No. 992247, decided November 23, 1999, and cases cited therein, where we noted that a hearing officer "could not consider non-documented employment contacts in arriving at the good faith determination."

For this reason, we reverse the good faith determination in this case and remand for further express findings of whether the claimant established a documented weekly job search during the qualifying period. In this regard, we note first that documentation is not limited simply to the information contained on a TWCC-52, but can include any documentation properly in evidence and second that a documentation of a job contact outside the qualifying period is not documentation of a contact in the qualifying period.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge