

APPEAL NO. 000326

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 5, 2000, and January 20, 2000, with the record closing on that date. The issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 13th compensable quarter, September 28, 1999, to December 27, 1999. The hearing officer determined that the claimant is entitled to SIBS for the 13th compensable quarter. The appellant (carrier) appeals, requesting that we reverse the hearing officer's decision and render a decision in its favor. The carrier argues both that none of the jobs sought by the claimant were those he was capable of performing and that since he made only three contacts, he did not seek work in every week of the qualifying period. The appeals file contains no response from the claimant.

DECISION

Reversed and rendered.

It was agreed that the period under review, the "filing" period, ran from June 16 through September 14, 1999. As such, the period was subject to review under the new SIBS rules. The claimant sustained a back and neck injury on \_\_\_\_\_, and was also treated for depression relating to this injury. He had back surgery, a 360E fusion, on October 12, 1994. His treating doctor was Dr. B. Dr. B determined, for the period of time under review, that the claimant had at least a sedentary ability to work and opined that he could work security guard jobs. Dr. B noted in an April 1999 functional capacity evaluation that the claimant could work four hours a day. All of Dr. B's reports note that although the claimant contended he did not exercise, he was very fit and muscular. Muscles in the lumbar region were noted to be tight upon examination and the claimant had no trouble doing deep knee bends.

The claimant said that Dr. B really did not believe that he would be able to retain a job. He said that he was emotionally unstable at times and this affected his ability to work.

The claimant's Application for Supplemental Income Benefits (TWCC-52) showed that for the period of time under review, he made three telephone contacts with security firms on two days. Three other telephone contacts made on one day were outside the qualifying period.

The claimant showed earnings of \$40.00 or \$50.00 per week from June 28 through July 30, 1999, and \$35.00 per week from August 27 through September 17, 1999. These were for babysitting and the mothers of the children involved have filed statements verifying the claimant's services in this regard. The claimant asserted that he had to give up the first babysitting, job because one of the children attempted to abuse his own child. He said he was psychologically set back from this for about two weeks. He had not been babysitting

prior to June 28th. He said that his mother-in-law was also there and she did the cooking and he generally kept an eye on the children.

The claimant had applied at the **Texas Rehabilitation Commission** (TRC) and been approved to study photography, but had not yet undertaken the course of study. It appears that these classes were to begin at the end of September; however, the claimant was not enrolled at the time of the CCH. He said that he was currently doing small repair jobs (since November) on his landlord's other properties as a form of defraying his rent and was thus not able to start school. He said that he had not gone previously to the TRC due to being incarcerated for 16 months.

SIBS were intended by the legislature to support a return to employment and because income benefits are exhausted utterly at 401 weeks after the date of the injury, there is a requirement to search for employment in order to be entitled to SIBS. In promulgating the new rules, the Texas Workers' Compensation Commission has demonstrated that it intends such search efforts to be more than occasional or haphazard. We agree that there was insufficient evidence in this record to support the hearing officer's finding that the claimant made a good faith search for employment during the qualifying period.

Tex. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) and (e) (Rule 130.102(d) and (e)), effective January 31, 1999, set out the criteria to assess good faith as follows:

- (4) 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
  - (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.

- (e) 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....

Subsection (e) goes on to list criteria that should be reviewed for a search.

In this case, the hearing officer found against the claimant on the "good faith" equivalencies listed in Rule 130.102(d)(1), (2), and (3); he did not agree that the minimal babysitting tasks amounted to work relatively equal to the claimant's ability to work. Thus, claimant was required to search for employment and document the search even during the weeks that he had some income. Even under a standpoint of substantial compliance, three job contacts made by the claimant in a two-week period of the qualifying period simply do not satisfy the requirement set out in Rule 130.102(e) that a search be made, and documented, during every week of the qualifying period. We, accordingly, reverse the findings and conclusions that the claimant made a good faith search for employment commensurate with his ability to work and that he was thus entitled to SIBS, and render a decision that the claimant did not make a good faith search for employment and, consequently, was not entitled to SIBS for his 13th quarter.

Susan M. Kelley  
Appeals Judge

CONCUR:

Alan C. Ernst  
Appeals Judge

Elaine M. Chaney  
Appeals Judge