APPEAL NO. 000347

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 hearing officer determined that the appellant (claimant) was unemployed as a direct result of the claimant's impairment during the fourth and fifth quarter qualifying periods for supplemental income benefits (SIBS); that the claimant did not attempt in good faith to obtain employment commensurate with the claimant's ability to work during the fourth and fifth SIBS qualifying periods, but did for the sixth quarter qualifying period. However, the hearing officer found that the claimant was not entitled to SIBS for the sixth quarter as well as the fourth and fifth quarters. He stated that claimant was underemployed due to his choice to live in Mexico.

The claimant has appealed. He argues that he did not have the ability to work during the fourth quarter filing period and the fifth quarter qualifying period. He further argues that he was underemployed (as measured by what he was paid compared to what he earned at the time of his injury) during the sixth quarter filing period and has proven that this directly resulted from his impairment. He pointed to evidence that he could not return to his occupation at the time of injury, but has instead found work to accommodate his restrictions. The carrier responds by questioning whether claimant's efforts during the sixth quarter amounted to a good faith search for employment; however, this is not timely filed as an appeal. The carrier argues that workers will seek to minimize their income by moving to and working in Mexico in order to draw SIBS. There is no citation to statutory or case law authority to support the argument that different treatment must be given to wages earned in Mexico for purposes of income benefits.

DECISION

Affirmed in part, reversed and remanded in part.

It was stipulated during the CCH, although it is not in the decision, that the claimant's filing period for the fourth quarter ran from February 2 through May 3, 1999 (and was under the "old" rules), and the fifth and sixth quarter qualifying periods, under the new SIBS rules, ran from April 21 through July 20, 1999, and from July 21 through October 19, 1999. The claimant sustained an injury to his neck, head, and hand on _____, while employed as a painter by (employer). He fell from the top of a train car he was painting. The claimant had cervical surgery in April 1997. He said he was not released to work with restrictions until September 1998. However, he said he returned to work on July 26, 1998, with the help of the Texas Rehabilitation Commission (TRC).

The claimant had been examined on September 29, 1997, by Dr. S, a doctor for the carrier, who assigned a 15% impairment rating (IR). Dr. S said that claimant could not return to work as a painter because he had significant range of motion limitations in his neck and could not look up high or down. Dr. S said that claimant should do sedentary work.

The claimant went to work in a warehouse for six months, until December 1998; he said that he stopped working for this company because his pain was getting worse. That job was assembly line work, and he had to work fast to keep up with quotas.

The claimant said that the TRC found him another job and he worked beginning February 15, 1999, until March 3, 1999. He said that the $6.15 wages per hour that he was paid was less than he had been paid at the time of his injury but it was brought out on cross-examination that he had also worked overtime while employed for this company. The claimant said that his doctor, Dr. R, took him off work on March 3, 1999, for additional therapy. Another doctor who also treated the claimant during the pertinent times periods was Dr. R's associate, Dr. K.

The claimant did not look for work at any time during the fifth quarter qualifying period. The claimant explained that his doctor had kept him off work and put him again through a work hardening program that lasted 18 weeks, gradually increasing from two hours a day to eight hours a day. He described his physical problems as strong pain in his right arm and strong headaches, along with blurry vision and impaired memory.

For the sixth quarter qualifying period, the claimant said he looked for and found employment beginning September 6, 1999, returning to work in Mexico for his brother, who operated a ranch. The claimant was paid 350 pesos a week along with a room. The claimant said this was the equivalent of $35.00 US per week. He said that meals were not provided. He estimated that his room would amount to a value of 850 pesos a month (or 212.50 pesos a week) and that the value of his water and electricity would be another 450 pesos a month (112.50 pesos a week). He said that he sought for and obtained this job because it would accommodate his abilities, and that he did no heavy work.

Medical evidence in the record shows that on October 9, 1998, Dr. K described the claimant's injuries as a closed-head injury, a compression fracture at C-4, posttraumatic injuries to the cervical and thoracic spine, thoracic myofascitis, and injury to the right wrist. A March 3, 1999, report from Dr. K indicates that claimant is to undergo therapy but does not really address ability to work. There are only pre-printed off-work slips covering the time period from March 3 until July 19, 1999, when the office manager for Dr. K wrote that claimant could return to work in another six weeks. A release from Dr. K dated September 1, 1999, states that claimant could not return to work until he completed all therapy treatments, and that he was as of that date released back to work.

It was during closing argument that the carrier argued that as there were "two different systems" in the United States and Mexico, the claimant should not be paid SIBS in American dollars based upon a Mexican wage, even if converted, which was below the United States minimum wage. The two cases cited by the carrier had to do with working for less than minimum wage for family members; those cases, however, involved employment in the United States. The carrier argued that unless the hearing officer declined to compare "apples to oranges," then a lot of people would go to work in Mexico in order to draw SIBS. The carrier further argued that proving an exchange rate would not be enough and it was

incumbent upon the claimant to prove through expert testimony what his Mexican wages meant in standard of living for that country.

We affirm the determinations made for the fourth and fifth quarters; the hearing officer could determine that the medical evidence produced did not rise to the level of proving a complete inability to work, and the hearing officer was not required to consider that claimant was completely unable to work only because of his participation in therapy. Furthermore, new Rule 130.102(d)(3) which was in effect for the fifth quarter qualifying period requires a narrative report from the doctor describing how the injury caused the total inability to work; there is no document in evidence of this nature that compels us to find that the hearing officer erred. As claimant did not seek employment for the last part of the fourth quarter or the entire fifth quarter periods under review, the hearing officer's determination of no good faith search for employment may be affirmed.

The hearing officer found that claimant's job search for the sixth quarter was made in good faith, and this has not been timely appealed. However, he was persuaded by the carrier's final argument and found that claimant's underemployment did not prove he was underemployed, because his cost of living was less in Mexico than it would have been in the United States. The hearing officer stated that he would decline to compare wages paid for claimant's employment in Mexico, and would not find underemployment "just because" his Mexican wages would convert to lower US dollars. The hearing officer further stated that the value of his housing and utilities should be compared to the value of similar benefits in the United States and that the claimant was required to procure such evidence in order to meet his burden of proof.

For continuing entitlement to SIBS, Section 408.143 requires that the injured employee must prove that he or she has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment and in good faith sought employment commensurate with the employee's ability to work. Claimant sustained a severe injury with lasting effects, and was under restrictions during the qualifying period for the sixth quarter. We believe that Section 408.143 requires the trier of fact to look at what the employee is actually being paid, not what he might be paid were he working in another country and accordingly cannot agree that the claimant was required, as part of his burden of proof, to make the case for what a hypothetical employer in the United States might have paid him. If there are such policy considerations that have escaped review by the legislature in the years since the 1989 Act was first passed, it is not up to hearing officers and the Appeals Panel to engraft them without statutory authority. We therefore reverse and remand for the determination of whether what the claimant earned (including in kind payment) was less than 80% of his AWW.

The statute does not indicate that wages earned in Mexico should be accorded different treatment. Whatever superficial appeal an argument about national standards of living may carry, we are further concerned about how far this line of analysis could be carried within the borders of Texas or the United States, given regional differences in the same variables such as costs of living, the labor market, pay scales, and the types of available jobs between urban and rural locations and between Texas and other states. We

cannot agree that the legislative body of the border state of Texas was unaware, when the 1989 Act was passed, of the possibility that an injured worker could obtain work through a good faith search for employment in Mexico during the SIBS periods and will therefore decline to read into the statute that which the legislature failed to expressly provide.

While we would agree that a conversion of wages and benefits paid in Mexican pesos to US dollars is in order, this can be done either through believing the claimant's testimony, or taking official notice of the exchange rate for the period of time covered by claimant's work at the ranch. We therefore remand for reconsideration of the "direct result" determination for the sixth quarter, and for further findings as to the claimant's preinjury AWW, and whether the amount of wages and in-kind benefits he was actually paid for work on his brother's ranch were less than 80% of the AWW.

We affirm the determination as to the fourth and fifth quarters, and reverse and remand for a determination of underemployment for the sixth quarter.

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.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge