APPEAL NO. 000364

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 13, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the second quarter, October 5, 1999, through January 3, 2000, having made "a good faith job search, commensurate with her ability to work" and that claimant's underemployment was a direct result of her impairment. The hearing officer's findings on direct result have not been appealed and will not be addressed further.

Appellant (carrier) appeals, contending that the hearing officer's finding that claimant searched for work with 17 potential employers and "during the weeks that claimant did not work she was 'either working, getting medical treatment or visiting with her counselor at the Texas Rehabilitation Commission [TRC]'" is not supported by the evidence. Carrier contends that claimant's job search efforts were minimal, that her employment was temporary and part time, and such job contacts that claimant made were of very short duration. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Reversed and remanded.

Claimant had been employed as a "paramedic" and on _____, sustained a right shoulder injury moving a heavy patient. Claimant had arthroscopic surgery in September 1996, subsequently had "trigger point injections" and shoulder reconstruction surgery in May 1997. Claimant has since been receiving continued treatment and physical therapy and had additional shoulder surgery on November 30, 1999.

The parties stipulated that claimant sustained a compensable injury on _____; has a 15% or greater impairment rating (IR); that impairment income benefits (IIBS) have not been commuted; and that the qualifying period for the second quarter was from June 22 through September 20, 1999. Although claimant earned some wages during the qualifying period, the parties stipulated that claimant earned less than 80% of her preinjury average weekly wage (AWW). In a report, apparently dated April 27, 1999, Dr. C, one of claimant's treating doctors, released claimant to sedentary work with restrictions of lifting 10 pounds maximum occasionally and restrictions against stooping, squatting, etc. A functional capacity evaluation, dated May 28, 1999, performed by Dr. S indicates claimant has an ability to do light work, occasional lifting up to 20 pounds and frequent lifting up to 10 pounds.

Claimant's Statement of Employment Status (TWCC-52) lists some 17 job contacts beginning on May 18, 1999 (a month prior to the qualifying period), with 15 being during the qualifying period. Among those contacts are contacts with Ms. OS as a personal caregiver and Ms. JC as a respite caregiver. Also listed are contacts with (M Hospital) (for an "ER [emergency room] tech" position), (B Hospital), (Employer W) and an (Service). The job contacts were made sporadically with several contacts in one week and none in others. There do not appear to be any contacts listed between July 15 and August 15, 1999, and August 15 to September 9, 1999. Claimant testified, however, that she called the M Hospital and Employer W job lines at least weekly. Claimant testified that on July 12, 1999, she began temporary, part-time employment with Ms. OS "doing personal in-home care." Claimant said this consisted of assisting Ms. OS in dressing, bathing, personal hygiene and light cooking. Exactly how claimant was contacted or claimant's schedule in working for Ms. OS is not clear. In evidence is a statement from Ms. OS's daughter stating that claimant has been employed since July 12, 1999, on a part-time, temporary basis "until we are able to hire a qualified full time person." Claimant was not considered for the full-time position because of her "physical limitations." In evidence are some photocopies of checks for various periods of care for Ms. OS.

Claimant was also hired by Ms. JC to care for Ms. JC's "retarded daughter" as a respite caregiver. Her documentation indicates that claimant worked August 10 through August 12, 1999. (Carrier contends that claimant said she was paid $35.00 for one shift of 58 hours. We disagree with that characterization as claimant testified "I get paid on a state rate of $5.00 an hour or $35.00 a day." Tr. 19: 2-3) Claimant testified that her record keeping and bookkeeping skills were not good. Claimant testified that she discussed with her doctor the jobs she had with Ms. OS and Ms. JC and that the doctor indicated that the jobs were within claimant's physical limits "as long as I kept it at the level that I was at and was very careful, that he'd allow me to work." At the CCH, the parties and the hearing officer referred to a "calendar" and/or "notebook" or books which are not in evidence and not before us. Similarly, carrier cross-examined claimant using the transcript of a prior CCH (which apparently was appealed and resulted in Texas Workers' Compensation Commission Appeal No. 992346, decided December 1, 1999).

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's AWW as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case is subsection (4), whether the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. Claimant contends that she has made a good faith effort to obtain employment commensurate with her ability to work. The SIBS rules effective January 31, 1999, apply to the dispute before us. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) addresses the good faith effort requirement of the 1989 Act and Rule 130.102(d)(1) provides that an injured employee has made a good faith effort if the employee "has returned to work in a position which is

relatively equal to the injured employee's ability to work." The hearing officer made no finding that the two jobs claimant had during the qualifying period were "relatively equal to the injured employee's ability to work." Rule 130.102(e) states:

> [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. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(4) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding: . . .

Listed are some nine or ten factors to be considered.

> The hearing officer, in the Statement of the Evidence, commented:
>
> The TWCC-52 in evidence showed searches were not performed weekly, however Claimant was a credible witness and testified that during the weeks were [sic] there were no searches, she was either working, getting medical treatment or visiting with her counselor at the [TRC].
>
> As a result of Claimant's job searches, she found employment with two employers as a care giver. Claimant began working for Employer [Ms. OS] on July 12, 1999. Claimant works part time temporary since she is physically unable to perform all the necessary tasks of caring for [Ms. OS's] relative. This Employer currently does the work that Claimant cannot do so that Claimant's duties are within her work restrictions. The second Employer, [Ms. JC], hired Claimant on an as needed basis. During the relevant filing period, Claimant worked from August 10, 1999 through August 12, 1999.

In the findings of fact, the hearing officer determined:

> 3. During the 2nd quarter qualifying period, Claimant searched for about 17 jobs, but did not search during each week of the qualifying period.

The hearing officer, although finding that claimant did not search during each week of the qualifying period, did not indicate how this finding comports with the requirement of Rule 130.102(e) quoted above. We are unable to determine whether the hearing officer believed that claimant's employment with Ms. OS and Ms. JC was relatively "equal to the injured employee's ability to work" under Rule 130.102(d)(1) and/or whether contact with Ms. OS's family (when claimant was requested to work) constituted a documented job search for the purposes of Rule 130.102(e). The hearing officer should also make findings regarding which weeks after July 12th claimant worked for Ms. OS. We remand for the hearing

officer to make findings considering Rule 130.102 and reach conclusions supported by those findings.

In this opinion, we have previously addressed carrier's complaint that claimant's work for Ms. JC "was for wages far less than minimum" and believe the cited portion of the transcript must be read with claimant's prior testimony that she received $5.00 an hour or $35.00 a day as mandated by state rates. Whether claimant's contacts, however brief, with the M Hospital, Employer W and B Hospital job lines constituted a good faith job search is a factual determination within the province of the hearing officer to resolve. Regarding carrier's complaint that claimant did not receive medical treatment during the qualifying period, claimant testified that she saw Dr. R and Dr. C "in 1999" and had certain diagnostic procedures performed which ultimately resulted in additional shoulder reconstruction surgery on November 30, 1999. The hearing officer could infer that claimant was continuing to receive medical treatment during the qualifying period which resulted in the surgery slightly more than two months after the qualifying period. Further, claimant testified and explained the misunderstanding with the TRC and testified regarding her contacts with Ms. D, the TRC counselor.

The case is remanded for the hearing officer to make specific findings referencing Rule 130.102 and make conclusions of law supported by the facts. The hearing officer should also make findings regarding the questions raised in the concurring decision.

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.

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur in the decision to remand this case for the hearing officer to make specific findings tracking the language in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) and (e) (Rule 130.102(d) and (e)) in making her determination of whether the claimant made a good faith effort to look for work commensurate with her ability to work in the qualifying period for the second quarter of supplemental income benefits (SIBS). I write separately to emphasize that by its plain language, I believe that Rule 130.102(e) provides

that the every week job search is only applicable in the weeks where the injured employee "has not returned to work and is able to return to work in any capacity . . . ." That is, where, as here, the injured employee has returned to work in a week, I do not read subsection (e) to impose a requirement that the employee also look for work in that week. It has long been recognized that the purpose of SIBS is to supplement the income of an injured employee while that employee attempts to reenter the job force. As such, success in a job search and an actual return to work would seem to be a significant factor in the assessment of good faith and no basis would exist for not considering the fact that the claimant is working, albeit part time, in resolving the question of whether the claimant has satisfied the good faith requirement. It would certainly be an anomalous result if a claimant's part-time work in a week were used to defeat a finding of good faith because the claimant did not seek additional employment in that week. In my view, the plain language of subsection (e) of Rule 130.102 counsels against such an interpretation in that the every week job search requirement is imposed only where the injured employee has not returned to work and yet is able to work. Accordingly, if on remand, the hearing officer finds that the claimant either worked or looked for work in each week of the qualifying period, then she can further determine that the claimant has satisfied the good faith requirement in this case, even if there are weeks in the qualifying period where the claimant "did not look for work."

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge