APPEAL NO. 000365

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 26, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the second quarter, October 29, 1999, through January 27, 2000.

The appellant (carrier) has appealed, arguing as it did at the hearing that the claimant, having held two jobs before (a "dual professional"), was required to search for a second job, or a higher paying job, in order to qualify for SIBS. The carrier also argues that the claimant's underemployment was not the direct result of his impairment. The claimant responds that he has fulfilled the good faith job search requirement for SIBS by having full-time employment within his restrictions, which would no longer permit working two jobs.

DECISION

We affirm the hearing officer's decision.

The claimant was working as a market manager and meat cutter for (employer) on _____. He hurt his back when he tripped over a pallet and fell while loading some meat into the cooler. He said he usually worked in this capacity 50 to 60 hours a week and had 42 years of experience as a meat cutter. The claimant said that he also preached at (the church) on Wednesdays and Sundays. While he might occasionally visit someone in the hospital, he had no further duties for the church and was paid $25.00 a week. He obtained and held this job about three months prior to his injury. The claimant had pastoring experience that went back to 1970.

The claimant testified that he was unable to go back to cutting meat because of his limited ability to stand and inability to bend over or lift. He said that damage to his sciatic nerve caused his leg to give out.

The claimant said he had been offered full-time employment with the church and hired as the pastor at $200.00 a week. He started work for the church in September 1998 and was definitely working more than 40 hours a week. His duties included not only preaching, but visitation, counseling, bringing in new members, and community outreach. He said that the church had gone from 25 to over 100 members. He said that the job offered maximum flexibility in accommodating his limitations.

The claimant had undergone computer training through Texas Rehabilitation Commission (TRC) in February 1998 but was thereafter offered the pastoring job at the church. He said that his TRC counselor felt that the job for the church would be the best thing for him to do and its services to him were ended.

The claimant stated that he had been a full-time pastor from 1970 to 1985 in (state 1); when he left, his salary and benefits package was about $85,000.00 a year. He speculated that if he had stayed there, his compensation might currently be $100,000.00 a year.

Due to changed circumstances and the end of his marriage, the claimant then moved to (state 2) and his pastoring then paid about $300.00 per week and he began doing meat cutting again to help pay his bills. He said he served as a full-time pastor in (state 3) from 1987 to 1990 and did not do meat cutting, and his salary grew to $500.00 a week. By the time of this job, however, he was a full-time meat cutter doing pastoring on the side.

The qualifying period for SIBS was from July 17 through October 15, 1999. The claimant agreed he had not sought employment because he already had a full-time job. He had, however, talked with one company that sold Christian educational materials and determined he would not be able to do this because it involved long periods of sitting. A functional capacity evaluation from August 1999 recommended that the claimant seek light-duty work even though there were some functions he could perform at the medium level.

He said that the employer had fired him and he had not gone back to seek a possible light-duty position with them. He said that he had not sought a position with another church because the determination was, in some respect, the decision of God to "open the door." The claimant agreed he had a mild heart attack in 1996 but that his restrictions on activity did not result from this.

The carrier cites no authority for its argument that one who holds two jobs at the time of his injury is required to seek a second job after his injury in order to meet a requirement of "good faith" for SIBS. The SIBS rules in effect during the qualifying period under consideration cite the indicia of a good faith effort. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 130.102(d) (Rule 130.102(d)) states:

> 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.

Rule 130.102(e) provides that, if subsections (d)(1), (2), and (3) do not apply, a weekly job search shall be made:

(5) 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.

In this case, the hearing officer believed that the pastoring job that the claimant held during the qualifying period was one which was relatively equal to his ability to work. In short, he could be found to have made a good faith effort by virtue of Rule 130.102(d)(1).

The carrier's argument that the claimant's underemployment does not result from his impairment is belied by the uncontroverted evidence of a serious injury with lasting effects and an inability to return to the position in which he sustained injury.

The hearing officer's decision is not against the great weight and preponderance of the evidence and correctly applies the SIBS rules. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge