APPEAL NO. 000420

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 February 1, 2000. The hearing officer determined that the appellant (claimant) "did not seek employment every week of the thirteen weeks of the qualifying period" and, therefore, is not entitled to supplemental income benefits for the second quarter. The hearing officer's determination that claimant's unemployment was a direct result of his impairment has not been appealed and will not be addressed further.

Claimant, in his appeal, seeks to explain why he did not seek employment during the last two weeks of the qualifying period, suggests that he believed that he "had no ability to work" during the start of the qualifying period and emphasizes his testimony on the quality of his job search. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The appeals file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

Claimant had been employed as a "make ready" man at an automobile dealership (employer) when he sustained a right knee injury on _____, in a motor vehicle accident. The parties stipulated that claimant sustained a compensable injury on that date, that claimant reached maximum medical improvement with a 15% or greater impairment rating and that the qualifying period for the second quarter began on August 5 and ended on November 3, 1999.

The medical records, and the hearing officer's Statement of the Evidence, reflects that claimant has had some orthopedic back problems, with spinal surgery in 1986, which claimant concedes "have no bearing" in this case. The compensable injury did, however, eventually require a total right knee replacement on February 19, 1998. Claimant's treating doctor is Dr. H, who, on a Specific and Subsequent Medical Report (TWCC-64) regarding a June 3, 1999, visit, noted that claimant "still has a fair amount of stiffness in the knee," referenced claimant's back problems and that claimant "is fairly severely impaired from a combination of all these" and stated that claimant "will be off duty indefinitely." In a report dated September 24, 1999, Dr. H referenced the compensable knee injury, a history of "hepatitis C" and emphasized claimant's back problems. Dr. H concluded that claimant "has numerous orthopedic problems and it's going to be very difficult to find meaningful work, but he certainly has made a good effort in looking for jobs, etc." Dr. H suggested that claimant may eventually need a left knee replacement and hip replacement but the report is not clear whether those possible surgeries relate to the compensable injury or claimant's other problems.

Claimant was examined by Dr. S, carrier's independent medical examination doctor, who, in a report dated July 16, 1999, reviewed claimant's medical history and concluded that "[a]t this point, [claimant] may be returned to an occupation that can be performed with the patient in the sitting position. This more likely than not will require some vocational retraining." A functional capacity evaluation (FCE) was performed by Dr. T on September 30, 1999, and, in a report of that date, Dr. T commented:

> Theoretically [claimant] could return to the workforce in some sedentary or light duty capacity with an occasional lift up to 10 to 20 pounds.
>
> In order to return to the workforce, he would have to be able to drive to and from work. He states that because of his knee replacement he is unable to drive a car well. He states he cannot use his right leg on the pedals of a car.
>
> Assuming that some type of accommodation could be made in terms of his ability to travel to and from work, theoretically there is some type of work that he could do. His pain behavior is difficult to sort out. This will play a role in any attempt to return him to the workforce. [Claimant] states that he wishes to become retrained to try to return to the workforce.

Claimant testified that he has contacted the Texas Rehabilitation Commission (TRC) and a letter dated September 27, 1999, confirms claimant's testimony. Claimant testified that a TRC worker told him that he "needed a 100% return to work" from his doctor before they could assist him.

Claimant's Application for Supplemental Income Benefits (TWCC-52) listed 11 job contacts made during the filing period for clerk or cashier jobs which would meet his physical restrictions. The listed job contacts began on September 13 and continued through September 18, 1999, with one contact on October 18 and another on October 19, 1999. Also, apparently attached to the TWCC-52 is a page of handwritten notes which the hearing officer accepted as follow-up contacts with the listed employers during the period of October 15 to 21, 1999. On the job contact portion of the TWCC-52 claimant noted, after his September 16, 1999, contact, "[r]an out of money for gas and car insurance. Live 10 miles out of town." After his October 18, 1999, contact, claimant wrote "I have received some money. I will keep looking for work that I can do. I will try to have better results."

Carrier, in its closing argument, even conceded that claimant "has made good faith effort to obtain jobs within his limitations," but that the new rules require a search (and documentation) every week. Carrier concedes that the FCE by Dr. T was not done until September 30, 1999, well into the qualifying period. The hearing officer, in his Statement of the Evidence, commented:

> Under the old Rules it appeared that the Claimant made a genuine attempt to find employment during the qualifying period. Claimant may have reasonably believed that he was in a no work status up to September 13, 1999. At that

> time he began to look for employment. However, his own testimony and the documentary evidence reflected that he did not look for employment after October 21, 1999. Regrettably, under the new stringent requirements the Claimant did not meet the qualifying criteria since he did not look for employment every week of the qualifying period.

At issue in this case is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)), which implements Sections 408.142(a)(4) and 408.143(a)(3). The pertinent portion of Rule 130.102(e) provides that:

> [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 this case, the qualifying period began on August 3, 1999, and claimant's first job contact was not until September 13, 1999. The hearing officer seems to excuse this by saying that claimant reasonably believed that he was in a no-work status up until that date. We will note that claimant's reasonable belief is not an element in the requirement to look for employment every week and document those job search efforts. Furthermore, even if claimant had not been required to seek employment until September 13, 1999, there appears to be a one-month gap between September 18 and October 18, 1999, where claimant made no job contacts, presumably because he had no money for gas and insurance and there is no documentation on follow-up contacts during this period.

Claimant, in his appeal, attempts to explain the lack of job search after October 21 (the qualifying period ended November 3), 1999, on the basis that the filing deadline listed on the TWCC-52 that carrier sent the claimant showed dates of "10/14/99 to 10/27/99" and those dates led claimant to believe that he "must file my application no sooner than 10/14/99 and not later then [sic] 10/27/99." That may be so; however, that fact was not brought out to the hearing officer at the CCH and the Appeals Panel does not normally consider matters raised for the first time on appeal, particularly where that evidence was available at the CCH. Texas Workers' Compensation Commission Appeal No. 92536, decided August 13, 1993, and Texas Workers' Compensation Commission Appeal No. 992873, decided February 4, 2000. In any event, that does not explain the lack of documented job search for the period of September 18 through October 18, 1999.

We do not wish to appear totally unsympathetic to claimant's position, as both the hearing officer and carrier appeared to agree that claimant's efforts were made in good faith, for positions claimant was physically capable of performing. However, we cannot agree that claimant's lack of knowledge of a particular doctor's report or FCE excuses claimant from complying with the requirements of the 1989 Act as implemented by Rule 130.102 (for the August 3 to September 13, 1999, period). Nor is there any explanation, other than the lack of gas and insurance money, for the failure of claimant to seek and document job searches during the period between September 18 and October 18, 1999.

We might further comment that job searches, and documentation thereof, may be made in other ways than in person, which appeared to be claimant's preferred method of contact.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge