

APPEAL NO. 000505

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 February 2, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the seventh and eighth quarters. The appellant (self-insured) appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee meets the criteria during the "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBs quarter and consists of the 13 previous consecutive weeks. The seventh SIBs quarter was from August 3 to November 1, 1999, and the qualifying period for this quarter was from April 21 to July 19, 1999. The eighth SIBs quarter was from November 2, 1999, to February 1, 2000, and the qualifying period for this quarter was from July 20 to October 18, 1999. The claimant had the burden of proving he was entitled to SIBs for each quarter claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

Rule 130.102(e), in effect at all relevant times, provides that "an injured employee who . . . is able to return to work in any capacity shall look for employment . . . every week of the qualifying period and document his or her job search efforts." In Texas Workers' Compensation Commission Appeal No. 992321, decided November 22, 1999, we held that the documentation requirement of Rule 130.102(e) was mandatory and that a hearing officer could not consider nondocumented employment contacts in arriving at the good faith determination. See *also* Texas Workers' Compensation Commission Appeal No. 992247, decided November 23, 1999.

The hearing officer found that the claimant made a good faith effort to obtain employment commensurate with his ability to work in each qualifying period in issue. In support of this determination she commented that a "review of the documentation provided by the Claimant indicates that he made job contacts throughout the qualifying period." This statement cannot necessarily be construed as saying that the claimant documented a weekly

job search. The only job search documentation pertaining to seventh quarter SIBs was a Statement of Employment Status (TWCC-52) on which no job contacts were listed, but attached to which were a series of 15 separate printouts presumably produced by the Texas Workforce Commission (TWC) and given to the claimant as job leads. The documents contain the date on which they were created, and we accept them as documentation of a job search on the date of the printout. From our review of this evidence, we are compelled to conclude that there was no documentary evidence of a job search in at least six weeks of the seventh quarter qualifying period.¹ Under these circumstances, the claimant failed to document a weekly job search and thus did not establish a good faith job search commensurate with his ability to work during the seventh quarter qualifying period. For this reason, we reverse the determination that the claimant was entitled to seventh quarter SIBs and render a decision that he was not entitled to SIBs for this quarter.

Attached to the TWCC-52 for the eighth quarter were two TWC printouts with a date of August 5, 1999, plus a listing of some 22 job contacts throughout the eighth quarter filing period. A review of this evidence, if deemed credible, reflects a job search effort in every week of this filing period. The question for resolution then became whether these efforts were in good faith to obtain employment commensurate with the claimant's ability to work. This presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. From this evidence, the hearing officer could conclude that the jobs identified involved basic unskilled labor. The claimant testified that he believed each employer was hiring and that he would at least try to do the job. The hearing officer found that this evidence established the required good faith job search. The self-insured appeals this determination, arguing that "many" of these employers were not hiring, that the claimant knew he did not have the educational and work experience required for these jobs (for example, a grill position at a fast food restaurant), and in one case that the claimant listed the position applied for as a "waitress" when he should have known that as a male he could not be a waitress. Whether the jobs essentially were of a type that involved little experience or were beyond the claimant's skills was a matter for the hearing officer to resolve. Similarly, she could believe the claimant's assertion that these employers were actually hiring.² We will reverse a factual determination of a hearing officer only if that determination is

¹Documentary evidence of a search in the last week of the filing period was not contained in the attachment to the seventh quarter TWCC-52, but was attached to the TWCC-52 for the eighth quarter.

²She dismissed the job description for a "waitress" as essentially a typographical error with no evidentiary

so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination that the claimant made the required good faith effort to seek employment during the eighth quarter filing period.

The self-insured also appeals the finding that the claimant's unemployment during the eighth quarter filing period was a direct result of his impairment, arguing that there was no evidence that an employer failed to hire him because of his impairment and that it was the local economic conditions and the claimant's limited skills that prevented his employment. We have in the past noted that it is unreasonable to expect an employer to tell a potential employee that he or she was not hired because of some physical restriction. Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993. In addition, in this case, there was absolutely no evidence whatsoever of local economic conditions and their possible effect on the claimant's unemployment. These conditions are not a proper subject of official notice. In any case, a finding of direct result may be affirmed based on evidence of a serious injury with lasting effects and evidence that the claimant could not perform the type of work he was doing at the time of the compensable injury. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

For the foregoing reasons, we affirm the decision of the hearing officer that the claimant was entitled to eighth quarter SIBs . We reverse the determination that he was entitled to seventh quarter SIBs and render a decision that he was not.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

significance.

Dorian E. Ramirez
Appeals Judge