APPEAL NO. 000666

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 14, 2000. The issues at the CCH were whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the fourth, fifth, and sixth quarters, from March 30 through December 27, 1999; and whether the respondent (carrier) is relieved of liability for SIBs for the fourth quarter, March 30 through June 28, 1999, and not liable for the fifth quarter from June 29 through July 15, 1999, and not liable for the sixth quarter from September 28 through October 13, 1999. The hearing officer determined that the claimant was not entitled to SIBs for the fourth, fifth, and sixth quarters; and that carrier is relieved of liability. The claimant appeals, requesting that we reverse the hearing officer=s decision and render a decision in his favor. He also complains that the hearing officer erred in not admitting proof of when the fourth quarter Statement of Employment Status form (TWCC-52) was filed (proof of certified mailing). The carrier responds, urging affirmance.

DECISION

Affirmed.

The qualifying periods for the fourth quarter ran from December 29, 1998, through March 29, 1999, and falls under the "old" SIBs rules. The fifth quarter ran from March 17 through June15, 1999, and the sixth quarter from June 16 through September 14, 1999.

The claimant injured his neck and right arm on _____. He had two operations on his right wrist, performed by Dr. S. The claimant began his testimony by describing his job search for the fourth quarter. He identified attachments to the TWCC-52 for the fourth quarter. He stated that he could not recall some of the contacts, no application was given to him, or he was told no work was available. The claimant primarily looked for maintenance jobs. He went to such businesses on cold-call walk ins because he happened to be passing by or was referred by friends. He also said there were some places where work was available but the business did not want to give it to him or didn't want "trouble" because he was injured. The claimant had never looked in the Sunday newspaper. He said that the Texas Rehabilitation Commission declined to assist him because he had not been released to work.

The claimant began treating with Dr. S in March 1999 and had surgery on his right wrist on April 15th. He said he was in the hospital four or five days. Dr. S was the first doctor he had seen who recommended surgery. He said that he remained in pain and could not write with his right hand. The claimant said he had not looked for work since this operation.

At the beginning of the CCH, objection was made to most of claimant's documents because they had not been timely exchanged. The claimant also sought to admit certified mail searches purporting to show when TWCC-52 forms had been filed with the carrier by certified mail. The attorney for the claimant said that it was necessary for him to request such

information from the United States Postal Service (USPS) because his office had either not received or had misplaced green cards. This information was not requested from the USPS until after November 17, 1999. The hearing officer found no good cause and did not admit the document. All the document in question shows is some certified mail numbers, the originating post office and the purported date of delivery (March 17 or 19, 1999). How any of these numbers tie into the TWCC-52s in issue is not developed, and claimant was never asked when he completed any of these forms and had them mailed. The receipt that ties into one of the numbers shows an illegible name of destination and an address that does not tie into the carrier's addresses in evidence.

The claimant withdrew nearly all of his proferred exhibits. A letter from Dr. S dated December 27, 1999, was not admitted. However, a June 2, 1999, letter from Dr. S is in evidence. This letter asserted that claimant's casted wrist prevented him from returning to gainful employment. Dr. S further noted that claimant's back and neck were being treated by other doctors; however, he stated that claimant's medicine for these conditions caused drowsiness and that claimant also could not sit, stand, or walk without increasing back pain.

The claimant was examined by a doctor for the carrier, Dr. J, who was an orthopedic surgeon. While claimant argues in his appeal that this examination lasted three minutes or was otherwise not thorough, there was no testimony from the claimant to this effect at the CCH. Dr. J noted claimant had been scheduled for a functional capacity evaluation on February 5, 1999, but failed to show up for it. Dr. J said that while claimant could not return to his previous job doing maintenance work which required frequent and strenuous lifting and bending or gripping his right hand, he could work light duty or sedentary work. He suggested that neck surgery, as well as wrist surgery, be considered.

An investigator for the carrier filed an affidavit in which she outlined an attempt to verify the contacts listed on the claimant's fourth quarter TWCC-52. There were a number of contacts that could not be verified due to lack of telephone information from the claimant.

The last two quarters were covered by the "new" SIBs rules. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)) defines good faith as follows:

> (d) 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:
>
> * * * *
>
> (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[.]

Since for most of the fifth and all of the sixth quarters the claimant had refrained from working, he was required to show an inability to work. We cannot agree that the hearing officer abused her discretion in applying the new SIBs rules to the evidence provided by Dr. S and Dr. J, and arriving at the conclusion that the claimant had some ability to work.

For the fourth quarter, the hearing officer could consider whether the claimant's method of searching for work reflected a plan or intent to obtain employment. In reviewing the record, we cannot agree that her determination that claimant did not make a good faith job search is against the great weight and preponderance of the evidence.

Finally, there appears to be no appeal of the hearing officer's determination that late filing of the Applications for [SIBs] [TWCC-52] absolved the carrier of liability for the fifth and some of the sixth quarters. As to the fourth quarter, given the state of the evidence, we cannot agree that timely filing of this TWCC-52 was shown. In any case, given the affirmance of the hearing officer's determination that the claimant was not entitled to SIBs for the fourth quarter, on the merits of his application, the aspect of late filing of the TWCC-52 is not dispositive.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We, therefore, affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge