APPEAL NO. 000749

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 March 21, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fourth or fifth quarter because claimant failed to make a good faith effort to obtain employment commensurate with his ability to work and that claimant had not timely filed applications for SIBs for the fourth and fifth compensable quarters. The claimant appealed, contending that he had a total inability to work as indicated by his doctors. Claimant also appealed the hearing officer's decision on timely filing of his applications, but gives no reason how or why he believes the hearing officer's decision is incorrect. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (self-insured) responded to claimant's points and urges affirmance.

DECISION

Affirmed.

Claimant had been employed as a forklift operator in the self-insured's warehouse when, on _____, claimant was struck by a falling pallet. An early medical record (1995) indicates claimant was "unconscious for a few moments," but at the CCH claimant testified that he was unconscious for 20 or 30 minutes. The parties stipulated that claimant sustained a compensable injury. The extent of the injury, however, was not defined, other than head, neck and back. Claimant alleges a multitude of symptoms including headaches, blurred vision, seizures, hearing and sight loss, memory loss, "shaking spells," etc. The parties further stipulated that claimant has an 18% impairment rating (IR); that impairment income benefits (IIBs) have not been commuted; and that the filing period for the fourth quarter was from February 10 through May 11, 1999, with the qualifying period for the fifth quarter being from April 28 through July 27, 1999. The parties agreed that the fourth quarter came under the "old" SIBs rules, those in effect prior to January 31, 1999, and the fifth quarter came under the "new" SIBs rules, those after January 31, 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 average weekly wage 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 claimant made the requisite good faith effort to obtain employment commensurate with his ability to work. The hearing officer's finding on direct result has not been appealed and will not be addressed further.

Regarding the fourth quarter of SIBs under the old rules, in evidence is the hearing officer's decision and order for the third quarter, where claimant did make, or at least listed, a

number of job contacts. Claimant testified that he did that because his attorney told him he had to do so. Claimant is no longer represented by an attorney and, for the fourth and fifth quarters, proceeds on a total-inability-to-work theory. The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

Claimant testified that he is unable to do any work; that he does no household chores except occasionally make the bed; and that he has migraine headaches, ringing in the ears, blurred vision, a bulging disc and seizures. Dr. O, in a neuropsychological evaluation dated July 30, 1999, recites a history of a pallet falling 10 feet, hitting claimant in the head, and that claimant was unconscious for 20 to 30 minutes. Dr. O, after conducting various psychological tests, concluded that while there is no "organic impairment," he does not feel claimant "is capable of working" and that claimant needs a psychiatric referral. Dr. M, in a report dated October 13, 1999, noted an "EEG of the brain was normal" and an MRI "shows a 2-3 mm disc [bulge] at two levels in the neck and a normal lumbar spine." Dr. M also recommended a neuropsychiatrist. Dr. J, apparently a clinical psychologist, although not clear, in a report dated November 10, 1999, stated:

> Since January 27, 1999, [claimant's] condition has been such that he is still unable to work. He suffers form the physical complaints of severe headaches, sleep disturbance, pain in his back and neck, seizure-like symptoms, blurred vision, tinnitis, memory and impairment. In addition, [claimant] suffers from Major Depression (DSM IV, 296.23) and Post Traumatic Stress Disorder (DSM IV, 308.81).

* * * *

> He is unable to work in any capacity until some of his physical and psychological issues are medicated.

Dr. B, claimant's treating doctor, in a letter dated December 7, 1999, to the Texas Workers' Compensation Commission (Commission) states:

> [Claimant] does not have the ability to obtain or retain employment at pre-injury wage levels because of his injury. As you know, he has chronic headaches and a concussion as a result of a blow to the head. His diagnoses are postconcussion syndrome with severe depression, chronic cervical strain, and chronic lumbar strain.

Evidence to the contrary includes a 1996 functional capacity evaluation showing a 35- to 50-pound lifting ability, and a 1997 report from Dr. R, who commented that claimant "did better and does quite better than the formal testing has revealed." Also in evidence is a surveillance videotape taken on April 18 through 21, 1999, showing claimant briskly walking to an automobile auction; working on or inspecting cars; carrying a hydraulic jack and a jack stand; and apparently standing and walking about for several hours at the automobile auction, all without any obvious signs of discomfort.

Regarding the fifth quarter, under the new rules, the standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d) (Rule 130.102(d)). Rule 130.102(d)(3) provides that the statutory good faith requirement may be met 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[.]

For both the fourth and fifth quarters the hearing officer found that claimant "had some ability to work." The hearing officer is the sole judge of the weight and credibility to be given to the evidence (Section 410.165(a)) and as such she could give greater weight to the videotape and her own observations than to claimant's testimony about his condition and Dr. B's opinion that claimant is unable "to obtain or retain employment at pre-injury wage levels," which is not the SIBs standard. For the fourth quarter, claimant's ability to work was a question of fact for the hearing officer to resolve. For the fifth quarter, the hearing officer found that claimant failed to establish an inability to work in any capacity and, therefore, specifically failed to meet the requirements of Rule 130.102(d)(3). Those findings are supported by the evidence.

In his appeal, claimant stated he disagreed with Findings of Fact Nos. 8 and 9, and Conclusions of Law Nos. 3 and 4, without specifying the nature of his disagreement. Basically,

claimant had been represented for the first three quarters of SIBs and apparently had relied on his attorney to file the appropriate forms. Claimant testified that after the attorney/client relationship ended he was unaware that he was required to file any forms until he spoke with individuals with the Commission. The hearing officer explained her findings in the Statement of the Evidence thusly:

> Both parties agreed that Claimant filed his 4th quarter [SIBs] statement on November 9, 1999, and that he filed the 5th quarter application on August 19, 1999. As recognized in [Texas Workers' Compensation Commission] Appeal No. 990411, decided April 15, 1999, there was no good cause exception in effect under the old [SIBs] rules, so Commission Rule 130.104(g) applies with respect to the 4th compensable quarter. With respect to the 5th subsequent quarter, new [SIBs] rules apply, and Rule 130.105(a) must be reviewed. In the instant case, none of the exceptions listed apply, therefore, if otherwise eligible, Claimant would not be entitled to 5th quarter [SIBs] for the time period from August 11, 1999 until August 19, 1999.

We find no error in the hearing officer's determinations on lack of timely filing and would further note that it is well-established that "ignorance of the law does not excuse noncompliance with it." Texas Workers' Compensation Commission Appeal No. 992219, decided November 19, 1999 (Unpublished).

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:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge