APPEAL NO. 000914

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 992762, decided January 28, 2000, we reversed the award of third quarter supplemental income benefits (SIBs) and remanded the case to the hearing officer. After a hearing on remand, the hearing officer again determined that the respondent (claimant) was entitled to SIBs for the third quarter. The appellant (carrier) again appeals, contending that the decision is contrary to law and the great weight and preponderance of the evidence. The appeals file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

The background facts and applicable law are contained in Appeal No. 992762 and need not be repeated here. The purpose of the remand was for the hearing officer to make express findings of fact that the claimant did or did not satisfy the requirements for SIBs entitlement contained in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) and (e) (Rule 130.102(d) and (e)). We specifically noted that the hearing officer had failed to make findings regarding the requirement for a weekly documented job search.[1] In response, the hearing officer made the following Finding of Fact No. 9 in his decision and order on remand:

> During the qualifying period, Claimant sought employment every week of the qualifying period but she only listed on the application those job contacts [that] resulted in an application or sufficient interest to leave her name and number.

The hearing officer concluded that the claimant was entitled to third quarter SIBs. In its appeal of this determination, the carrier contends, as it did at the remand hearing, that the claimant did not document a job search in three specific weeks of the qualifying period. The hearing officer also found that the claimant can work 40 hours of light duty per week (Finding of Fact No. 4) and that her cleaning work was not a position "which is relatively equal to her ability to work." Finding of Fact No. 6.

We note initially that the required documentation is not limited to the information on the Application for [SIBs] (TWCC-52) and its attachments. To the extent that Finding of Fact No. 9 seems to suggest the contrary, we disapprove it. We agree with the carrier that the TWCC-52 does not document job searches in three weeks of the qualifying period. We have also examined other documentation submitted by the claimant, including copies of

[1] 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 non-documented employment contacts in arriving at the good faith determination.

job applications and undated statements of homeowners for whom the claimant supplied cleaning services, and find that they do not document a job search in the three weeks not covered by the TWCC-52. The only remaining documentation consists of four pages of what appear to be wage statements. The "Period Ending" date on one of the documents is illegible. The period endings on the other three are June 27, 1999; July 4, 1999; and July 18, 1999. There was no evidence that otherwise established the time period covered by these statements. The periods not covered by the TWCC-52 were April 28 to May 4, 1999; June 23 to June 29, 1999; and July 21 to July 27, 1999. Arguably, it could have been established that the pay statement for the period ending July 4, 1999 (reflecting nine hours of work) could cover the June 21 to July 2, 1999, gap in documentation, but this is an inference we are unwilling to make.

Having reviewed the evidence in this case, we are compelled to conclude that the award of third quarter SIBs was contrary to both the great weight and preponderance of the evidence and to the applicable provisions of Rule 130.102(e) because the claimant failed to document a weekly job search throughout the qualifying period. For this reason, we reverse that determination and render a decision that the claimant was not entitled to third quarter SIBs.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

It is plain to me that the Texas Workers' Compensation Commission (Commission) has not intended, in passing Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)), to elevate form over substance; that is why the rule goes on to list various considerations that must be considered in assessing the sincerity of a job search. Documentation of a weekly search is but one factor and the Commission recognized that one size would not fit all workers. Plainly, the language speaking of a search in every week was intended to preclude consideration of the "last minute flurry" at the end of the quarter that had previously been found adequate. It was not intended to strip qualification for supplemental income benefits (SIBs) from the worker who makes a good faith search but happens to miss a week or two. In this case, there are two pay stubs reflecting work for

two of the weeks that the majority feels are not accounted for. (Unlike the majority, I can readily support an inference that the pay stub for July 4, 1999, extends into the week that ended July 2nd.) That leaves only the first week "undocumented." However, the hearing officer was evidently satisfied from testimony that a search had been made every week, as the rule requires, and that the overall search efforts were documented. This is a legitimate reading of the rule.

Under the strict and literal approach taken here, a worker could inadvertently miss documenting a specific job contact during the first week (perhaps to the frequent confusion we see in defining the periods due to ongoing impairment treating disputes) and then make three job contacts every remaining day of the quarter and yet still not be found eligible for SIBs because of the failure to document a search in "every" week. I cannot endorse an interpretation of Rule 130.102(e) which would necessarily lead to this absurd result. At some point, common sense and the doctrine of liberal construction as set forth in Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999), must guide our interpretation of the intent of rules. The hearing officer has done that here and should be affirmed.

Susan M. Kelley
Appeals Judge