APPEAL NO. 001385

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 May 18, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth quarter because the claimant had not attempted in good faith to obtain employment commensurate with her ability to work.

The claimant appeals, citing evidence of good faith and pre-1999 Appeals Panel decisions. The claimant emphasizes factors and evidence in support of her position and requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (self-insured) responds, also citing pre-1999 Appeals Panel language and decisions, urging affirmance.

DECISION

Affirmed.

The claimant had been employed as a secretary/librarian with the self-insured. On _____, while removing a book from a bookshelf, several books were dislodged, falling on her and knocking her from the step stool she was standing on, causing her to injure her neck and low back. The parties stipulated that the claimant sustained a compensable neck and low back injury on _____; that the claimant has a 20% impairment rating (IR); and that the qualifying period for the eighth quarter was from October 19, 1999, through January 17, 2000. The hearing officer, in an unappealed finding determined that the claimant was unable to go back to her preinjury job. The claimant had cervical spinal surgery (cervical diskectomy and fusion at C5-6 and C6-7) in September 1995. The claimant testified regarding her current condition, ability to drive, and current treatment. The claimant's treating doctor is Dr. M.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the impairment income benefits (IIBs) period expires if the employee has: (1) an IR of at least 15%; 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 the 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.

The claimant contends that she made a good faith effort to obtain employment commensurate with her ability. Attached to her Application for [SIBs] (TWCC-52) are 23 job contacts that she made between October 19, 1999, and January 18, 2000, for clerical, sales, bookkeeping, and billing positions. The hearing officer analyzed the claimant's applications and in his Statement of the Evidence, commented:

Most of the jobs for which she applied were clerical, commensurate with her job experience and physical ability. But a closer look revealed that she made only two employment contacts per week for the first eight weeks of the period, and then only one per week for the next four weeks, and a "flurry" of three in the final week. Although the number of contacts is not conclusive, the frequency or a lack of activity is to be considered. Moreover, on some applications she put part-time only, but checked full-time for others.

Of these 23 job contacts only eight were from want ads. From her testimony, the other 15 were a result of word-of-mouth, as opposed to any organized system, method, or plan for a job search in her local city of 90,000 people. Also notable is the unsolicited information that the Claimant voluntarily put on the job application forms, which was rather counterproductive due to the number of times she listed the inhibiting factors. Two particular items, among others, were noted by their repetition. On at least half of her applications, since all were not in evidence, she wrote that she was not available to start work until her doctor permitted her to return to work, and that she was not currently employed but was on "workman's compensation." Although the Claimant reiterated that she was just trying to be honest with the employers, that is difficult to accept in the full context of the evidence.

The claimant in her appeal and the carrier in its response, reference pre-January 1999 Appeals Panel decisions which have to some extent been overcome by the subsequent adoption of specific rules. The standard of what constitutes a good faith effort to obtain employment in SIBs cases was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) and (e) (Rule 130.102(d) and (e)). Specifically, Rule 130.102(e) provides that an injured worker who has not returned to work and who "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." The rule goes on to list some of the factors that may be considered which may include, but are not limited to, the following:

(1) number of jobs applied for throughout the qualifying period;

(2) type of jobs sought by the injured employee;

(3) applications or resumes which document the job search efforts;

(4) cooperation with the Texas Rehabilitation Commission [TRC];

(5) cooperation with a vocational rehabilitation program provided by a private provider that is

included in the Registry of Private Providers of Vocational Rehabilitation Services;

(6) education and work experience of the injured employee;

(7) amount of time spent in attempting to find employment;

(8) any job search plan by the injured employee;

(9) potential barriers to successful employment searches;

(10) registration with the Texas Workforce Commission [TWC]; or

(11) any other relevant factor.

While it appears that the claimant made a job contact every week of the qualifying period, it was within the province of the hearing officer to consider whether those contacts met the requirements of Rule 130.102(e). The hearing officer could certainly consider the fact that the claimant wrote on many of her applications that she was not available to start work until released by her doctor and the fact that Dr. M continued to declare her in an off-work status despite the functional capacity evaluations and testimony of the self-insured's vocational rehabilitation specialist regarding the claimant's cooperation or lack thereof. The hearing officer commented about the claimant's contact with the TRC and noted that the claimant "contacted the TRC about 4-6 weeks before [the CCH], which was right *after* the Benefit Review Conference where her non-contact was raised." (Emphasis in the original.) The hearing officer concluded:

> Putting all the evidence together led this Hearing Officer to conclude that the Claimant was going through the motions to make it appear that she was putting forth a good faith effort to find work.

We hold that the hearing officer's decision is supported by the evidence and that the claimant had not met the requirements of Rule 130.102(e).

Upon review of the record submitted, we find no reversible error. 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:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge