APPEAL NO. 001768

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 June 15, 2000. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter (July 14, 1999, through October 12, 1999), sixth quarter (October 13, 1999, through January 11, 2000), or seventh quarter (January 12, 2000, through April 12, 2000). The claimant appealed the adverse determinations on the grounds of sufficiency of the evidence. The respondent (carrier) responded that the evidence was sufficient to support the determinations and should be affirmed.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he sustained an injury to his back on _____, which required surgery in 1997. The claimant contended that the fusion was not stable, but has not undergone any additional procedures other than steroid injections and physical therapy. The claimant testified that his doctors had him off work during all three qualifying periods, but he continued to work as a night courtesy security patrol officer at the apartment complex where he lived. The claimant testified he had worked at this job for over four years and that it only required him to walk the grounds and to call the local police department if he observed any suspicious activity. He worked about three hours every other night making three rounds during the course of each night. The claimant was compensated by reducing the price of his rent by two weeks each month. The claimant testified his rent was somewhere between $300.00 and $400.00 per month. He explained that he went to the Texas Rehabilitation Commission (TRC) in 1998 or early 1999 and received training on how to be a security guard.

The claimant testified that during the fifth and sixth quarter qualifying periods (March through September 1999), he did not look for work because his doctor had not released him back to work. He stated he did not look for work before October 1999, and began looking for security positions during the seventh quarter qualifying period because he was afraid he was going to lose his job at the apartment complex. The claimant testified that he asked friends about work and made cold calls but did not put in applications anywhere because potential employers did not believe him capable of working as a security guard as he was using a cane to walk.

The testimony and argument from the claimant were confusing as to whether he was actually asserting that he had no ability to work or whether his part-time employment satisfied the good faith criteria for the fifth and sixth quarters. He clearly testified that he was working during all three quarters and he began looking for another job during the qualifying period for the seventh quarter when he thought he might lose his job. The

Decision and Order does not reference the SIBs rule then in effect, nor does the hearing officer discuss or make any findings as to what theory of recovery the claimant was pursuing.

The burden of proof was on the claimant to provide sufficient credible evidence to support entitlement to SIBs for the fifth, sixth, and seventh quarters. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. 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. 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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)), effective January 31, 1999, defines good faith as follows:

> 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:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
>
> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period;
>
> (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 caused a total inability to work, and no other records show that the injured employee was able to return to work; or
>
> (4) has provided sufficient documentation to show that he or she has made a good faith effort to obtain employment.

The claimant's own testimony that he worked and earned the equivalent of two weeks rent each month during each of the qualifying periods belies his claim that he had no ability to work. He testified that he did not look for any other jobs during the fifth and sixth quarter qualifying periods and began looking for work after October 1, 1999, for the seventh quarter. The Application for Supplement Income Benefits (TWCC-52) forms reflect wages in the amount of $343.20 each month.

Medical records offered by the claimant for the fifth quarter reflect that the claimant was receiving treatment for continuing complaints of back pain but they do not discuss or describe the claimant's ability to work in general other than a statement by the treating

physician that job retraining was still not a possibility. These records do not address the fact that the claimant was working as a security patrolman on a part-time basis and whether he was capable or not of working full-time.

Medical records for the sixth quarter reflect continuing treatment for back pain but do not contain an indication as to the claimant's ability to work until the claimant obtained a release dated September 28, 1999, wherein the form was checked "totally incapacitated" for the period "present to undetermined." The claimant was referred for a functional capacity evaluation by a report dated October 11, 1999.

It is worth noting that a good faith job search will not mean, in every case, a search for full-time employment. Rather, the search must be commensurate with the claimant's ability to work. Section 408.143(a)(3). Accordingly, "no" search can only meet the requirements of a good faith search if there is the complete inability to perform any type of work as provided in Rule 130.102(d). This rule precludes a simple weighing of conflicting medical evidence and all three portions must be applied. Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999. Conversely, under Rule 130.102(d) if there is some ability to work, the employee may establish good faith by proving that he has returned to a position that is relatively equal to his ability to work. The hearing officer apparently believed that the claimant failed to establish what, if any, ability he had to work.

The seventh quarter qualifying period began on October 13, 1999, and no other medical records were offered for this time period by the claimant. The carrier tendered a narrative report from Dr. K dated November 30, 1999, which discussed his examination of the claimant and his ultimate conclusion that the claimant had the ability to work full-time at an eight-hour sedentary job which allows him to change positions periodically. A functional capacity assessment conducted for the purposes of social security benefits reflected that the claimant had the ability to work light duty as of January 13, 2000. An additional examination was performed by another doctor on May 10, 2000, at the carrier's request who found that the claimant demonstrated a decreased ability to engage in activities that required prolonged standing, carrying objects, and lifting objects and that he had a decreased range of motion in the lumbar spine.

The TWCC-52 for the seventh quarter contains approximately 30 contacts at apartment complexes where the claimant testified he tried to find someone looking to hire a security patrolman. The claimant listed the dates of these contacts as either being done on January 4, 2000, or January 6, 2000, and he apparently did not try to find work doing anything other than security work. Rule 130.102(e) provides in relevant part that "an injured employee who has not returned to work and 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." In this case, as noted above, the claimant's TWCC-52 for the seventh quarter does not reflect that he looked for work each week of the qualifying period.

The hearing officer's determinations that the claimant did not make a good faith job search in the fifth, sixth and seventh quarter qualifying periods are not so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse these determinations, or the determination that the claimant is not entitled to SIBs for the fifth, sixth and seventh quarters, on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer found that the claimant's evidence was insufficient to show that the compensation (rental rate discount) which the claimant received as a part-time, courtesy patrol officer amounted to less than 80% of his preinjury average weekly wage. (AWW) There was no stipulation or evidence offered by either party to establish the claimant's AWW and it was the claimant's burden to prove that he was underemployed in order to be entitled to SIBs. On the other hand, the hearing officer made contradictory findings for all three quarters that the claimant's underemployment was not a direct result of his impairment. By finding that the claimant was underemployed she contradicted her earlier finding that the claimant failed to prove that he earned less than 80% of his AWW.

A remand for clarification would serve no useful purpose in light of our affirmance of the other findings in this case as they are dispositive of the issues. For this reason only, we affirm the hearing officer because the claimant failed to establish what his AWW was which is a prerequisite to the determination of whether or not he was underemployed.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Gary L. Kilgore
Appeals Judge