

## APPEAL NO. 002555

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 October 10, 2000. The issue at the CCH was whether the respondent (claimant) was entitled to supplemental income benefits (SIBs) for her fifth quarter of eligibility. The hearing officer found that the claimant was so entitled.

The carrier has appealed. It points out that although the hearing officer found as fact that the claimant did not document a job search for every week of the qualifying period, he nevertheless found, against the express terms of the applicable rule, that the claimant made a good faith search for employment. The claimant responds that whether a good faith search was made is a fact finding to be made by the hearing officer.

### DECISION

Reversed and a decision rendered that the claimant failed to make a good faith search for employment commensurate with her ability to work and is therefore not entitled to SIBs for the fifth quarter.

The claimant had injured her hands when a machine crushed them. She lost parts of two fingers on each hand. The qualifying period for the fifth quarter ran from December 21, 1999, through March 20, 1999. The claimant testified that she searched for employment during every week of the qualifying period, and kept track of contacts in a notebook. Most of her contacts were by newspaper or telephone. She said she perhaps visited only 10 prospective employers in person, and placed applications with very few. Claimant said that she did not really know what types of jobs to search for. The claimant spoke only a little English.

The claimant said much of her time was spent going to classes and conventions for (Company A). She said on cross examination that she became involved with this organization in March or April 2000 (six months prior to the CCH) . She had signed up two people into the organization, which she indicated was the way to begin making money. However, she also said that she was required to invest a certain amount of money to make money, and had not been able to make anything but a partial payment of what was needed. When the topic was explored further on redirect examination (until objection was made), claimant said she had been involved with Company A "a long time" but did not have the exact date with her as to when that was.

When it was noted that claimant's Statement of Employment Status (TWCC-52) listed two job placement agencies, the claimant said she was unable to recall whether she had been to these agencies in person, and invited the carrier's attorney to call himself to verify her contact. A substantial number of questions that claimant was asked in direct and cross-examination were answered with "I don't know" or "I don't recall".

At the beginning of the CCH, the hearing officer sustained an objection that was made to the claimant being able to supplement her TWCC-52 listed contacts with testimony. He did so because the claimant had also not answered (even though assisted by her attorney) an interrogatory that asked her to list all other contacts not listed on her TWCC-52. He said he would disregard any testimony to this effect although he would allow a record to be created.

A vocational counselor, Ms. P, testified for the carrier. Out of 24 prospective employers listed, Ms. P had been able to make contact only with 13. She said that none of these employers had either an application on file or recalled claimant making contact. She noted that some of the companies listed had also been listed on TWCC-52 forms made for prior quarters. These companies still had no record of contact by the claimant and in fact were not hiring nor did they offer cleaning jobs as the claimant indicated was the job being sought.

The hearing officer made a specific finding of fact detailing the dates that the claimant sought employment, as indicated by her TWCC-52, and, he found these contacts were not documented every week of the qualifying period. However, he also made a finding of fact that the claimant sought employment every week of the qualifying period.

The purpose of SIBs is to provide a benefit for the transition back to employment and, to this end, a good faith search for employment commensurate with the ability to work is required. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) 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 during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;
- (4) 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; or

- (5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

Rule 130.102(e) states:

(e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1),(2),(3), and (4) of this section, 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 search efforts.

The Appeals Panel has held that the requirement to document a job search in every week of the qualifying period is mandatory (although it need not be on the TWCC-52) and a finding of a good faith job search cannot be made on the basis of testimony about undocumented contacts. Texas Workers' Compensation Commission Appeal No. 992247, decided November 23, 1999; Texas Workers' Compensation Commission Appeal No. 992872, decided February 7, 2000; and Texas Workers' Compensation Commission Appeal No. 001112, decided June 30, 2000.

Plainly, the hearing officer erred by finding that the claimant made a good faith search for employment when he also found that she failed to document contacts every week of the qualifying period. We note that in addition to the gap in documentation he found from December 21, 1999, to January 2, 2000, there is another large gap running from February 5 to February 21, 2000.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We agree that this is the case; we reverse the findings and conclusions that

the claimant made a good faith search for employment during every week of the qualifying period, and we render a decision that claimant failed to make a good faith search for employment commensurate with her ability to work, and therefore is not entitled to SIBs for the fifth quarter.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Robert W. Potts  
Appeals Judge