APPEAL NO. 002577

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 September 25, 2000. The record was closed on October 4, 2000. The CCH concerned whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for his first and second quarters; the hearing officer held he was not. The claimant appealed and argued that there was no evidence presented that he had any ability to work and that the hearing officer erroneously ignored his current medical evidence in favor of old medical opinions outside the qualifying periods. There is no response from the respondent (carrier).

DECISION

Reversed and rendered on direct result; affirmed on the good faith job search requirement.

The claimant fell into a 38-foot hole and contended he sustained injuries that include a low back injury, a broken ankle, bladder impairment, and cognitive difficulties from a head injury. He argued at the CCH that sedentary work would require more cognitive skills than he had. His 39% impairment rating was assigned for bladder dysfunction, specific conditions of the lower spine, range of motion (ROM) deficits, sensory loss and pain, and cognitive dysfunction. The qualifying periods under consideration ran from October 22, 1999, through May 3, 2000. The treating doctor was Dr. V. The claimant said that he was in pain all day long. He did not seek work during either of the qualifying periods.

On April 20, 2000, Dr. V wrote that the claimant did not believe that the claimant could return to even a modified work. He stated:

> A more attainable goal would be the ability to carry out simple, infrequent tasks in a sedentary environment. At this time, I am restricting him from any and all standing, sitting, bending, crawling, climbing, pushing, pulling, lifting, riding, or walking. It is my opinion that there are no tasks which he can currently perform in a forty hour work week which his condition will tolerate.

Dr. V's reports up to this point show that he was treating the claimant for increasing right leg pain from S1 radiculopathy, for which he could find no clear etiology. Dr. V recommended a CT scan as he felt it possible that there was something not visible on an MRI that could be causing this. A myelogram was performed on May 24, 2000, which showed a burst fracture of the second lumbar vertebral body with cord compression consistent with moderate to severe spinal stenosis. The claimant had mild-to-moderate degenerative disease at L5-S1.

Dr. V reviewed the myelogram and reported that as the claimant's symptoms tended to S1 in nature, he would not recommend surgery. Dr. V stated that the S1 problems were due to two conditions related to the claimant's injury.

On June 20, 2000, the claimant's attorney sent four pages of questions to Dr. V to allow him to assess the claimant's condition and abilities to work. Although there were areas to check off, the questions and descriptions of function limitations with which the doctor was asked to agree or disagree are detailed. There were questions calling for narratives as well. While some minimal abilities were indicated as within the claimant's capabilities (the claimant could perform gross, if not fine manipulations, and could repeatedly lift five pounds), Dr. V stated that he did not believe that the claimant could perform these functions four hours a day (part-time work) five days per week. Dr. V noted that the claimant had leg weakness, occasional incontinence, and depression. He assessed the claimant as "incapable of performing even low stress jobs." He stated that the claimant was unable to focus on tasks due to cognitive dysfunction. Dr. V disagreed that the claimant could perform sedentary work on an eight-hour-a-day basis.

Because it is the only medical record specifically mentioned in the hearing officer's decision, we will note that well before the qualifying periods, on January 24, 1997, Dr. V had released the claimant to work four hours per day, with no lifting greater than 15 pounds on an occasional basis.

The claimant was examined by Dr. S, a doctor for the carrier, on November 17, 1999. Dr. S noted that the claimant's ROM measurements met consistency requirements. He said that the claimant had a marked limp, could not push off with his heel, and had trouble getting on his toes and heels. Dr. S concluded that the claimant had "total disability," as defined by his ability to return to construction work. He further noted that the claimant should be sent to the Texas Rehabilitation Commission (TRC) for testing and retraining and that the claimant would "only qualify for sedentary type of work in the future." Dr. S said that the claimant did not have to have a functional capacity evaluation because he was unlikely to be assessed at anymore than a sedentary level. Dr. S said that it was likely that the claimant would have to go on SIBs pending a TRC evaluation. At the time it was written, this letter was interpreted by the carrier as a pronouncement that the claimant could perform sedentary work, and a vocational counselor was retained to forward job announcements to the claimant. Jobs forwarded to the claimant included security guard, driving children to childcare facilities, dispatching, floral delivery, race track attendant, cashiering, assembly, and servicing portable toilets. While hourly wages are indicated, hours that the job would entail are rarely indicated.

We cannot ascertain either from the discussion or the decision why the hearing officer determined that the claimant's unemployment was not a direct result of his impairment. Because the seriousness of the claimant's injury and its lasting effects are nearly self-evident, with both the treating doctor and the carrier's doctor agreeing the claimant cannot return to his former line of work, and as there is no evidence of any subsequent or intervening injury, a finding that the claimant's unemployment is not a direct

result of his impairment is so against the great weight and preponderance of the evidence as to be manifestly unjust. We reverse, and render a decision that the claimant's unemployment is a direct result of his impairment.

The decision contains no specific findings on the elements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)), although an inability to work was asserted. The hearing officer generally states that "medical evidence indicates various abilities to perform work sedentary or greater." There are no records opining that the claimant can work at a "greater" than sedentary level. There are at least two narratives from Dr. V. which would qualify to show an inability to work under the rule. The 1997 part-time release from Dr. V is, in our opinion, too remote for use in consideration of whether the claimant had an ability to work during the period under review.

However, because the assessment from Dr. S is subject to interpretation as another record that "shows" some ability to work, we can affirm the decision of the hearing officer on the good faith job search criterion of SIBs. The order is therefore affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

CONCUR IN THE RESULT:

Thomas A. Knapp
Appeals Judge