APPEAL NO. 031190
FILED JUNE 25, 2003

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 March 28, 2003. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the first or second quarters.

The claimant appealed, contending that the hearing officer's decision does "not conform to the reality and the totality of the evidence" that there was medical evidence which showed that the claimant was unable to work in the first quarter and that the claimant had made a good faith effort to obtain employment commensurate with his ability during the second quarter. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated to the eligibility criteria of a compensable injury, impairment rating (IR), no commutation of impairment income benefits, and that the qualifying period for the first quarter was from May 1 through July 30, 2002, and the qualifying period for the second quarter was July 31 through October 29, 2002. (The hearing officer suggests that the stipulated dates are off by one day due to the year 2000 being a leap year.) The hearing officer's determination that the claimant's unemployment during the respective qualifying periods was a direct result of the impairment has not been appealed. At issue is the requirement of Section 408.142(a)(4) and Rule 130.102(b)(2) that the claimant has made a good faith effort to obtain employment commensurate with his ability to work. The claimant proceeds on a basis that he had a total inability to work in the first quarter qualifying period and that he had made a good faith job search in the second quarter qualifying period.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee 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. The hearing officer found that the claimant did not identify a narrative report which "demonstrated" (specifically explains) a total inability to work. The claimant's appeal references several Work Status Reports (TWCC-73) which take the claimant off work for various periods of time but a TWCC-73, by itself, generally does not meet the requirement of a narrative that specifically explains how the injury causes a total inability to work. Texas Workers' Compensation Commission Appeal No. 011246, decided July 17, 2001. The claimant also points to a medical report dated March 10, 2003, which

states that the claimant's need to constantly change positions makes it "unlikely this patient will be able to find gainful employment in any capacity." This report was well after the first quarter qualifying period and speaks in terms of "gainful employment" rather than explaining how the injury causes a total inability to work. Toward the end of the first quarter qualifying period a functional capacity evaluation was performed which noted that the claimant "is not planning to return to work," noted Waddell's signs and a "secondary agenda" and concluded the claimant was able to "perform sedentary activities." The claimant's treating doctor in a report dated August 7, 2002 (at the beginning of the second quarter qualifying period) agreed that the claimant "can return to work at [a sedentary] level but is not to engage in any lifting or repeated bending, stooping, or twisting." These reports support the hearing officer's determination that the claimant failed to meet the requirements to make a good faith effort to obtain employment under Rule 130.102(d)(4).

With regard to the good faith job search criterion, Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, 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. That subsection then lists information to be considered in determining whether a good faith effort has been made. Although the claimant documented some 26 job contacts with at least one each week in the second quarter qualifying period, it is apparent, based on the claimant's testimony, that the claimant's efforts were directed at qualifying for SIBs rather than making a good faith effort to obtain employment. The hearing officer also determined that the claimant had failed to cooperate with a vocational rehabilitation consultant. The claimant, in his appeal, cites a 1994 Appeals Panel decision for "the proposition that a Claimant is not required to use a Carrier's vocational rehabilitation consultant." However that case was prior to the amended SIBs rules effective November 28, 1999. *See* Rule 130.102(e)(5). Good faith effort is a factual determination for the hearing officer to resolve. There is sufficient evidence to support the challenged finding of the hearing officer.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Veronica Lopez-Ruberto
Appeals Judge