APPEAL NO. 950173

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 7, 1994, a contested case hearing (CCH) was held in(city), Texas, (hearing officer) presiding. The sole issue was: "Is CLAIMANT entitled to supplemental income benefits (SIBS) for the second compensable quarter, from September 20, 1994 to December 18, 1994?" The hearing officer determined that the claimant did not have the ability to work during the 13 weeks prior to September 20, 1994, and therefore "was not required to seek any type of work." The hearing officer determined that claimant was entitled to SIBS for the second compensable quarter of September 20 to December 18, 1994. Appellant, carrier, contends that the hearing officer erred in her determinations, that claimant was able to work during the period in question and that failure to obtain a "release" from the physician does not absolve a claimant from seeking employment commensurate with the ability to work. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant, did not file a response.

DECISION

Affirmed.

Pursuant to Section 408.142, an employee is entitled to (SIBS) if on the expiration of the impairment income benefits (IIBS) period the employer has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The parties stipulated that claimant had an IR of greater than 15% and had not commuted any portion of her IIBS.

Claimant had been employed as a sewing machine operator by (employer), employer, and on (date of injury), suffered injuries to both knees as a result of a slip and fall at work. Claimant's treating doctor, (Dr. H), apparently certified maximum medical improvement (MMI) and assessed an IR (Dr. H's report is not in evidence). (Dr. A) was appointed a designated doctor and assessed a 16% IR (Dr. A states that the Texas Workers' Compensation Commission (Commission) did not request an MMI certification). Claimant underwent an "ERGOS Evaluation" at a rehabilitation hospital in March 1993 at the request of Dr. H. The 24-page report appears to indicate that claimant would be able to return to light duty with certain restrictions. Apparently, in conjunction with the evaluation, claimant went through an eight-week work hardening program at the same

rehabilitation hospital from March through May 1993. During the work hardening program claimant had periodic "work hardening team conferences." The discharge summary dated June 14, 1993, stated:

> Based on her limitations, it is our recommendation that [claimant] be discharged at Light level with consideration to possible alternate placement. Job modifications have to be made to accommodate the restrictions mentioned above.
>
> * * * *
>
> She will be referred to Texas Rehabilitation Commission [TRC] for further assistance in the baking field if she is not able to return to her previous employer. [Claimant] has verbally reported she will contact her employer once a release is obtained. She has also agreed to maintain contact with our Vocational Department on a regular basis.

Claimant testified, through a translator, that she did contact the TRC, but that TRC would not "take her" because she is "100% disabled."

Although not entirely clear from claimant's testimony, and not documented, claimant apparently returned to Dr. H, who certified MMI and assessed an IR, and then apparently "switched" (according to carrier) from Dr. H to (Dr. B) (no dates are available when this switch occurred). In evidence are progress reports from Dr. B, dated June 7, June 22, June 29, July 7, July 14, July 21, July 28, August 5, August 11, and August 26, 1994. Claimant testified that she sees Dr. B about every week and receives treatments (apparently acupuncture, "bleeding" and "cupping"), which make her feel better for about a week, or until she sees the doctor again. Dr. B's reports generally indicate "mild pain," "prognosis is improved," "Pt.'s work-type activities and exercise activities have been excellent," "therapy and acupuncture . . . good," "Pt. continues to do well," "prognosis . . . is improved," etc. During the filing period time frame, in identical notes dated June 22, July 21, and August 17, 1994, Dr. B states:

> TO WHOM IT MAY CONCERN:
>
> This is to inform you that [claimant] is currently under my medical care for an injury sustained while at work. [Claimant] is unable to return to work for the following 4 weeks due to the medical condition.

In another note, also dated August 17, 1994, Dr. B states:

> TO WHOM IT MAY CONCERN

This is to inform you that [claimant] is currently under my medical care for an injury sustained while at work. [Claimant] is 100% disabled and unable to work due to her total disability.

Claimant testified that she has not sought employment during the filing period because she is unable to work, her doctor has not released her to work and that she is "100% disabled." Claimant states her family does all the housework and assists her in doing the shopping. Claimant states she does prescribed exercises of riding a (stationery) bicycle and walking on a treadmill but she is unable to stand or sit for long periods of time. Claimant further testified that she was unaware of the employer's light duty work programs. Claimant did complete a "job analysis" (carrier refers to it as a functional capacity evaluation) on September 9, 1994, which seems to indicate that claimant can do some lifting and other activities. With this evidence the hearing officer determined that claimant did not have the ability to work during the filing period and therefore "was not required to seek any type of work."

Before discussing carrier's appeal, we note some procedural points. First, the hearing officer recites no witnesses were called for the carrier when, in fact, the record shows (AA), employer's human resource manager, was called, sworn and testified. Secondly, Claimant's Exhibit No. 4 was offered and admitted without objection. That document is a letter dated September 13, 1994, from TRC to claimant and is written almost entirely in Spanish. No effort appears to have been made to translate it into English, which makes it difficult to review. Finally, the claimant's attorney is listed as (JH), appearing on behalf of another attorney, (Mr. B), but the entire hearing on behalf of the claimant was conducted by (Mr. K), who is listed as the "workers' compensation case coordinator" with Mr. B's law firm. In fact, at one point, Mr. K gave unsworn testimony to the effect that he was aware of the employer's light duty program and that it is an excellent program. None of the above points were appealed, nor would they have constituted reversible error had they been appealed, but the record should reflect what actually occurred and all documents not in English should have translations.

Carrier's principal point on appeal is that contrary to the hearing officer's determination, claimant was capable of performing "some work" during the filing period. Carrier (incorrectly) contends that "claimant submitted no medical records for the period in question to show her inability to work." We disagree and note Dr. B's reports of June 22, June 29, July 4, July 14, July 21, July 28, August 5, August 11, and August 26, 1994, and "disability" notes of June 22, July 21 and two notes of August 17, 1994. In contrast, it is carrier that has failed to provide any medical documentation, other than the September 9, 1994, "job analysis" to rebut Dr. B's opinion that claimant is "100% disabled." Claimant's testimony only reveals that while she does some prescribed exercising, including walking, she maintains she is unable to work and, in that regard, is supported by Dr. B's notes (although the reports would indicate claimant is progressing nicely.)

Carrier cites Texas Workers' Compensation Commission Appeal No. 941559, decided January 5, 1995, and Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, for the proposition that claimant must prove that she had "no ability" to work and such a finding must be based on medical evidence or "be so obvious as to be irrefutable." We do not retreat from that position but rather note that claimant's testimony is supported by Dr. B's notes, and while another fact finder might have discounted claimant's testimony and Dr. B's notes, that alone is not a sound basis for setting aside the hearing officer's decision. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As noted previously, carrier provides no documentation other than the job analysis to counter claimant's contentions.

Carrier cites Appeal No. 941559, *supra*, as holding that the absence of a "release" from the claimant's treating doctor does not necessarily absolve a claimant of the statutory requirement to search for employment commensurate with the ability to work. Again, we do not disagree with that proposition but only note that Appeal No. 941559 went on to state:

> An injured employee who did not return to his or her treating doctor might never have "a release" and yet have some ability to work. A doctor's failure to give "a release" could be based solely upon a reluctance to give a full release to the employment previously worked, or it may be the particular doctor's practice not to give a written release unless requested for some purpose.

In the instant case claimant was under active treatment by Dr. B, the treating doctor, on an almost weekly basis. Dr. B prepared medical reports and affirmatively stated claimant could not work during the period in question. This is in contrast with Appeal No. 941559 where claimant was not receiving active treatment and had simply just not been released by the doctor.

Carrier also cites Appeal No. 941439, *supra*, where the Appeals Panel instructed claimant to "seek out whatever retraining may be available to her, within restrictions placed on her by her doctors." We again agree, but note that the claimant's doctor in the instant case states that claimant is "100% disabled." How much credibility one gives to that opinion, in the light of claimant's testimony, is in the province of the hearing officer, who is the sole judge of the weight to give the evidence. Section 410.165(a). We would note that claimant's spokesman, Mr. K, agreed that the employer has an excellent light duty and retraining program. Now that claimant is aware of that program, and the testimony of the human resources manager that every effort would be made to accommodate claimant, claimant should explore employment with her employer to see what retraining and/or light work might be available within the restrictions placed on her by the doctors. Otherwise, the admonition discussed in Appeal No. 941439 may be applicable.

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

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge