

APPEAL NO. 931063

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq.*). On October 22, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be resolved is whether the claimant is entitled to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer determined that the appellant, claimant herein, is not entitled to SIBS for the first compensable quarter because claimant's unemployment or underemployment was not a direct result of his impairment and that claimant has not, in good faith, attempted to obtain employment commensurate with his ability to work.

Claimant disagrees with the hearing officer's decision and contends he has met all the requirements to obtain SIBS and requests we reverse the hearing officer's decision. Respondent, carrier herein, responds that the appeal was not timely filed and, in the alternative, that the employer's bona fide offer of employment precludes claimant from receiving SIBS and requests we affirm the hearing officer's decision.

DECISION

For reasons set forth below, we reverse and remand the decision of the hearing officer for further consideration not inconsistent with this opinion.

First we turn to carrier's contention that claimant's appeal is not timely filed, which is predicated on the assumption that the hearing officer's decision "was deemed to have been received on or before November 8, 1993." However, our review of the Texas Workers' Compensation Commission (Commission) records shows that the hearing officer's decision in this case was distributed on November 4, 1993, (notwithstanding that the transmittal letter is dated November 3, 1993) and therefore in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) the deemed date of receipt would be November 9, 1993. Fifteen days (the time for filing an appeal (Section 410.202(a)) from that date was November 24, 1993. Claimant's appeal was received by the Commission on November 24, 1993, and was therefore timely filed.

The facts are not in dispute, and as stated above, the only issue is whether claimant is entitled to SIBS for the first compensable quarter. We would also note that this case is a follow-on case to Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993, by this panel, where we affirmed the hearing officer's decision that claimant, at that time, was not entitled to SIBS. Subsequently, claimant has filed for SIBS for the first compensable quarter and was denied, which is the basis for this case. The parties entered into a number of stipulations, which provide a background, as follows:

STIPULATIONS

The Claimant and the Carrier stipulated on the record that:

- a.the Claimant reached maximum medical improvement on March 30, 1992, with an impairment rating of 25%;
- b.the Claimant was entitled to 75 weeks of impairment income benefits reduced by one-third for contribution;
- c.the period for which the Claimant should receive impairment income benefits was from March 30, 1992, through September 5, 1993;
- d.the filing period for the first compensable quarter for [SIBS] is June 8, 1993, through September 5, 1993, inclusive;
- e.the first compensable quarter for [SIBS] is September 6, 1993, through December 5, 1993, inclusive;
- f.the Claimant submitted his Statement of employment (sic) Status to the Commission on August 13, 1993, before the expiration of the filing period;
- g.the Statement of employment (sic) Status was approved by the Commission on August 20, 1993; and,
- h.the Carrier contested the Claimant's entitlement to [SIBS] on September 2, 1993, within 10 days of the expiration of the impairment income benefit period consistent with Rule 130.108.

By way of review, claimant was an airline flight attendant for 17 years and sustained a compensable back injury on (date of injury). Claimant was released for light duty in early 1992, and the light duty release was reiterated on March 3, 1992. Claimant applied for and was offered a light duty position in March 1992 but subsequently declined the offer. It was agreed that claimant reached maximum medical improvement (MMI) on March 30, 1992. Claimant contends that he was referred to the Texas Rehabilitation Commission (TRC) for vocational rehabilitation in February 1992, and that he fully "cooperated with the TRC because to refuse their services I would lose my entitlement for SIBS." Claimant cites former Article 8308-4.28(j) (now codified in the Texas Labor Code, § 408.150(b)). Claimant urges that he was referred to TRC one month before the employer made its bona fide offer of employment and that he "accepted the TRC offer first."

It is undisputed that claimant moved from (city), where claimant lived at the time of the injury and where the light duty work was located, to (city) in April 1992, to attend college in preparation to transfer to the University of Texas to obtain a degree in electrical engineering. Claimant has been a full-time student since the summer of 1992. Between summer 1992 and summer 1993, claimant held a number of part-time positions commensurate with being a full-time student. In early summer 1993 claimant obtained a

part-time position, at the college he was attending, as a laboratory assistant to help other students in the computer laboratory. Claimant testified that he works 19 hours a week in that position, that he has not made other efforts to find other employment because his schooling is a full-time job. Claimant's argument is that the Commission referred him to TRC for retraining and that he should not be punished for going to school full time and working part time.

The claimant's work restrictions are "no heavy lifting, bending or straining of greater than 25 lbs." Claimant testified that he last saw his treating doctor in (city) in February 1992, that he saw a doctor in (city) sometime in 1993 and that he still has some pain in his back, but his work limitations have not changed.

Carrier's principal position is that the employer made a bona fide offer of employment in March 1992 and that claimant's failure to take the offered position precludes him from receiving SIBS. The hearing officer notes "[t]his argument extended indefinitely, would forever deny claimant [SIBS]." In our previous decision we stated that "what the employee was offered in the way of light duty in March of 1992 may affect the payment of TIBS [temporary income benefits] as a bona fide offer of employment (Rule 129.5), but does not impact on SIBS where the claimant's status at the expiration of IIBS [impairment income benefits] is the determining factor."

The hearing officer's pertinent determinations are:

FINDINGS OF FACT

18. The Claimant's work limitations would not prevent him from doing many types of work.
19. The Claimant's return to work earning less than 80 percent of his average weekly wage was because of his economic choice for self-improvement, not as a direct result of his impairment.
20. The Claimant' unemployment or underemployment is not a direct result of his impairment.
21. Other than working as a laboratory assistant at (city) Community College, the Claimant has not made efforts to find other employment.
22. The Claimant has not attempted in good faith to obtain employment commensurate with his ability to work.
23. The Claimant has not shown by a preponderance of the credible evidence that his unemployment or underemployment is a direct result of his impairment.

CONCLUSION OF LAW

2.The Claimant is not entitled to [SIBS] for the first compensable quarter.

As we noted in our earlier decision, SIBS are authorized in some circumstances under provisions of Section 408.142 and Rules 130.101 through 130.110. An employee is entitled to SIBS "if on the expiration of the impairment income benefit period computed under Section 408.121(a)(1) the employee:

- (1)has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;
- (2)has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
- (3)has not elected to commute a portion of the impairment income benefit under Section 408.128; and
- (4)has attempted in good faith to obtain employment commensurate with the employee's ability to work."

Further, Rule 130.103 provides:

(a)Initial entitlement criteria. An injured employee who received an impairment rating of 15% or greater, and who has not commuted any impairment income benefits, is entitled to receive supplemental income benefits upon termination of the impairment income benefits period if the employee:

- (1)has been unemployed, or underemployed as defined in § 130.101 of this title, (relating to Definitions), as a direct result of the impairment from the compensable injury; and
- (2)has made good faith efforts to obtain employment commensurate with the employee's ability to work.

The hearing officer apparently found that the claimant had not complied with Rules (1) and (2) above.

Claimant contends that he has complied with the statute and the Commission Rules, that he has cooperated with the TRC and that if the Commission refers ". . . someone to the TRC for vocational rehab and that person accepts that offer why does the underemployment, unemployment, and good faith effort to find employment be used against that person when they are going to school full time and working part time?" Claimant

argues those requirements are not part of "section j" (referring to Section 408.150, formerly V.A.C.S., Article 8308-4.28j). The hearing officer found that claimant's underemployment or unemployment was not related to his impairment, but rather that it was due to his being a full-time student. The 1989 Act, in making provisions for SIBS, requires that impairment, rather than other economic factors, determine the eligibility for SIBS. In Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, we quoted from 1 Montford, Barber & Duncan, A Guide to Texas Workers' Comp Reform § 4.28 at 4-122 that:

The employee has, before the Commission, the burden to prove that his lost or reduced earnings are "*a direct result*" of the employee's impairment, rather than, for example, economic factors unrelated to the employee's physical limitation.

Claimant cites Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993, which states that the Commission does not want to discourage preparing for "a less strenuous work opportunity." However, in that case, we went on to state, "[i]f the claimant's ability is to work a full time, 40 hour week and he has not made good faith efforts to obtain employment commensurate with that ability, he would not meet the requirement of TWCC Rule 130.103(a)(2) for entitlement to SIBS benefits for the period involved." Appeal No. 93559, however, was a reversal and remand. On the hearing on remand, the hearing officer determined the claimant was entitled to SIBS and the carrier appealed. The Appeals Panel, in considering the carrier's appeal, in Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993, and another recent similar case, Texas Workers' Compensation Commission Appeal No. 93936, decided November 29, 1993, had instructive language in situations where a claimant is cooperating with TRC and going to school, as follows:

[T]here are more stringent requirements under the 1989 Act and Texas Workers' Compensation Commission (Commission) rules concerning attempts to seek employment where SIBS are involved. And, we fully recognize and totally agree with the concepts of Commission Rule 130.103 concerning referral to the TRC to assist an injured employee, in every appropriate case, and the exhortation that such injured employee must cooperate with TRC or face potential loss of benefits. This should not be seen as placing the injured worker "on the horns of a dilemma." Rather, it should be recognized that the injured employee is expected to act in good faith as he progresses through the workers' compensation stages, from initial injury to the hoped-for restoration, ultimately, to gainful employment consistent with his capabilities. As we stated in Texas Workers' Compensation Commission Appeal No. 93936, decided November 29, 1993, where we upheld a hearing officer's determination denying SIBS for the third compensable quarter where the claimant was a full-time student under a TRC program but made no good faith efforts to obtain employment commensurate with his ability to work:

Under the particular facts of this case which demonstrate that the claimant had time outside of school hours in which to work if he had found employment commensurate with his ability to work, we agree with the hearing officer's rationale that attendance in a retraining program can be considered in evaluating the claimant's good faith efforts to attempt to find employment commensurate with the employee's abilities (which may include availability for work), but it did not remove the claimant's responsibility to make a good faith attempt to find some employment.

Adopting the language of Appeal No. 931019, *supra*, we find that because an injured employee is in a study program with TRC does not automatically remove him from the statutory requirements of making a good faith effort to obtain employment commensurate with his ability to work. Section 408.142(a). It may well be an appropriate factor to be considered along with other factors in determining his good faith efforts and eligibility for SIBS. We in no way state a requirement that an injured employee who is cooperating with TRC to assist him in alleviating or overcoming the effects of an on-the-job injury is required, nonetheless, to seek out full or any particular level of employment to be entitled to SIBS. Rather, all the factors affecting the qualifications for SIBS must be considered under the particular circumstances of the case.

The hearing officer, in the instant case, apparently not having the benefit of these two most recent cases, made a decision which may have tracked other cases not touching on the specific point of being a full-time student under a TRC program. Consequently, we remand this case for further consideration and development of evidence, if necessary, not inconsistent with Appeal No. 931019 and Appeal No. 93936.

Nor are we persuaded by the carrier's position that once claimant refused a bona fide light duty offer of employment he would be forever ineligible for SIBS. Entitlement to SIBS is determined prospectively for each potentially compensable quarter, based on criteria met by the injured employee during the prior filing period. See Rule 130.102(b). Consequentially, even were claimant initially ineligible for SIBS, if there is a change of condition, and if the claimant meets the requirements of Rule 130.103(a), claimant may subsequently be entitled to SIBS. See Rules 130.105 and 130.106. Hence, it is the employee's status, determined prospectively for each potentially compensable quarter, that is the determining factor, rather than claimant's rejection of a bona fide offer of employment over a year before.

Carrier, in its response, cites the standard for review for questions of "factual sufficiency." We would submit this case involves principally a question of law with the facts being relatively undisputed. Consequently, the hearing officer's decision and determination were reviewed on a standard of legal accuracy.

Having reviewed the record, evidence and argument presented, the decision is

reversed and the case remanded for further consideration and development of evidence if necessary, not inconsistent with this decision and the cases cited herein.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge