

APPEAL NO. 93936

On September 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of 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.*). The issue in the case was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the third compensable quarter of 1993. The hearing officer concluded that the claimant is not entitled to SIBS for the third compensable quarter of 1993 because the claimant did not attempt in good faith to obtain employment commensurate with his ability to work. The claimant disagrees with the hearing officer's decision. The respondent (carrier) responds that the hearing officer's decision is supported by the evidence and requests that it be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The issue to be decided at the hearing was whether the claimant is entitled to SIBS for the third compensable quarter of 1993. The third compensable quarter for the claimant in this case was from July 2 to September 30, 1993. 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 claimant during the prior filing period. The prior filing period in this case was April 3 to July 1, 1993. The benefit review conference (BRC) report indicates that the claimant was paid SIBS for the first and second compensable quarters.

Pursuant to Section 408.142, an employee is entitled to SIBS if on the expiration of the impairment income benefit period the employee:

- (1)has an impairment rating of 15 percent or more 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; and
- (4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Rule 130.104(a) provides that an injured employee initially determined by the Texas Workers' Compensation Commission (Commission) to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period:

- (1)has been unemployed, or underemployed as defined by Rule 130.101 (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.

Section 408.150 provides as follows:

- (a)The Commission shall refer an employee to the Texas Rehabilitation Commission with a recommendation for appropriate services if the Commission determines that an employee entitled to supplemental income benefits could be materially assisted by vocational rehabilitation or training in returning to employment or returning to employment more nearly approximating the employee's preinjury employment.
- (b)An employee who refuses services or refuses to cooperate with services provided under this section loses entitlement to supplementary income benefits.

In the instant case, the claimant injured his back at work on (date of injury), had back surgery performed in April 1991, reached maximum medical improvement with a 15 percent impairment rating on February 19, 1992, and his impairment income benefit period expired on December 30, 1992. On or about June 18, 1993, the claimant applied for SIBS for the third compensable quarter of 1993, and the carrier refused the request and requested a BRC within 10 days. The carrier contended at the BRC and at the hearing that the claimant is not entitled to SIBS for the third compensable quarter because he had not made good faith efforts to obtain employment commensurate with his ability to work during the prior filing period.

The claimant, who was 39 years of age at the time of the hearing, testified that prior to his compensable injury he had an eighth grade education and that his job experience consisted of construction and roofing work and heavy equipment steam cleaning. He further testified that his treating doctor, (Dr. L), recommended that he not lift more than 20 to 25 pounds on a continuous basis and that he not do any stooping or bending. He said he did not return to the job he was injured on because his doctor told him he could not do that type of work anymore. The type of work the employer was engaged in is not identified in the record; however, a medical report indicates the claimant injured his back carrying a bathtub up a flight of stairs. The claimant further said his treating doctor told him to go to the Texas Rehabilitation Commission (TRC) which he did about one month after his injury. The claimant has not worked since the date of his injury. The claimant said he obtained a General Equivalency Diploma (GED) in the fall of 1991 and that from January 1992 through the date of the hearing (September 23, 1993) he has been a full-time student at the Community College (Community College). He said the TRC has paid for his tuition and books. The claimant is enrolled in a course of study that leads to an Associate Degree in Telecommunications. The claimant said the TRC wants him to get a four-year college

degree but he thinks he will only be able to get a two-year degree because he needs to get a job. He said he is in college in order to get a job. The claimant said he sees Dr. L about once a month.

As previously indicated, the filing period prior to the third compensable quarter was April 3 through July 1, 1993, and, according to Rule 130.102(b) it is for this period that the claimant must meet eligibility criteria to be entitled to SIBS for the third compensable quarter of 1993. The claimant's 1993 Spring Semester and Summer Session partially overlap the April through June filing period. The claimant said the 1993 Spring Semester was from January through May 1993 and that he was a full-time student during that semester taking 12 hours of classes. The claimant initially indicated that he went to classes four days a week, Monday through Thursday, during the Spring Semester, but on further questioning indicated that he attended classes three days a week during that semester. The claimant said the 1993 Summer Session was from June through August 1993 and that he was a full-time student during that session taking one class which met from 7:00 p.m. to 10:00 p.m. four nights a week. The claimant indicated that he needed to have three to four hours of study time for each hour of class.

In his request for continuation of SIBS for the third compensable quarter of 1993 dated June 14, 1993, the claimant indicated that during the previous 13 weeks he had applied for only one job, that being a sales position at the (Company A). The claimant testified that he orally applied for the job in May 1993 and was told there were no sales positions available. He said he was unable to perform other types of work Company A had available out in the yard because of his work restrictions. The claimant's testimony regarding Company A is corroborated by a letter from the owner of Company A. The claimant further testified that during the period January through March of 1993 he had orally applied for a sales position at (Company B), which is a salvage yard, and had orally applied for an estimating job at (Company C), which is a construction company. The claimant said he was told at the time he applied to Companies B and C that those companies did not have an opening for him because of his back injury. The claimant said that although he did not list Companies A and B on his request for SIBS for the third compensable quarter of 1993, he had orally "followed-up" with those companies during the prior filing period of April through June 1993 and had been unsuccessful in getting work due to his back injury. The claimant testified that when he applies for a job he tells the prospective employer about his work restrictions from his injury and that he is in school; however, he said he does not tell the prospective employer that his work hours are limited due to school. The claimant said that he would have had to quit school to go to work if a job had become available. The claimant further testified that he has never applied to the Texas Employment Commission (TEC) for work. He also said he does not know whether the Community College has a placement office that could help him find work.

The hearing officer made several findings of fact among them the following:

FINDINGS OF FACT

No. 6. The claimant made only one application for a job during the appropriate filing period.

No. 7. The claimant did not make any written job applications for any business during the filing period.

No. 8. The claimant was not registered with the TEC to seek work.

No. 9. The claimant has been and is enrolled as a full-time student in [Community College].

No. 10. The claimant's school hours were such that he could have done extensive work outside of school hours.

The hearing officer concluded that the claimant is not entitled to SIBS for the third compensable quarter (of 1993) because he did not attempt in good faith to obtain employment commensurate with his ability to work.

In his discussion of the evidence the hearing officer noted that the claimant did not have classes three days a week during the 1993 Spring Semester and that he did not have any courses during the daytime on any day of the week during the Summer of 1993. As previously noted, the filing period prior to the third compensable quarter of 1993 encompassed the months of April and May 1993, which were part of the Spring Semester, and the month of June, which was part of the school session held in the summer of 1993. The hearing officer stated that:

The Act [1989 Act] places an affirmative responsibility on the injured worker to attempt to find employment consistent with his limitations and restrictions. The attendance of an injured worker in a retraining program can be considered in evaluating the good faith effort of the worker, but it does not remove the worker's responsibility to make a good faith attempt to find employment. The Claimant did not make any diligent efforts to find employment consistent with his ability to work during the appropriate period.

In Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993, we reversed the hearing officer's decision that the claimant in that case was entitled to SIBS and remanded the case for further development of the evidence in regard to the initial entitlement criteria for SIBS. In that decision we stated that "entitlement to SIBS hinges on making good faith efforts to obtain employment." However, we also stated that the injured employee had "apparently cooperated with the referral to the [TRC] to assist in preparing for a less strenuous work opportunity, a matter that we do not believe the Commission would want to discourage." In Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993, we affirmed a hearing officer's decision that the claimant was not entitled to SIBS based on the hearing officer's finding of an absence of good faith efforts to find suitable employment where the claimant was

attending school full-time and had applied for only one part-time position during the applicable filing period.

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. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). In the instant case the claimant testified that during the applicable filing period he applied for one job and followed-up on two previous applications. However, the claimant indicated that he had contacted only one prospective employer during the applicable filing period on his written request for SIBS. Conflicts and inconsistencies in the evidence are for the hearing officer to resolve. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). Having reviewed the record we conclude that the hearing officer's findings of fact, conclusions of law, and decision are supported by sufficient evidence and are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge