APPEAL NO. 94119

This case was originally heard in (city), Texas, (hearing officer) presiding as hearing officer, and is returned following our remand in Texas Workers' Compensation Commission Appeal No. 931063, decided January 4, 1994. We remanded the case in that it involved entitlement to supplementary income benefits (SIBS) for a claimant who was attending school on a full-time basis in cooperation with the Texas Rehabilitation Commission (TRC) vocational rehabilitation program (retraining program). Earlier SIBS cases had not involved the TRC retraining program and the Appeals Panel had decided two cases (Texas Workers' Compensation Commission Appeal No. 93936, decided November 29, 1993, and Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993) after the hearing officer had heard the evidence in Appeal No. 931063. It was the Appeals Panel's desire that the hearing officer consider cases involving the requirement to, in good faith, seek employment by a full-time student under the TRC program.

The hearing officer apparently did not conduct another hearing (nor does this recitation imply that he was required to do so) and stated "[a]fter review of Appeal No. 931019 and Appeal No. 93936, it appears that no further consideration and development of evidence is necessary." The issue in the case on remand was "whether the claimant is entitled to [SIBS] for the first compensable quarter." The hearing officer determined that claimant is not entitled to SIBS for the first compensable quarter, principally because "other than working as a laboratory assistant . . . the claimant has not made efforts to find other employment . . . [and] has not attempted in good faith to obtain employment commensurate with his ability to work."

Appellant, claimant herein, disagrees with certain of the hearing officer's determinations and contends, in essence, that by calculating his classroom hours, study time, and part-time employment as a laboratory assistant, he is occupied more than 40 hours a week. Claimant points out that if he were to drop out of the TRC retraining program (by quitting school) in order to obtain full-time 40 hour a week employment he would also become ineligible for SIBS for failing to cooperate with the TRC. Claimant urges we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Determining that the hearing officer failed to consider claimant's attendance in the TRC mandated retraining program (14 hours a week college classroom work) and failed to consider claimant's 19 hours a week work as a laboratory assistant in considering whether claimant had made a good faith effort to obtain some employment commensurate with claimant's circumstances, we reverse and render a new decision that the claimant is entitled to SIBS for the first compensable quarter.

We find the hearing officer's statement of evidence to be a fair and accurate recitation of the facts and adopt it for purposes of this decision. By way of background, and at the

risk of repeating evidentiary matters from our previous decision, 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 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, Section 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 1993, 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.

The carrier's position, as summarized by the hearing officer was, and is, that the claimant was not entitled to receive SIBS because:

a.he had refused a bona fide light duty offer of employment by the employer in March of 1992;
b.his return to work earning less than 80 percent of his average weekly wage was not as a direct result of the claimant's impairment; and,
c.he has not attempted in good faith to obtain employment commensurate with his ability to work.

The hearing officer dismissed carrier's contention regarding the bona fide offer of light duty employment, and we affirm the hearing officer's comment that the employer's bona fide offer of employment was for purposes of reducing temporary income benefits (TIBS) and is not applicable to the question of SIBS in this case. We agree with the hearing officer's statement that: ". . . the Claimant must qualify for [SIBS] based on his work status and

good faith efforts at the time he would become eligible for [SIBS], not his status a year or more before he otherwise became eligible for [SIBS]."

Nonetheless, the hearing officer determined claimant was not entitled to SIBS for the first compensable quarter. The claimant specifically disputes the following findings of fact:

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's 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.

Claimant, in his appeal in the instant case, attempted to submit some data regarding what he was earning as a flight attendant versus what he could earn as a "40 hour a week employee" earning slightly more than the minimum wage. Carrier objects to this and other new information on the basis that the Appeals Panel pursuant to Section 410.203(a)(1) is limited in its review to the record developed at the CCH, and since this information was never presented at the CCH it "cannot be considered" citing several Appeals Panel decisions. We do not disagree with that general proposition of law although we would note the hearing officer did not give the parties an opportunity to present evidence on the point for which we reversed Appeal No. 931063. Nonetheless there was evidence in the initial hearing that claimant attended class 14 hours a week (evidence was that he was taking 14 credit hours a semester which requires one to attend class 14 hours a week) and that he was working as a laboratory assistant 19 hours a week. We will further note that common experience would suggest that a full-time student carrying 14 credit hours will be required to study some amount of time, and that even seven hours a week of study would have the claimant occupied 40 hours a week going to school, studying and working.

As we noted in our earlier decision, SIBS are authorized in some circumstances

under provisions of Section 408.142 and Rule 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.

Claimant contended at the initial hearing on this issue that he had complied with the statute and the Commission rules, that he had 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 8308-4.28(j)). Claimant further argues that the hearing officer has put him "on the horns of a dilemma" (which in Appeal No. 931019 we said we would not do) because if he quit school and worked 40 hours a week he would not be entitled to SIBS because he would not be cooperating with the TRC rehabilitation program and yet if he goes through retraining (school required by TRC) he is being denied SIBS by the hearing officer because he "has not attempted in good faith to obtain employment commensurate with his ability to work." 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.

What we intended in our remand of Appeal No. 931063 was for the hearing officer to consider Appeal Nos. 93936 and 931019, in determining whether claimant's 19 hour a week part-time employment (in conjunction with the full-time student status) constituted "a good faith attempt to find some employment." We stated explicitly 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 but rather that the claimant's student status, together with his 19 hour a week part-time lab assistant job, were factors to be considered in determining whether this constituted a good faith effort to comply with the SIBS requirements. The hearing officer, in several comments and findings appears to have totally disregarded claimant's 19 hour a week position by saying "other than working as a laboratory assistant . . . the claimant has not made efforts to find other employment." (Emphasis in the hearing officer's statement.) It appears that the hearing officer is requiring claimant to find "other employment" totally disregarding the lab assistant job. We explicitly stated in our remand of Appeal No. 931063, "[w]e 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." Simply stated we said an employee, who is a full-time student in cooperation with TRC, must make some good faith effort to seek employment commensurate with his ability. The employee cannot simply say "I am a student and there is no need to seek other employment." We are mindful the hearing officer cites the claimant as having said just that, however, that disregards claimant's 19 hour a week lab assistant job as some employment. The hearing officer has failed to make a determination regarding the lab assistant job and instead appears to have placed the claimant on the "horns of a dilemma" whereby whatever he does, or does not do, will result in loss of eligibility for SIBS. We do not believe that is what the law intends.

In Appeal No. 93936, the injured employee was "taking 12 hours of classes," under the TRC retraining program, but was not working and had applied for only one job during the prior filing period. The Appeals Panel affirmed the hearing officer stating that attendance in a retraining program is a factor which can be considered in evaluating the employee's good faith efforts to find commensurate employment but going to class alone "did not remove the claimant's responsibility to make a good faith attempt to find some employment." (Emphasis added.) In Appeal No. 931019, the injured employee was a full-time student under the TRC retraining program "taking 12 hours of courses." The employee was working in a "part time job" (the nature and extent of the job is not clear in the decision) but was not seeking a full-time 40 hour a week position because he was a full-time student. The Appeals Panel affirmed the hearing officer who had determined the employee was eligible for SIBS, discussing the requirement for seeking employment and the rule requiring cooperation with TRC are not in conflict and should not present a dilemma for the student. It was our intent in the remand of Appeal No. 931063 that the hearing officer consider the two cited cases and apply the principles enunciated in those cases to the instant case.

The hearing officer, in the instant case, basically ignores claimant's 19 hour a week job as a lab assistant stating "the claimant has not made efforts to find other employment." The hearing officer's position (and at least partly the carrier's position) is predicated on the faulty assumption that claimant's lack of full-time employment is due to going to school (under the TRC retraining program) rather than because of his impairment. The fact that claimant is in the TRC retaining program at all is due solely to his impairment (i.e., he would not be eligible for TRC retraining unless he had a certain level of impairment). The hearing officer speaks in terms of claimant "retraining himself" when actually he has become eligible for the TRC retraining solely because of his impairment. Consequently in determining whether the claimant has made a good faith effort to obtain employment commensurate with his ability to work, the hearing officer should take into consideration as factors, claimant's participation in the TRC retraining program (which we have said is insufficient, in and of itself, to establish eligibility for SIBS, Appeal No. 93936) as well as any additional part-time employment, such as was present in Appeal No. 931019.

It is undisputed that claimant was attending classes 14 hours a week (as opposed to the 12 hours a week in Appeal Nos. 93936 and 931019) as well as working as a lab assistant 19 hours a week. We would further note that it would not be unreasonable for one to conclude that some study time was necessary to sustain 14 hours of classroom work a week. We determine that the hearing officer's decision that the claimant is not entitled to SIBS for the first compensable quarter is clearly against the great weight and preponderance of the evidence, if not incorrect as a matter of law, because the hearing officer did not consider claimant's participation in the TRC required retraining program (going to school) and claimant's 19 hour a week part-time employment as a lab assistant, in evaluating whether claimant attempted in good faith to obtain employment commensurate with his ability to work. Consequently we render a new decision that claimant is entitled to SIBS for the first compensable quarter and order that carrier pay SIBS for the first compensable quarter as provided by the 1989 Act and Commission rules.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge