

## APPEAL NO. 94335

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on January 14, 1994, to determine the issue of whether the claimant was entitled to supplemental income benefits (SIBS) for the second and third compensable quarters. The carrier, which is the appellant in this action, appeals the decision of the hearing officer, (hearing officer) in the claimant's favor. The carrier contends that the claimant should be disqualified for at least a portion of the two quarters because of her failure to file a properly completed statement of employment status. It also contends that the evidence does not support the hearing officer's determination that the claimant made good faith efforts to obtain and retain employment, and that there is a lack of evidence that the claimant's inability to obtain and retain employment within her abilities was a direct result of her impairment. The claimant did not file a response.

### DECISION

The hearing officer's decision and order are affirmed, with modification.

The claimant, who was a seamstress for (employer), suffered a compensable back injury (a herniated disc) on (date of injury). Her treating doctor, (Dr. H), determined that she had reached maximum medical improvement (MMI) on April 7, 1992, with a 21% impairment rating (IR); a designated doctor appointed by the Texas Workers' Compensation Commission (Commission) to determine claimant's IR assessed a 15% IR, and the carrier paid impairment income benefits (IIBS) based upon that rating.

Claimant's first application for SIBS (Statement of Employment Status) for the February 18-May 18, 1993, quarter was approved by the Commission although, as she pointed out at the hearing, she did not indicate on that form that she had sought employment during the preceding 13 weeks. She did indicate on the form that she had contacted the Texas Rehabilitation Commission (TRC) for vocational retraining, and that she had not returned to work.

On May 5, 1992 (sic; probably should have read "1993"), claimant completed another Statement of Employment Status form for the second quarter (May 19-August 16, 1993) in which she did not indicate that she had applied for employment during the prior 90 days, but indicated she had returned to work. According to claimant's testimony and to notes of carrier's adjuster which were admitted into evidence, claimant checked this box on the form by mistake. On June 2nd, she contacted the carrier and apparently discovered her mistake; thereafter, a Commission representative sent the claimant a new form. On this form (Form TWCC-49, Employee's Quarterly Request for Continuation of Supplemental Income Benefits), dated June 12, 1993, claimant once again did not indicate that she had applied for employment, but stated that she had not returned to work. On June 15th the carrier wrote that it was denying claimant's request because she had failed to show a good faith effort to find employment, pursuant to the 1989 Act.

It was claimant's testimony that the TRC first sent her to a doctor then, following counseling, arranged for her to go to school to take courses in preparation for being licensed as a realtor. A letter from the TRC indicates that claimant was first seen on March 9, 1993, and she stated that it took from March until May for her application for school to be approved. From July 19th to October 4th she was enrolled in classes which lasted eight hours a day, five days a week. On October 12th claimant received a certificate of completion but she did not pass the examination to become a licensed real estate broker. The claimant said she thought going to school was the equivalent of working, for purposes of receiving SIBS.

On September 15th, the claimant completed another Statement of Employment Status for the third compensable quarter (August 17-November 14, 1993). On that form she listed three employers she had contacted, none of which had offered her a job. The carrier denied this application for SIBS based upon the fact that there was no medical to support claimant's being unable to work, and the fact that claimant was applying for positions she was neither licensed nor qualified for. At the hearing claimant explained that she had applied to U.S. Carpet for a telephone sales position and to Reliable Insurance Company (where a relative worked) for a sales position for which she said she was told by an assistant manager that no license was necessary. She also listed a (Mr. P), a real estate broker whom she said she contacted in June. She acknowledged that she could not have worked for Mr. P until she was licensed, but said that she was seeking his sponsorship.

On cross examination claimant said she also had made written application to (employer) in September and to (employer) in August (for part-time seamstress positions), as indicated in her answers to carrier's interrogatories. She said she also applied for a cashier position at (employer) in March and May, and that she called her former employer to inquire about a job every week until May, when she was told "the contract was over." Except for her former employer, claimant said she had learned of all these jobs through the newspaper. Claimant said the only work she had ever done was as a seamstress, but that she was no longer able to sit for periods in excess of two hours. Her treating doctor wrote on January 3, 1994, that he initially took claimant off work on April 23, 1991, and kept her off work following her next visit in September 7, 1991 (Dr. H stated claimant had seen another doctor in the interim because the carrier wouldn't allow her to continue seeing him). At the time he found she had reached MMI, Dr. H said claimant needed "permanent modification of work activities to avoid strenuous bending, lifting, repetitive stooping with lower back." Dr. H also, in his January letter, stated that claimant was not capable of doing repetitive bending, lifting, or stooping with her lower back and that she continued with "painful symptomatology."

Carrier's doctor, (Dr. L), had written on December 5, 1991, that the claimant's work station could be modified to obviate the need for turning and twisting. A third doctor, (Dr. G), had opined on April 18, 1991, that claimant's job was not strenuous and that there was no reason she could not work. The designated doctor did not express an opinion on claimant's ability to work.

According to written questions propounded to the appropriate custodians of records, (employer), (employer), and Reliable Insurance had no record or knowledge of claimant's having applied for jobs. The custodian of records for U.S. Carpets said claimant made an oral application in March but that there were no openings. Mr. P stated that claimant made oral application in November but that she did not pass the real estate exam.

In its appeal the carrier raises as error the hearing officer's findings and conclusions that the claimant made good faith efforts to seek employment commensurate with her ability to work, and that she is entitled to SIBS for her second and third compensable quarters. The carrier contends that the evidence does not support these determinations, and argues that there is a lack of showing that the claimant's inability to obtain employment was a direct result of her impairment.

Carrier's points of appeal center around the requirements of Section 408.142 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § (Rule 130.104) concerning a claimant's continuing entitlement to SIBS. The statute and rule provide in pertinent part that an injured employee initially determined by the 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 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 statute and rule also provide that, in order to be eligible for SIBS, an employee must have an impairment rating of 15% or more and must not have elected to commute a portion of IIBS; it was not in dispute that the claimant met these two criteria.

The Appeals Panel has stated that entitlement to SIBS is determined prospectively, for each compensable quarter. Texas Workers' Compensation Commission Appeal No. 931160, decided February 1, 1994; see also Rule 130.102(b). Therefore, we will examine the evidence to support the hearing officer's determinations with regard to the filing period preceding each of the compensable quarters at issue in this case.

It was claimant's testimony that during the first compensable quarter she was working with TRC to have an application for schooling approved which hopefully would retrain her. Prior Appeals Panel decisions have discussed the potential dilemma of an employee's need to cooperate with the TRC in rehabilitation efforts (as required by Rule 130.103) balanced against the statutory obligation to look for work, and have held that even attending school full time, at TRC expense, does not automatically relieve a claimant from the requirement to seek employment. See, e.g., Texas Workers' Compensation Commission Appeal No. 931188, decided February 9, 1994. However, in this case the claimant, while attending school during a portion of the second quarter, was only engaged in the application process

prior to that quarter. At the same time, it was claimant's testimony that in March and May she applied unsuccessfully at (employer) and that up until May she continued to seek, on a weekly basis, re-employment with her former employer; U.S. Carpets also indicated she applied there in March. Likewise, during the quarter preceding the third quarter, even though she was in school full-time (for a period spanning the second and third quarters) the evidence, if credited by the hearing officer, was that the claimant had also applied for jobs during that period. Thus, we cannot say there is insufficient evidence to support the hearing officer's determination that the claimant made a good faith effort to seek employment, despite the fact that such efforts were not exhaustive. See, e.g., Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993.

A more difficult question is posed by the requirement that the claimant show that lost or reduced earnings are a direct result of the employee's impairment, defined in the act as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). As stated in 1 Montford, Barber & Duncan, A GUIDE TO TEXAS WORKER'S COMP REFORM § 4.28 at 4-122, "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."

While the hearing officer made no specific finding of fact that claimant's lost earnings directly resulted from her impairment, such can be implied based upon the hearing officer's determination that claimant was entitled to SIBS for the quarters in question. The hearing officer did make a finding, not challenged by the carrier, that claimant's limited education, work history, and medical condition limited the claimant as to the areas in which she could seek employment, and this panel has held that an injured employee must make a good faith effort to obtain employment commensurate with his or her ability to work, Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993. Claimant testified that she had always worked as a seamstress, and that she was limited in her physical movement due to the effects of her injury. (Her treating doctor's letter also confirmed the latter statement concerning her work restrictions.) She also testified that she had sought jobs either doing seamstress work or other jobs (telephone sales, cashier) which apparently accommodated these restrictions. Although she was not hired for some of these jobs due to reasons not directly related to her injury, it is not clear that this was the case in every instance. As this panel has held, given that a potential employer may well not give a reason why an applicant was not selected for a position, a claimant may rely on other evidence. Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993. In that decision, which upheld a hearing officer's denial of a claimant's SIBS, the Appeals Panel noted a lack of medical evidence to substantiate the claimant's work restrictions arising from any impairment; such was not the case here. Compare Texas Workers' Compensation Commission Appeal No. 931159, decided January 31, 1994 (in affirming the hearing officer's denial of SIBS, the Appeals Panel noted claimant's testimony that she did not seek any employment where potentially available employment was advertised). To the extent that there is evidence in this case to the contrary of the hearing

officer's decision, we find that the hearing officer as sole judge of the weight and credibility of the evidence (Section 410.165(a)) is entitled to resolve any such conflicts. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Finally, the carrier argues that the claimant should be disqualified for a portion of the compensable quarters because of her failure to file a properly completed statement of employment status with the carrier within the allotted time frame. Section 408.143(b) provides that the employee statement required by that section must be filed quarterly on a form and in the manner provided by the Commission, and that the Commission may modify the filing period as appropriate to an individual case. Subsection (c) provides that the failure to file a statement under this section relieves the insurance carrier of liability for SIBS for the period during which a statement is not filed. In addition, Rule 130.104, which contains notification and filing obligations for a carrier and a claimant, provides at subsection (g) that if the employee is entitled to SIBS, the benefits begin to accrue on the later of the day after the last day of the prior compensable quarter, or the date the statement is filed with the carrier.

The evidence shows that the carrier on April 19th mailed to claimant a Statement of Employment Status and advised her that it was to be returned to carrier no later than seven days prior to the expiration of the first quarter (which ended May 18th) to avoid delays in benefits. The evidence further shows that on May 5th claimant signed the statement, erroneously indicating she had returned to work. Thereafter, the claimant's mistake was discovered by both parties; on June 12th, after having contacted the Commission and received another form, the claimant completed a TWCC-49, which request was denied by the carrier by letter dated June 16th due to the failure to show good faith effort to find employment. Claimant's Statement of Employment Status for the third quarter (beginning August 17th), in which she listed jobs she had applied for, was signed on September 15th.

We are unwilling to find, as carrier contends, that claimant's first statement was not filed until June 12th and that thus no SIBS are due before that date. The evidence reflects that claimant's original filing was made May 5th, two weeks before the start of the second quarter, and was thereafter amended after both parties became aware that the information in the original filing was in error. However, the evidence also shows that claimant's statement for the third quarter was not filed until September 15th. Applying the statute and rule, we find that claimant's entitlement to SIBS did not accrue until this date; therefore, the hearing officer's decision is hereby modified to hold that claimant is entitled to third quarter SIBS for the period September 15 - November 14, 1993. In all other respects, the hearing officer's decision and order are affirmed.

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Lynda H. Nesenholtz  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge