

## APPEAL NO. 94338

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 14, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) attempted in good faith to obtain employment commensurate with his ability to work but did not show that he had not returned to work as a direct result of his impairment; as a result she ruled that supplementary income benefits (SIBS) are not payable for the second compensable quarter. Claimant asserts that he did not apply for jobs beyond his ability where he knew he would not be hired; he added that he should not be required to apply for jobs that are not commensurate with his ability to work. Respondent (carrier) replies that the decision should be affirmed.

### DECISION

We affirm.

Claimant injured his back on (date of injury), and had surgery for it thereafter. He reached maximum medical improvement (MMI) on September 24, 1992, with 15% impairment. His second quarter in which SIBS were potentially payable was from November 6, 1993, to February 5, 1994. There was some evidence at the hearing in regard to whether claimant had requested SIBS timely and whether carrier disputed SIBS for this quarter by timely requesting a benefit review conference (BRC), but claimant had no filing deadline and carrier's dispute was found to be timely; no issue is raised on appeal that carrier was not timely.

On appeal only one element of entitlement to SIBS is in issue--whether claimant's failure to return to work is a direct result of the impairment. Claimant has met the 15% requirement for impairment rating; no question was raised that claimant commuted a portion of his impairment income benefits; and the hearing officer's decision that claimant made a good faith effort to find work is not challenged.

Within the prior filing period (see Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b) which calls for meeting criteria in the "prior filing period" for payment of SIBS in a potentially compensable quarter), claimant produced documents evidencing applications for employment filed with six employers. On direct examination the following question and answer took place:

Q.What did the employers tell you?

A.Well, they told me there was no work, that they wouldn't give me work. I went to many--I don't remember some of them, but they told me that they wouldn't give me an application, that there was no work.

Later, still on direct examination, claimant was asked specifically about two of the six employers that were contacted within the prior filing period:

Q.[Claimant], did you apply at (employer), on October 16th, 1993?

A.On October 16th of 93, yes.

Q.Did they have any job openings?

A.No

Q.Did you apply at (employer) on October 20th, 1993?

A.Yes

Q.Did they offer you a job?

A.No. I went to look, and there was no work, no.

Claimant never testified that any potential employer denied him a job because of his impairment. No other testimony or any document indicated that claimant's impairment directly affected his lack of success in returning to work.

The claimant asserts that he should not be required to seek jobs which he cannot physically handle in order to accumulate evidence of rejection because of the impairment. Contrary to the assertion on appeal, the six jobs solicited within the prior filing period indicate a variety of employment sought. Claimant stated as his preference for work in the six applications, "concrete finisher, carpenter, construction-helper" and at (employer), "anything available."

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, held that evidence must support a determination that claimant has not returned to work as a direct result of the impairment. The hearing officer's decision that claimant had not shown his inability to find work was the result of his impairment was sufficiently supported by claimant's testimony and the absence of other evidence to the contrary.

Finding that the decision and order are not against the great weight and preponderance of the evidence, the decision and order are affirmed. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Thomas A. Knapp  
Appeals Judge