

APPEAL NO. 950091
FILED FEBRUARY 23, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 7, 1994. Addressing the single disputed issue, the hearing officer determined that the appellant (claimant herein) was not entitled to supplemental income benefits (SIBS) for the first through the fifth quarters. The claimant seeks review of this decision by the Appeals Panel. The respondent (carrier herein) replies that the decision is correct and should be affirmed.

DECISION

We affirm.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee has: (1) an impairment rating (IR) of at least 15%; (2) has not returned to work or has earned less than 80% of the average weekly wage (AWW) as a direct result of the impairment; (3) has not elected to commute a portion of the IIBS; and (4) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101 *et seq.* (Rule 130.101 *et seq.*). A claimant seeking SIBS has the burden of proving his or her entitlement thereto. Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994.

It was not disputed that the claimant suffered a compensable right shoulder injury while working in a machine shop on _____, for which he was assigned a 19% IR, that none of his IIBS were commuted, and that the claimant's IIBS period ended on June 15, 1993. The hearing officer determined that the claimant was not entitled to SIBS for the first four compensable quarters because he did not in good faith attempt to find work commensurate with his ability to work and because his underemployment in the qualifying period for these quarters was not a direct result of his impairment. The hearing officer found the claimant was not entitled to SIBS for the fifth quarter because in the qualifying quarter he was earning more than 80% of his AWW.

The only medical evidence in the record of the CCH is a June 11, 1992, office note of (Dr. R), the claimant's treating doctor, in which he states that the claimant's "symptoms are fairly mild at this point, although he still has occasional pain at night . . . I think he can return to the work setting but is unable to do any lifting greater than 20 lb. with his right arm and probably cannot do any overhead lifting with his right arm."

The claimant testified that he returned to work on July 1, 1992, as a ranch hand. He described his work as primarily feeding cattle and raking hay. He said he used a

tractor with a front-end loader to lift hay bales and never has to do any heavy lifting. He stated that his employer knew of his limitations and accommodated them. It was his position that he could not work anywhere else in the small community where he lived because he does not have the education for a better job. According to the claimant, other jobs, such as janitorial jobs and even some factory jobs, would pay him no better than his ranch salary. He said he works at the ranch almost every day, now makes \$5.50 per hour and that his wages are limited by the amount of work available at the ranch, not by his medical condition. He admitted that he earned more than his AWW at the ranch during the qualifying period for the fifth SIBS quarter. He said he never looked for any other work before he got the ranch job and was offered this job by the owner as a way to work himself out of some debt he incurred.

With regard to the requirement that the claimant make a good faith effort to obtain employment commensurate with his ability to work, the claimant's position at the hearing was that he never sought other employment because no other work was available in his community that he could qualify for with his restrictions and his limited education and that would pay more than he was making as a ranch hand. For this reason, he contends, he either met the good faith requirement or it did not apply to him. The Appeals Panel has noted in the past that if a treating doctor states that a claimant is unable to work at all, the requirement to seek work commensurate with this ability to work would be "not to seek work at all." Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994. This is not the case with the claimant. Dr. R gave a limited duty release and the claimant for well over a year has demonstrated some ability to work by actually working. Under these circumstances, to accept his contention that no other job was available to him in the community for higher wages amounts to no more than speculation on his part and if accepted in satisfaction of the good faith effort requirement would effectively negate it. We distinguish this case from our decision in Texas Workers' Compensation Commission Appeal No. 94063, decided February 22, 1994, wherein the claimant was given a full-time job that paid less than his prior job, as a favor from his brother-in-law. Although he considered this work exhausting, he still made a minimal effort to find additional or more lucrative employment and the hearing officer found he met the good faith effort requirement. The Appeals Panel affirmed even though that effort "may appear to have been minimal. . . ." In the case now appealed, the claimant made no such efforts at all and sought to be excused from any additional efforts.¹

Based on this evidence, the hearing officer determined that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. We

¹ The claimant's Statements of Employment Status (TWCC-52) all list only wages received from his ranch employment. No issue was raised about the timing of these submissions. See Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995.

do not find this determination to be so against the great weight and preponderance of the evidence as to be manifestly unjust. We therefore decline to reverse it on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer also found that the claimant's underemployment for purposes of a SIBS entitlement for the first through the fourth quarters was not a direct result of his impairment. In Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, the Appeals Panel noted that the claimant had the burden of proving that his reduced earnings are a direct result of his impairment "rather than, for example, economic factors unrelated to the employee's physical limitation." Appeal No. 93630 quoting 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM (1991) § 4.28 at page 4-117. Whether the claimant's underemployment was the direct result of his impairment was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941185, decided October 19, 1994. The claimant testified, as noted above, that after he was hired at the ranch, he did not look for work anywhere else. He also testified that employment was scarce where he lived and that his wages were limited by the amount of work available at the ranch and he could work more to earn more if the work was available. The hearing officer considered this evidence and concluded that the claimant's underemployment was not a direct result of his impairment. Given our standard of review of factual determinations of a hearing officer, we decline to find that the hearing officer's decision was not supported by sufficient evidence.

Finally, the hearing officer found the claimant not entitled to SIBS for the fifth compensable quarter because the claimant earned more than 80% of his AWW in the prior quarter. Employment records introduced by the claimant clearly support this conclusion and claimant conceded as much in final argument.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge