APPEAL NO. 950581
FILE MAY 30, 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 was held on March 7, 1995. Addressing the appealed issues, the hearing officer determined that the respondent (claimant herein) was entitled to supplemental income benefits (SIBS) for the first through the third compensable quarters. The appellant (carrier herein) appeals arguing that these determinations are against the great weight of the evidence. No response was received from the claimant.

DECISION

We affirm.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS on the expiration of the impairment income benefits (IIBS) period, if 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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]."

Neither party having appealed the determination of the hearing officer that the claimant's IR was 15%, that determination has become final. Section 410.169. It was not disputed that the claimant did not elect to commute any portion of his IIBS and that he has not worked during any of the qualifying periods for the quarters in issue. The parties stipulated that the first compensable quarter was June 14, 1994, through September 13, 1994; the second was September 14, 1994, through December 13, 1994; and the third was December 14, 1994, through March 14, 1995. The only substantive matters for review are whether there was sufficient evidence to support the determinations of the hearing officer that the claimant met the good faith effort to find employment and that his unemployment was the direct result of his impairment.

The claimant worked at a leather processing plant. It was undisputed that he injured his lower back in the course and scope of his employment while carrying hides on _____. He was diagnosed with disc herniation at L5-S1 with foraminal compression. Surgery, not yet undertaken, was recommended. The claimant testified that he was generally not aware of the requirements for establishing an entitlement to SIBS and relied on the advice of an adjuster to wait until he received his last IIBS payment on June 14, 1994, to apply for SIBS. He nonetheless conceded that he received from the Commission

a letter of May 24, 1994, advising him that he may be entitled to SIBS and of the necessity to complete a Statement of Employment Status (TWCC-52) attached to the letter. The claimant signed the TWCC-52 on May 27, 1994, indicating he had not returned to work. No potential employer contacts were listed on the front of the form. A date stamp reflects that the TWCC-52 was received on the date it was signed. SIBS for the first quarter were approved on July 12, 1994. Although the testimony on this point was confusing, apparently the claimant later furnished to the Commission a list of 21 employer contacts he made. This list was then appended to the TWCC-52. In his testimony, the claimant stated he did not seek work with any of these employers prior to the date he signed the TWCC-52 because he did not even begin a job search until after June 14, 1994, when his last IIBS payment was made as he said he was advised by the adjuster. As to the list of potential employers, the claimant said none were hiring and he did not submit a job application to any of them. He further stated that the positions he sought with these employers were for jobs as a laborer and were not within his medical restrictions which he described essentially as no lifting and no standing or sitting for more than 30 minutes at a time. No duty release with these limitations was in evidence.

On December 16, 1994, the claimant signed a second TWCC-52 to which he attached a list of 27 potential employers none of which were hiring. He said he nonetheless made two applications, one to a position not used by that employer. The other employer, according to the claimant said they would call him back, but never did. The claimant said that none of these positions were within his physical restrictions.

On January 2, 1995, the claimant signed a third TWCC-52 to which he attached 11 potential employer contacts, none of which were hiring. He also said that at one of these employers he mentioned his prior injury and physical limitations and said he was told he could not be hired because of them.

The claimant also testified that he unsuccessfully sought job-finding assistance from the Texas Employment Commission and the Texas Rehabilitation Commission, but that the latter could not help him until he got his high school graduation equivalency diploma.

The claimant admitted at the hearing that he was only going through the motions of the job search process because he was told by an adjuster that he had to do this to qualify for SIBS. He felt, however, that his physical limitations from his injury made him unable to work at all.

In her discussion of the evidence, the hearing officer pointed out the claimant's limited skills, education and experience and stated "[i]n the instant case, it appears that CLAIMANT has no ability to work and is, therefore, not required to look for work in order to qualify for [SIBS]." She made the following pertinent Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

8. CLAIMANT has no skills or abilities other than those of a flesher, meat cutter, or laborer.

9. CLAIMANT'S educational level is only through the 11th grade and he has not been able to obtain a GED.

10. CLAIMANT'S work restrictions are such that he would be precluded from performing any of the work he knows how to do.

11. During the 90 days prior to the first, second, and third compensable quarters, CLAIMANT sought employment commensurate with his ability to work and was unable to obtain employment due to the impairment from his compensable injury.

CONCLUSIONS OF LAW

3. CLAIMANT is entitled to [SIBS] for the first . . . second . . . and . . . third compensable quarter . . . .

In its appeal of these determinations, the carrier argues that the claimant failed to make a good faith job search because, according to the claimant's own testimony, he only contacted potential employers because the adjuster said he had to and none had job openings consistent with his job skills and limitations. The carrier also contends that the fact that he only made four job applications over the nine months of qualifying quarters reflects lack of good faith in seeking a job. As to the first quarter, the carrier points out that the claimant admitted not even beginning a job search until after the qualifying period ended. The carrier also maintained that the claimant's lack of job success was not the direct result of his impairment but the result of applying for positions either not available or for which he was not qualified.

The Appeals Panel has stated that it will uphold the decision of a hearing officer on any legal theory reasonably supported by the evidence. Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993. In this case, we question the sufficiency of Finding of Fact No. 11 to support the conclusion of the hearing officer that the claimant is entitled to SIBS. It was beyond doubt that the claimant turned in job applications[1], but the concept of good faith in that job search was not addressed by the

[1]This finding of fact also fails to expressly make the statutory finding of "direct result" of the impairment. For purposes of this decision, we will imply such a finding but stress that the statutory elements to qualify for SIBS should always be addressed by findings of fact. In any event, we noted in Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993, that a finding of "direct result" is sufficiently supported by evidence of a serious injury with continuing effects and evidence that a claimant could not reasonably continue to perform the type of work he was doing at the time of his injury.

hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993.

Rather than remanding this case for further fact finding, we believe that the hearing officer also premised her conclusion of law on a finding that the claimant was in fact unable to work and, for this reason, a good faith job search was equivalent to no job search at all. Her Finding of Fact Nos. 8 and 9 support this theory of the case and are consistent with the position of the claimant throughout the hearing that, given his physical limitations, he was unable to work at all.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee establishes that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant." We also pointed out that an assertion of no ability to work must be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Finally, we emphasized that a finding of no ability to work is largely a fact specific determination of the hearing officer, *see* Texas Workers' Compensation Commission Appeal No. 94793, decided August 2, 1994, subject to reversal on appeal only if contrary to the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In the case now appealed, the uncontradicted evidence was that the claimant did not have a high school diploma and had few, if any, job skills beyond manual labor. It was also undisputed that he suffered disc herniation with nerve compression and pain radiating into the lower extremities and numbness and tingling in the right lower extremity. Conservative therapy has not been successful and surgery has been recommended. The claimant testified that his condition is worsening. Unfortunately, his statement of job restrictions (no lifting, no standing/sitting more than 30 minutes at a time) was not supported by any independent medical evidence. However, a current treating doctor, Dr. S wrote on January 31, 1995, in a Specific and Subsequent Medical Report (TWCC-64) that the prognosis for significant improvement without surgery is "essentially inexistent [sic]." Dr. S further states:

> His current restrictions include allowance for frequent change in position, he cannot tolerate either sitting down or standing up for any length of time. No stooping, and he is also unable to lift because of pain. These restrictions have played a major role in him not being able to secure gainful employment.

We believe that this medical evidence coupled with evidence that the claimant was limited

to performing jobs involving manual labor provided a sufficient evidentiary basis for a finding that the claimant, as a result of his impairment, had no ability to work. Thus, in this case, a good faith effort to obtain employment was tantamount to no effort. Under these circumstances there was sufficient evidence to support a determination that the claimant was entitled to SIBS for the first three compensable quarters.

The decision and order of the hearing officer are affirmed.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge