APPEAL NO. 951770
FILED DECEMBER 4, 1995

Following a contested case hearing held on August 16, 1995, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the sole disputed issue by determining that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the ninth and tenth compensable quarters. The appellant (carrier) asserts on appeal that the evidence is insufficient to support findings that claimant's underemployment during the qualifying periods for these compensable quarters was a direct result of her impairment and that she made good faith efforts to seek employment commensurate with her ability to work. The carrier maintains, in essence, that the evidence established that claimant's underemployment was attributable to her hypertensive condition and to the death of her husband and not to her impairment, that she could return to her former workload level as an apartment complex manager if she controlled her hypertension and practiced stress management, and that she simply chose to be underemployed as a part-time bookkeeper. Claimant's response contends to the contrary and seeks our affirmance.

DECISION

Determining that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm. We note that different inferences might reasonably be drawn from the evidence but this is not a sufficient basis to reverse a decision where there is some probative evidence sufficient to sustain a decision. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

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 15% or more; (2) has not returned to work or has earned less than 80% of the average weekly wage (AWW) "as a direct result of the employee's impairment"; (3) has not elected to commute a portion of the IIBS; and (4) "has attempted in good faith to obtain employment commensurate with the employee's ability to work." This case involves continuing entitlement to SIBS. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(a) (Rule 130.104(a)), which states the continuing entitlement criteria, provides that an injured employee initially determined to have been entitled to SIBS will continue to be entitled for subsequent quarters if during each filing period (the 90-day period preceding the compensable quarter) the employee (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." *See Also* Section 408.143(a).

The parties stipulated that on or about _____, claimant sustained a compensable injury; that she reached maximum medical improvement on August 19, 1991, (the hearing officer's decision misstated the date as August 21, 1991) with an impairment

rating of 23%; that she has not commuted any of her IIBS; that the ninth compensable quarter began on February 21, 1995, and terminated on May 22, 1995; and that the tenth compensable quarter began on May 22, 1995, and terminated on August 21, 1995. No documentary evidence was introduced which reflected the nature and extent of the compensable injury or injuries resulting in the 23% IR.

Claimant testified that on _____, while working as an apartment complex manager, she was walking with a prospective tenant to view an apartment when she slipped on a freshly painted curb and in struggling to keep from falling injured her neck, arms and back. She said she was later diagnosed with a herniated cervical disc. She further testified that the next morning, as she was sitting at her desk at work, she turned around towards her credenza and experienced sharp pain in her elbow; that the pain became so severe by the evening that her husband took her to an emergency room; and that she was later diagnosed with median nerve entrapment, which was surgically treated, and with bilateral carpal tunnel syndrome (CTS). She said she first saw her family doctor, Dr. L who referred her to Dr. H, an orthopedic surgeon; that after her surgery she underwent physical therapy and traction; that Dr. H told her she had a herniated cervical disc that was pinching a neck nerve but that nothing could be done about it; and that sometime later she began to receive chiropractic treatment from Dr. G but also remained under the care of Dr. H. No records of Dr. L were in evidence and only some massage prescriptions from Dr. H were in evidence.

Claimant further testified that she had worked in the apartment management field for nearly 20 years; that such work was physically demanding and involved being on call 24 hours a day; that she loved that work and did not find it stressful before her injury; that after her injury she returned to work in August 1991 and worked with her late husband as an apartment management team for about three years but restricted her duties to light office work while her husband did all the running around and more strenuous and physical activities; that her husband died in November 1993; that she was thereafter assigned to work at another of the employer's facilities where she had to work twice as hard for the same pay; that her duties were strenuous and stressful and involved long hours, that her workload was "unbelievable" and she became "sicker and sicker"; that in February 1994 she went to Dr. C who found her blood pressure highly elevated, prescribed medication, and advised her to seek less strenuous work; and that she thereafter resigned. Dr. C's records were not in evidence. She insisted that her resignation had nothing to do with her husband's death or her high blood pressure episode; however, she also testified that after the resignation her hypertension was quickly alleviated and she has not since had problems with hypertension. Claimant further stated that on March 1,1994, she commenced employment as a contract bookkeeper for a small company working 20 hours per week, that she was able to work at her own pace, which kept her symptoms "reduced," and that her doctor "agreed with" the work. Claimant said she continues to receive weekly massage therapy (prescribed by Dr. H) which is the only treatment that helps her; that she cannot work out because it "throws [her] neck out of place"; that she is all right so long as

she avoids strenuous activities; and that she knows she could no longer perform the duties of an apartment manager because "its a 24 hours per day job" and her "neck gives out" and her "nerves are pinched," these being problems she did not have before her injury. She insisted she was not physically capable of full-time work. Claimant stated that she has been earning approximately $150.00 per week whereas her AWW before the injury was approximately $300.00 per week. There was no dispute that she earned less than 80% of her AWW throughout the qualifying periods.

In a July 27, 1995, report, Dr. G recounted claimant's effort to avoid a fall and in so doing experiencing "sudden jerking motions throughout the neck and upper back and suddenly felt a snapping sensation in the cervical region," and of her later experiencing "severe pain in the upper regions of the back and neck area, and that the pain radiated into the left arm." Dr. G noted that claimant was thereafter treated by Dr. H, diagnosed with bilateral CTS, and operated on for ulnar nerve release "but continued to suffer pain and discomfort in the left arm." He further reported that for the past two years claimant has had continued exacerbations of the pain patterns, also suffers "at times" from hypertension and headaches, and feels "as if her neck `goes out' and experiences pain as a result." He reported claimant as stating that if she limits herself to sedentary and light duty activities "her exacerbations" are controlled and she can go about her normal daily activities with comfort but that "the more stressful and active she becomes, the stronger and longer lasting are the exacerbations." Claimant testified in detail to the same effect. Dr. G then stated that, in his opinion, claimant "must limit herself to light-duty and sedentary methods of gainful employment in order to control any further exacerbations which are inevitable. . . . I also recommend that she continue with conservative management to aid in the control of her pain and discomfort and strongly stress that she modify her lifestyle."

In the July 13, 1995, report of his independent medical evaluation, Dr. M stated that claimant underwent a surgical release of the ulnar nerve entrapment in April 1991 (which he characterized as successful from a strictly neurologic viewpoint though claimant stated she had no relief of pain), that claimant also had a left carpal tunnel release, that she has some right CTS, that she has some cervical, thoracic and lumbar disc abnormalities which do not merit surgical treatment, and that she has since had conservative treatment. His diagnosis included posttraumatic ulnar and median nerve entrapments in the left arm, surgically treated without neurologic deficits, and "post-traumatic cervical, thoracic and lumbar sprains with severe myofascial discomforts which are exacerbated by increased psychologic stress or anything other than sedentary to light physical activities."

The carrier introduced a January 14, 1995, report which indicated that a vocational specialist had opined that claimant was "under-employed as a bookkeeper," that a labor market survey indicated claimant could obtain employment as an apartment manager earning more than twice her present wages, and that according to an "IME report of September 13, 1991," by Dr. DC, claimant could go back to work as an apartment complex manager. An April 12, 1995, report from Dr. DC stated claimant's diagnosis as cervical

disc disease at two levels, a bulging disc at C6-7, cervical neuralgia at C6-7 and fibromyalgia. Referring to the diagnosis, Dr. DC stated that claimant "has reasons for cervical pain and radiculalgia" and that he recommended weight loss, swimming, low impact exercises, massage, and stress management. He felt that if claimant's blood pressure were controlled and if she had an adequate exercise program and stress management program, "she could do apartment management." The carrier also introduced a document which purported to reflect the opinion of a "physician advisor," Dr. W, that "short of carrying and climbing a ladder (if this is required) the claimant can perform the duties of an apartment manager." There was no indication that Dr. W had examined claimant nor did the document indicate the records that were reviewed, if any.

Claimant had the burden to prove by a preponderance of the evidence that she was entitled to SIBS for the ninth and tenth compensable quarters. Whether her underemployment during the qualifying periods for these quarters was the direct result of her impairment and whether she made a good faith attempt to obtain employment commensurate with her ability to work presented the hearing officer with questions of fact to resolve. It is the hearing officer who is the sole judge of the relevance, materiality, weight and credibility of the evidence (Section 410.165(a)) and it is the hearing officer who, as the fact finder, must resolve the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer made factual findings that claimant worked during the qualifying periods for the ninth and tenth compensable quarters, that her treating doctor had "restricted her from returning to her pre-injury level of employment," that she made good faith efforts to seek employment commensurate with her ability to work, and that her underemployment during these qualifying periods was a direct result of her impairment. The hearing officer quite apparently gave weight to claimant's testimony concerning the limiting effects of her impairment upon her ability to work.

We are satisfied that these findings, and the dispositive conclusions of law based on them and the other findings, are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The Appeals Panel has indicated in Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, and Texas Workers' Compensation Commission Appeal No. 94882, decided August 18, 1994, that "`good faith' is a subjective state of mind that denotes honesty of purpose, lack of intent to defraud and being faithful one's obligations," and that "the good faith effort necessary for SIBS must be to obtain employment commensurate with the ability to work, not to return to the previous employment or to employment at a certain wage scale." *See also* Texas Workers' Compensation Commission Appeal No. 951624, decided November 15, 1995. In the latter case, the principal opinion stated that in applying the "good faith attempt" criterion in an

underemployment case the hearing officer "may consider not only the kind of work being done, but also the number of hours being worked." As for the "direct result of the impairment" criterion, the hearing officer in the case we consider could believe from claimant's testimony and the report of Dr. G that indeed it was the impairment from her injury, and not her hypertension, the loss of her husband, and her election to work part-time, as the carrier contends, that resulted in Claimant's underemployment.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION

With some reluctance, I concur because of our demanding standard of review and our deference to a hearing officer's fact finding powers and not being fully convinced that there is error as a matter of law. That I might well have found differently is not the issue; rather, it is whether the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. *See* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. I write separately to express my concern that the requirements to qualify for SIBS are demanding, as provided by the legislature, and each requirement must be established by a claimant.

I find troubling here the ongoing underemployment character of this case. As set forth in detail in the principal opinion, there is no doubt an injury occurred and that the claimant was treated and found to be at MMI some six months later with a 23% IR. There is also no doubt that the claimant returned to full duty with her husband for a lengthy period of time when, according to the claimant, her husband passed away and the nature of her job position changed. She subsequently became unable to perform the requirements of the new position. Ultimately, she secured a much less demanding position for 20 hours per week and is able to work at her own pace and does not experience any injury related

problems.

While the part-time position and new pace may well be satisfying, it is quite another matter to hold that it meets the requirements of seeking employment commensurate with the ability to work. The hearing officer found as fact that the claimant satisfied that requirement here. In my opinion, this decision should be restricted to those facts and should not be viewed as in any way relaxing the specific requirements for SIBS as set forth in the statute and rules. "Commensurate with the ability" to work must be just that, and not rest on a mere satisfaction with retaining continuing part-time employment.

Stark O. Sanders, Jr.
Chief Appeals Judge