APPEAL NO. 980033

On December 11, 1997, a contested case hearing (CCH) was held The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act.) The issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 15th quarter. The appellant (carrier) requests review and reversal of the hearing officer's decision that the claimant is entitled to SIBS for the 15th quarter. No response was received from the claimant.

DECISION

Affirmed.

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 an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(b) (Rule 130.102b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the claimant during the prior filing period. Rule 130.104(a) provides that an employee initially determined by the Texas Workers' Compensation Commission (Commission) to be entitled to SIBS will continue to be entitled to SIBS for subsequent quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, 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 claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that the claimant, who is 44 years of age, sustained a compensable neck and left shoulder injury on _____; that he reached maximum medical improvement on December 1, 1992, with an 18% IR; that he did not commute IIBS; that the 15th quarter was from June 12 to September 10, 1997; and that the filing period for the 15th quarter was from March 13 to June 11, 1997 (filing period). According to documents in evidence, the claimant had cervical surgery in 1992 and 1994, and left shoulder surgery in January 1996. A physical therapist wrote that a functional capacity evaluation (FCE) done in October 1994 showed that the claimant should be able to perform medium to heavy work up to 75 pounds. The therapist wrote that the job the claimant had when he was injured was medium work. In June 1996 (Dr. S) wrote that the claimant was

to be returned to limited duty effective that date. Another physical therapist wrote on July 31, 1996, that an FCE done that month showed that the claimant can work at a medium level, but that the claimant has a restriction on using his arms over his head due to weakness of the left shoulder, and a restriction on repetitive twisting of his neck to the left side due to his neck surgeries. This therapist set out the physical requirements of the job the claimant had when he was injured and wrote that the claimant did not demonstrate the physical ability to return to that job, noting that he did not meet the lifting and constant reaching demands of that job. Dr. S noted in September 1996 that he discussed with the claimant the medium work category set out in the recent FCE.

The claimant said that (Dr. K) was his treating doctor during the filing period. Dr. K wrote that he had been seeing the claimant since 1991. Dr. S may have been a referral doctor from Dr. K as Dr. S indicated that copies of some of his letters were sent to Dr. K. Dr. K wrote on March 3, 1997, that the claimant was not physically able to seek work on a regular basis due to his "upper body and cervical disabilities" and that the claimant's limitations are "no prolonged standing or walking long distances; no climbing, stooping, bending, kneeling, crawling, prolonged sitting in one position, no bending or turning of neck, no working with arms extended." On April 15, 1997, Dr. K wrote that the claimant continued to have pain in his cervical spine and shoulder, that he is able to work only at a sedentary job, and that he is not able to return to his former type of work.

The claimant testified that he has continued to have pain in his neck and shoulder; that during the filing period he personally made written application for employment at the 12 employers listed in an attachment to his Statement of Employment Status (TWCC-52) for the 15th quarter; that during the filing period he also contacted another 15 to 20 employers about jobs, but did not list them on the TWCC-52 because he thought that only employers where he made written application could be listed on that form; that he obtained job leads from reading several different newspapers and by word of mouth; that during the filing period he did not contact the Texas Workforce Commission or the Texas Rehabilitation Commission; that in response to a newspaper advertisement he called a local baseball team about a host staff job during the filing period (the newspaper advertisement of April 18, 1997, was in evidence); that he was told by the baseball team's office to wait a few months until membership in a private club got going; that on July 6, 1997 (after the filing period) he made application for the baseball team job and was hired to initially sell memberships in a private club and then to sell beer at the stadium; that he sold memberships for about a week and then sold beer during baseball games until August 28, 1997; that during the last week or two of selling beer at baseball games he also worked on the catering crew of a restaurant and has continued to do that job.

Six of the 12 employers listed on the TWCC-52 provided a written acknowlegement that the claimant had sought employment with them. A person the claimant identified as his immediate supervisor at his beer-selling job for the baseball team stated in a written statement that the baseball team had advertised a job for membership card sales on July 6,

1997; that on July 8, 1997, the claimant applied for the job and was hired; and that the claimant began working on July 9, 1997. The carrier's vocational consultant wrote that she sent the claimant three job leads on March 10, 1997, and that during the filing period there were 43 jobs advertised in the local newspaper which appeared to be within the claimant's physical restrictions. The consultant also wrote that of the 12 employers listed on the TWCC-52, she was unable to contact several of them to verify that an application was made, she was unable to speak to the manager at one employer, several of the employers were either not sure or could not recall if the claimant had applied, one employer remembered the claimant, and another employer could not locate an application from the claimant.

It is undisputed that the claimant was not employed during the filing period. The hearing officer found that the claimant experienced significant lasting effects from his injury and is unable to return to his former employment; that the claimant's unemployment was a direct result of his impairment from his compensable injury; that the claimant contacted approximately 25 potential employers during the filing period; and that the claimant made a good faith effort to obtain employment commensurate with his ability to work. The carrier contends that the claimant failed to prove that he made a good faith effort to obtain employment commensurate with his ability to work during the filing period and that he failed to prove that his unemployment during the filing period was a direct result of his impairment. As the finder of fact the hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. The evidence that the claimant contacted the baseball team about a job during the filing period and obtained a job with that employer after the filing period is relevant to, but not necessarily dispositive of, the issue of whether the claimant made a good faith job search during the relevant filing period. His overall efforts in attempting to obtain employment during the relevant filing period must be considered. We conclude that the hearing officer's findings are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge