APPEAL NO. 980138
FILED MARCH 9, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 12, 1997. She (hearing officer) determined that the respondent (claimant) was entitled to fourth and fifth quarter supplemental income benefits (SIBS) and that the appellant (carrier) was not relieved of liability for any portion of fourth quarter SIBS because of the claimant's failure to timely file a Statement of Employment Status (TWCC-52). The carrier appeals these determinations, contending that they are not supported by sufficient evidence. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant sustained a compensable injury on _____, for which he underwent surgery on March 24, 1994, and November 1, 1994. He reached maximum medical improvement on July 31, 1995, and was assigned a 17% impairment rating. In Texas Workers' Compensation Commission Appeal No. 972515, decided January 15, 1998, we affirmed an award of second and third quarter SIBS on essentially the same facts relied upon by the claimant for the award of fourth and fifth quarter SIBS.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought 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 [SIBS] for any quarter claimed." Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. The fourth quarter was from April 22 to July 21, 1997, and the fifth quarter was from July 22 to October 20, 1997. The filing periods for these quarters were from January 21 to April 21, 1997, and April 22 to July 21, 1997, respectively. The claimant has not worked since his compensable injury.

The focus of this case was whether the claimant met the good faith job search requirement. According to an April 21, 1997, letter from (Dr. R), the treating doctor, the claimant was restricted to "very sedentary work with no lifting more than 5-10 lbs., no prolonged sitting, no bending, no twisting, and no stooping." On the TWCC-52s submitted for each quarter, the claimant listed no wages and no job contacts. He described his employment search efforts as regular (weekly or biweekly) contacts with employers in the

small community where he lived. He said he visited or spoke by telephone with these employers during both filing periods. In evidence were 12 undated letters from these employers. None offered employment. One was from a bait shop, others were construction and welding operations, sandblasting and painting businesses, a moving business and a nursery and land clearing business. The claimant also said he called "several" places from newspaper ads and made 25 to 30 other job inquiries which were not further identified. He said he believed most places had something he could do, but was not hired because no jobs were available that fit his physical restrictions. He said he never applied for work at restaurants or convenience stores, his only explanation being that he did not know how to operate a cash register.

Whether the claimant made the required good faith effort to obtain employment commensurate with his ability to work was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995. The hearing officer commented in her decision and order that she found the claimant "a sincere and credible witness who had a very limited ability to work during each of the respective filing periods. . . ." (Emphasis added.) Most problematic in this case is that, despite these severe restrictions, the hearing officer, nonetheless, found that job search efforts directed toward small business employers involved in heavy labor activities met the good faith standard presumably on the basis that the claimant thought these businesses could accommodate his work restrictions. The carrier also argues on appeal that the undated letters from potential employers carry no persuasive value as to job contacts during the filing period. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). In the discharge of this responsibility, she found the letters, in combination with the claimant's testimony, credible and persuasive that he made the job search efforts during the filing period. She also appears to have reconciled the notions of limited work ability and repeated applications at places of heavy labor with the concept of a good faith effort to obtain employment. *See* Texas Workers' Compensation Commission Appeal No. 941293, decided November 8, 1997. In addition, the hearing officer was not persuaded that this claimant should have realized that these places offered no realistic chance of employment after repeated contacts over six months and that, if he were seeking employment in good faith, he should have looked elsewhere. While another hearing officer may well have found otherwise in this case, we are unwilling to conclude that the findings of good faith were so against the great weight and preponderance of the evidence as to be clearly erroneous and unjust, which is our standard of appellate review. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We thus decline to reverse these determinations. We also conclude that the hearing officer's findings that the claimant's unemployment during the filing period was direct result of his impairment were sufficient supported by the evidence. *See* Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

Of greater concern is the hearing officer's finding that the carrier is not relieved of liability for fourth quarter SIBS for the period of time from the beginning of the fourth quarter until the TWCC-52 for this quarter was filed. *See* Texas Workers' Compensation Commission Appeal No. 961527, decided September 16, 1996. We have held that a

carrier is responsible for providing a TWCC-52 to the claimant and that its failure to do so excuses the claimant from the effects of a late filing until the form is furnished to the claimant. Texas Workers' Compensation Commission Appeal No. 972017, decided November 24, 1997, and cases cited therein.

The claimant testified that he did not recall receiving a TWCC-52 from the carrier for the fourth quarter. He did, however, remember filling others out, but was not sure for what quarters. He said he normally received the TWCC-52 forms in the mail, filled them out on the day he received them, and gave them to his attorney. He only signed the forms and the attorney completed the remainder of the form. There was no evidence in this case of a copy of a letter from the carrier transmitting to the claimant a TWCC-52 for the fourth quarter. The document that the parties concentrated on as evidence of this fact was dated January 31, 1997, and was obviously for the third quarter, not the fourth. In any case, it was also undisputed that the claimant signed the TWCC-52 for the fourth quarter on May 2, 1997. This form was not received by the carrier, as the parties stipulated, until June 26, 1997, when the attorney faxed it to the carrier. There was no explanation for the delay. Because the uncontradicted evidence from the claimant was that all he did was sign the form and send it to his attorney and the form was dated May 2, 1997, the delay apparently occurred in the attorney's office. The hearing officer ultimately concluded that the carrier "did not establish that it provided a TWCC-52 to the Claimant." Rather, she believed the form signed by the claimant on May 2, 1997, was given him by his attorney. Thus, we have a situation where the claimant has in hand a TWCC-52, but because he did not receive it from the carrier, he could, for whatever reason, wait another seven weeks to file the form, and still not suffer any penalties for the delay. However anomalous this conclusion may be, it is consistent with the obligation of the carrier to provide the form and the consequences attached to its failure to do so.

In its appeal, the carrier argues that the claimant's memory was so poor about how he received the TWCC-52 that he should be given no credibility and that the conclusion is compelled that the form he signed on May 2, 1997, was sent him by the carrier. We decline to substitute our opinion of what facts the evidence established for that of the hearing officer. Under our standard of review, we affirm the finding that the carrier did not send the claimant the TWCC-52 and find no error of law in the hearing officer's conclusion that, under these circumstances, the carrier was not relieved of liability to pay a portion of fourth quarter SIBS.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Christopher L. Rhodes
Appeals Judge