APPEAL NO. 980139
FILED MARCH 11, 1998

Following a contested case hearing (CCH) held on December 15, 1997, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first through the seventh, the 11th, and the 14th compensable quarters and is not entitled to SIBS for the eighth, ninth, 10th, 12th, and 13th compensable quarters. The appellant (carrier) has appealed, urging the insufficiency of the evidence to support the SIBS entitlement determinations. Claimant filed a response containing rebuttal of the carrier's assertions.

DECISION

Affirmed in part; reversed and rendered in part.

The determinations of the hearing officer that claimant is not entitled to SIBS for the eighth, ninth, 10th, 12th, and 13th compensable quarters have not been appealed and thus have become final pursuant to Section 410.169.

The parties stipulated that claimant suffered an injury in the course and scope of his employment on _____; that he reached maximum medical improvement (MMI) on January 11, 1993; that he received a 24% impairment rating (IR); that he did not commute his impairment income benefits; that he filed a Statement of Employment Status (TWCC-52) form for the first compensable quarter on July 25, 1997; that he did not return to work earning 80% of his preinjury average weekly wage during the filing periods for any of the 14 compensable quarters at issue; and that he was a full-time student subsequent to his injury up until May 12, 1995.

The dates of the 14 compensable quarters at issue and their respective filing periods were neither stipulated to nor specified in findings of fact. The hearing officer did find that the first compensable quarter started on May 31 and ended on August 29, 1994, with the next 13 quarters following sequentially, as set out on the last page of claimant's Exhibit No. 1; and that the filing periods for the 14 quarters were the periods of at least 90 days immediately preceding the start of each compensable quarter with the filing period being essentially the prior quarter. Thus, the filing period for the first quarter began on March 2 and ended on May 30, 1994, and the filing period for the 14th quarter began on May 28 and ended on August 26, 1997.

As noted, the parties stipulated that claimant filed his TWCC-52 form for the first compensable quarter on July 25, 1997. By way of partial explanation the carrier represented that it had assessed an IR of 19% IR after the MMI date and paid IIBS on that rating and that the 24% IR was not assigned by the designated doctor, (Dr. LW), until July 8, 1997.

The hearing officer made 34 findings of fact relating to the two conclusions that claimant is entitled to SIBS for the first through seventh, the 11th, and the 14th compensable quarters, and that he is not entitled to SIBS for the eighth through tenth, the 12th, and the 13th quarters. The carrier appears to take issue specifically with assertions in Findings of Fact Nos. 2 and 3 that claimant had limitations on sitting and had cervical cord compression but does not otherwise specifically appeal the factual findings. The gist of the carrier's contentions on appeal are that claimant's attendance at school as a full-time student under the auspices of the Texas Rehabilitation Commission (TRC) until May 12, 1995, did not relieve him of the requirement to also seek employment while in student status, that any job-seeking efforts that he made during any of the 14 filing periods were inadequate to meet the requirement for SIBS entitlement that he make a good faith attempt to obtain employment commensurate with his ability to work (Sections 408.142(a) and 408.143), and that he did not prove with medical evidence that he had no ability to work during any of the filing periods.

Claimant testified that he is 56 years of age; that at the time of his injury, he had worked for (employer) for eight years as an equipment operator; that he was injured on _____, when he fell to the ground while getting off a mower and injured his left shoulder and neck; and that he continued working until November 18, 1992, when (Dr. G), who operated on his left shoulder, referred him to the TRC for retraining because he continued to reinjure himself. Dr. G wrote on November 18, 1992, that claimant has been referred to the TRC and that continued participation in his present employment activities is not medically advisable. Claimant further stated that the TRC had him evaluated and sent him to college for more education so that he could work in management-type jobs since he could no longer do the heavier work he had previously done; that he has not worked since November 18, 1992; and that he underwent shoulder surgery in 1993.

Claimant further testified that in 1993 he enrolled as full-time student at (college) under the auspices of the TRC; that he took full course loads during the fall and spring semesters; that he also attended courses during semester breaks and attended summer school sessions full time; and that he completed his studies at the college on May 12, 1995. Claimant also testified that it was painful for him to sit for long periods of time. TRC counselor (Ms. N) wrote on July 31, 1997, that claimant is a client of the TRC, that claimant attended the college "from 7/27/93 through 6/3/95," and that claimant successfully completed his program at the college and will be continuing his studies at the (university) under TRC sponsorship. She testified that claimant cannot stay in class for long periods and so has not continued with his education and that he is taking a lot of pain medication which affects his concentration. She also stated that claimant had not provided medical documentation that he cannot attend school. Claimant stated that in the fall of 1995 he took two evening courses at his own expense and was considering pursuing further study but did not enter the university. The college transcript reflects that claimant took 17 hours in the fall 1993 term, three hours in the mid-winter term, 15 hours in the spring 1994 term, six hours in the first summer 1994 term, three hours in the second summer 1994 term, 15 hours in the fall 1994 term, 12 hours in the spring 1995 term, and three hours in the fall

1995 term, and that he was awarded an associate's degree in applied science in May 1995, graduating *cum laude*.

Claimant stated that since completing his studies at the college, he basically stayed home, looked for a couple of jobs, lost his telephone, and took a couple of evening classes. He further testified that on dates which he could not recall, he looked, unsuccessfully, for a night clerk job at some motels and that he did not contend that these efforts constituted a serious job search because he had not documented them. He also indicated that since 1993 he has had restrictions from (Dr. V) from lifting more than 20 pounds and from prolonged sitting and that his current treating doctor, (Dr. JW), has him in a "no work status" because of a spinal cord compression and concern for further injury and so he has not looked for work; that he takes pain medicine twice a day which makes him tired; and that he has some loss of control and sensation in his left fingers which impedes his typing and guitar playing. Claimant said that he did not receive any medical treatment for his injury between January 1993 and June 1997 but indicated he did not understand that he was entitled to continued medical benefits after the cessation of income benefits, and that he could not afford to pay for medical treatment. Claimant said he did not look for work while in school because he did not realize he was required to do so while cooperating with the TRC. He also stated that on an occasion in 1995, his wife drove him to a job interview in (city 1), (state 1) and to another in (state 2). He also said he talked to the Texas Workforce Commission (TWC) but that he did not have a required medical clearance from a treating doctor and at the time did not even have a treating doctor.

In item 8 (listing employers contacted for employment during the last 90 days) of the TWCC-52 forms for the first five quarters, which he signed on "7/25/97," claimant stated that he had not contacted any employers because he maintained a full schedule of college courses, 38 hours, "graduated May 12," and had "never received a medical clearance to return to work." Claimant contended that his full-time school attendance to May 12, 1995, constituted his good faith effort to obtain employment commensurate with his ability to work for the first five quarters. On the TWCC-52 form for the sixth quarter, claimant listed two employment contacts, the TWC for a veteran service officer position, and the university for a research assistant position, and he also wrote, "[n]o medical clearance." On the TWCC-52 form for the seventh quarter, claimant listed one employment contact, the (contact 1) for an assistant grant writer position, and also wrote, "[n]o medical clearance." On the TWCC-52 form for the eighth quarter, claimant wrote, "attended and graduated grant writing school," and "no medical clearance." On the TWCC-52 form for the ninth quarter, claimant listed two employment contacts, the (contact 2) for a public relations coordinator position, and the university for a communications officer position, and also wrote, "[n]o medical clearance." On the TWCC-52 form for the10th quarter, claimant listed two employment contacts, namely, the (contact 3) for a transport manager position, and (contact 4) for a dispatcher position, and also wrote, "[n]o medical clearance." On the TWCC-52 form for the11th quarter, claimant listed one employment contact, the employer's school district, for a substitute teacher position, and also wrote that he "returned to work on 11-1-96 worked 3.5 days could not continue." On the TWCC-52 form for the 12th quarter, claimant listed one employment contact, (contact 5), and also wrote "[n]o medical coverage." On the

TWCC-52 forms for the 13th and 14th quarter, claimant listed no employment contacts and wrote, "[n]o medical clearance."

Dr. V, to whom claimant was referred by Dr. G, reported on January 11, 1993, that claimant seems to be mildly reinjuring the brachial plexus with each episode of prolonged awkward positioning or heavy lifting. She said that his work restrictions should include no vibration, no lifting above shoulder level with the left arm, no prolonged work at or above the shoulder level with the left arm, no lifting of more than 20 pounds with the left arm, and the ability to refuse tasks he believes will bring on loss of sensation or strength. This report and the November 18, 1992, statement of Dr. G that it is inadvisable for claimant to continue in his present employment activities are the only medical records in the file that precede or are contemporaneous with claimant's attendance at the college, and claimant indicated he did not see a doctor after seeing Dr. V on January 11, 1993, until seeing Dr. LW on July 8, 1997.

Dr. LW reported on July 8, 1997, that she evaluated claimant at the request of the Texas Workers' Compensation Commission (Commission) for an IR only and that claimant had apparently been previously determined to be at MMI effective "1/11/93" and given a 24% IR by Dr. G. Dr. LW diagnosed cervical spondylosis with myelopathy, a brachial plexus traction lesion, and intrinsic shoulder pathology. She also stated that claimant is developing lower extremity upper motor neuron signs due to apparent cord compression and progressive radicular symptoms in the left upper extremity and early symptoms in the right upper extremity.

Dr. JW wrote on November 9, 1997, that claimant developed motor and sensory impairment to the left upper extremity associated with marked weakness and chronic, intermittent pain; that despite the shoulder surgery and supporting physical therapy, after he tried to return to work, vibratory motions of the heavy equipment he formerly operated further degraded his neuromotor status in his left upper extremity; that Dr. V saw claimant and concluded he had a severe injury to his left brachial plexus; that "some oversight in the application of benefits" led to claimant's being without medical care for some four years or more until the Commission reviewed his file and detected the oversight; and that Dr. LW felt claimant may have a cervical cord compression. Dr. JW stated that his principal concern is with the neurological findings, especially with cervical cord compression and the hazard which may exist of significant and irreversible exacerbation, and that he recommends claimant be on a "no-work, disability status" pending resolution of the issue of possible risk of further cord compression and other determinations of diagnosis, treatment, and rehabilitation.

Common to all quarters at issue the hearing officer found that claimant has cervical cord compression which make it difficult for him to use his left arm and limits his ability to even sit or do sedentary work for extended periods of time, that claimant is unable to return to his prior employment due to the impairment from the compensable injury, that the impairment from the compensable injury prevents claimant from returning to ordinary labor

jobs, that claimant has restrictions on his ability to lift or use his left arm, and that he has some ability to do sedentary work for limited periods with the ability to move around.

Concerning the first five quarters, the hearing officer found that claimant's impairment included limitations on sitting which prevented him from taking more than a 17-hour class load while at the college; that claimant took a full class load until May 12, 1995, with the help of the TRC and took two additional classes the following fall believing he would be entering the university; that claimant made minimal attempts to find employment during the first five filing periods due to his full-time school work; that claimant had no ability to work beyond the class load he was taking at the college in 1994 and through May 12, 1995; and that claimant's full-time school work, including classes between semesters and full loads during summer school constituted a good faith effort to obtain employment commensurate with his ability to work during the first five filing periods. We do not view these findings as being so against the great weight and preponderance of the evidence as to be clearly wrong and unjust (Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)) and determine these findings sufficient to support the conclusion that claimant is entitled to SIBS for the first five compensable quarters.

In Texas Workers' Compensation Commission Appeal No. 960999, decided July 10, 1996, the Appeals Panel observed that "SIBS is not intended to be a degree program." However, in that case the injured employee voluntarily resigned from light-duty employment to pursue college studies. In Texas Workers' Compensation Commission Appeal No. 93936, decided November 29, 1993, the Appeals Panel affirmed a hearing officer who determined that the employee, who was attending school under the auspices of the TRC and who applied for only one job during the filing period, was not entitled to SIBS for the third quarter because he did not attempt in good faith to obtain employment commensurate with his ability to work. The hearing officer in that case noted that the employee did not have classes three days a week during the 1993 spring semester, that he did not have any courses during the daytime on any day of the week during the summer of 1993, and that the filing period encompassed the months of April and May 1993. The Appeals Panel agreed with the hearing officer's rationale that while attendance in a retraining program can be considered in evaluating the good faith effort, it did not remove the employee's responsibility to make a good faith attempt to find some employment.

In Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993, the Appeals Panel affirmed the decision of the hearing officer who determined that the employee, who was a full-time student under the TRC program during the filing period taking 12 hours of courses, and who obtained a part-time job for the last month of the filing period, was entitled to SIBS. The decision stated that because an injured employee is in a study program with TRC does not automatically remove the employee from the statutory requirement of making a good faith effort to obtain employment commensurate with the ability to work but that it may well be an appropriate factor to be considered along with other factors in determining the good faith attempt criterion. The opinion stated that we are not stating a requirement that an injured employee

who is cooperating with the TRC to assist in alleviating or overcoming the effects of a job-related injury is required, nonetheless, to seek out full or any particular level of employment to be entitled to SIBS but rather that "all the facts affecting the qualifications for SIBS must be considered" under the particular facts of the case.

In Texas Workers' Compensation Commission Appeal No. 951580, decided November 1, 1995, the Appeals Panel affirmed a hearing officer's determination that a full-time student who was cooperating with the TRC made a good faith effort to obtain employment commensurate with his ability to work where the evidence showed that the employee made no effort to find work. The employee testified that he had no time to work because he was required to attend classes, use the computer lab, perform research, study, do homework, and attend physical therapy for two and one-half to four hours per day, four to five days per week.

In Texas Workers' Compensation Commission Appeal No. 972623, decided February 2, 1998, the Appeals Panel, with one member dissenting, affirmed the hearing officer's determination that the employee, who attended college full time, had outside-the-classroom study, research, and writing, and who applied for a substitute teacher position during the latter part of the filing period, made a good faith attempt to obtain employment commensurate with his ability to work. There was testimony that the employee averaged from three to five hours of class-associated work per day involving homework, studying, research, and writing papers. *And see* the cases cited in the dissenting opinion.

The SIBS cases involving employees in student status tend to be fact specific. In the case we now consider, the hearing officer found that claimant's impairment including limitations on sitting prevented him from taking more than a 17-hour class load while a student at the college and that he had no ability to work beyond the class load he was taking at the college in 1994 and through May 12, 1995. There was no finding concerning the amount of time claimant spent outside the classroom studying and performing research, writing and other tasks related to his classroom time and the the evidence was not expressly developed in this area. While one could argue with these findings and another fact finder may well have drawn different inferences from the evidence, we cannot say they are against the great weight of the evidence. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and as the trier of fact is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey , 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)).

Concerning the sixth quarter, the hearing officer found that during the filing period claimant registered with the TWC and interviewed for executive-level jobs, that he does not have complete records of his job searches during the summer of 1995 due to the passage of time, and that he made a good faith effort to obtain employment commensurate with his ability to work. According to the TWCC-52 for this period, claimant applied for two positions, one with the TWC and one with the University. The evidence did not establish

when in the filing period these two contacts were made, whether they were made on different days, and whether there was any follow up by the claimant.

Concerning the seventh quarter, the hearing officer found that during the filing period claimant drove to (state 1) for a job interview, took two classes at his own expense in anticipation of returning to school with the assistance of the TRC to obtain a baccalaureate degree, and made a good faith effort to obtain employment commensurate with his ability to work. Claimant's TWCC-52 listed the one position he applied for in the filing period, that of an assistant grant writer.

Concerning the 11th quarter, the hearing officer found that during the filing period claimant interviewed for one job, accepting a different job as a substitute school teacher working three days during November 1996, that he was unable to perform the duties of a substitute school teacher, and that he made a good faith effort to obtain employment commensurate with his ability to work. Claimant's TWCC-52 for this period reflected that he worked for 3.5 days in November 1996 and could not continue.

We regard the findings that claimant made good faith efforts to obtain employment commensurate with his ability to work during the filing periods for the sixth, seventh, and 11th compensable quarters as being against the great weight and preponderance of the evidence. King, *supra*. The Appeals Panel has stated that the number of employment applications made does not, per se, establish or fail to establish a good faith job search (Texas Workers' Compensation Commission Appeal No. 941160, decided October 12, 1994; Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1994). However, the Appeals Panel has also said that the number of job searches is a factor to consider along with such other factors as when the applications were made. Texas Workers' Compensation Commission Appeal No. 960818, decided June 3, 1996. We have further stated that the requirement to make a good faith attempt to obtain employment generally spans the entire filing period. Texas Workers' Compensation Commission Appeal No. 971184, decided August 1, 1997; Appeal No. 960999, *supra*.

We view the evidence in this case as falling well short of that which is legally sufficient to support these findings as to the sixth, seventh, and 11th quarters. In essence, claimant went from being a full-time college student taking a full course load to, as he put it, basically staying at home and looking for a couple of jobs. Good faith has been generally stated to be an intangible and abstract quality, denoting honesty of purpose, freedom of intention to defraud, being faithful to one's obligations, and which may not be determined by the individual's protestations alone. Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993. In Texas Workers' Compensation Commission Appeal No. 960964, decided June 26, 1996, the Appeals Panel reversed and rendered a decision that the employee, who made only one job contact in the filing period, was not entitled to SIBS as a matter of law. That decision stated that the 1989 Act contemplates an injured employee returning to the workforce when able to do so and places certain duties and obligations on a claimant to seek employment within the restrictions resulting from a compensable injury, and that overt manifestations of the attempt to obtain employment

commensurate with the ability to work must be shown and evaluated in determining whether there has been a good faith effort as opposed to one's own conclusion that he has made a good faith effort, citing Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995.

Concerning the 14th quarter, the hearing officer found that during the filing period (May 28 through August 26, 1997) claimant actively sought medical treatment for his condition and saw a Commission-designated doctor who confirmed probable cervical problems with cord compression, that the treating doctor identified cord compression and recommended claimant not work due to the possibility of increasing permanent neurologic deficits which appeared to already exist, that claimant had no ability to work, and that claimant's lack of a job search constituted a good faith effort to obtain employment due to his medical condition. We view these latter two findings as being against the great weight and preponderance of the evidence. The medical records reflect that during the filing period, claimant was evaluated by Dr. LW, the designated doctor, on July 8, 1997, and her report was silent concerning claimant's ability to work. Previously, claimant's shoulder surgeon, Dr. G, had written on November 18, 1992, that it was inadvisable for claimant to continue in his present job activities. Dr. V's report of January 11, 1993, was silent on claimant's ability to work. Dr. JW's report stated that "at present, it is recommended that this patient be on a no-work, disability status pending resolution of the issue of possible risk of further cord compression and other appropriate determinations of diagnosis, treatment, and rehabilitation." However, Dr. JW's report, the only medical report mentioning claimant's work status, was dated November 9, 1997, a date more than two months after the close of the filing period. Accordingly, we view the evidence as insufficient to support the hearing officer's findings concerning claimant's entitlement to SIBS for the 14th compensable quarter. King, *supra.*

The hearing officer's decision and order is affirmed in so far as it determines that claimant is entitled to SIBS for the first five compensable quarters and it is reversed and a new decision is rendered that claimant is not entitled to SIBS for the sixth, seventh, 11th, and 14th compensable quarters.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge