APPEAL NO. 980153
FILED MARCH 11, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 19, 1997, a contested case hearing (CCH) was held with hearing officer. The issues were whether the appellant, who is the claimant, was entitled to supplemental income benefits (SIBS) for his fifth compensable quarter and whether the respondent (carrier) was relieved of liability for some portion of the period due to an incomplete filing of the Statement of Employment Status (TWCC-52) through October 15, 1997.

The hearing officer held that the claimant, who the hearing officer found was underemployed throughout the filing period for the fifth quarter of SIBS as a direct result of his impairment, was not eligible for SIBS because he failed to make a good faith search for employment commensurate with his ability to work by not seeking a "potentially higher paying job." The hearing officer held that the carrier was not relieved for any period of SIBS due to an "incomplete" TWCC-52, because the TWCC-52 contained all current information when filed. Although the claimant was found not entitled to any SIBS, the hearing officer held that the carrier would not be relieved of any period of payment (if it had been liable for SIBS) due to any "late filing" of the TWCC-52.

The claimant has appealed the determination that he did not make a good faith search for employment. He argues that he could not search for employment because he was already working full time. The claimant argues that the vocational counselor who testified for the carrier was not disclosed to him prior to the CCH so he was not prepared to rebut her testimony. The claimant disputes a finding of fact that he did not cooperate with the vocational counselor. The claimant cites previous Appeals Panel decisions that stand for the position that an injured employee who is employed does not have the statutory obligation to search for a higher paying job. The claimant argues that the rationale of the benefit review officer in recommending against SIBS was that his underemployment was not the direct result of his impairment, after the carrier had agreed to partially settle the case. The carrier responds that the Appeals Panel decisions cited by claimant are not absolute and that all cases run on the particular facts of the case. The carrier argues that the job which claimant held during the filing period was one created by his family as an accommodation for him during a period of transition and, as such, did not absolve the claimant from continuing to seek employment. The carrier argues that the claimant failed to object to the testimony of the vocational counselor at the CCH and cannot raise an objection for the first time on appeal. The carrier finally points out that the claimant is raising matters not raised prior to appeal and such new matters should not be considered. The carrier has also filed a cross-appeal which disputes the hearing officer's determination that claimant's underemployment was the "direct result" of impairment, pointing out that the underemployment resulted from acceptance of a family job at less than the minimum wage. The carrier further disputes that claimant timely filed a complete TWCC-52 because he did not furnish information about his remaining two weeks of wages until the benefit review

conference (BRC) in October 1997. The carrier argues that the claimant's failure to timely supplement his TWCC-52 amounted to a failure to timely file it.

DECISION

Affirmed.

The claimant was employed by (employer) on _____, when he injured his back, which resulted in surgery. It was stipulated that the "qualifying period" for the fifth quarter was May 18 through August 16, 1997; however, this is a misnomer and the referenced period in the stipulation is the "filing" period for the fifth quarter, or the period for which compliance with statutory requirements is analyzed. *See* 28 TEX. ADMIN. CODE §' 130.101 (Rule 130.101). It was undisputed that the claimant filed a TWCC-52 for the fifth quarter on August 5, 1997, disclosing his wages received to date, and that it was received by the carrier on August 15, 1997. It was also stipulated that his pre-injury average weekly wage was $539.00.

Claimant had worked the filing period prior to the quarter in issue for a video rental store but was unable to continue due to the physical demands of that job. He further was employed at the time of the CCH in a full-time, minimum wage trainee position. During the filing period, he worked in his mother's lounge, The (HO Lounge), doing managerial work for which he did not receive tip income. He stated that his pay started out at a gross of $270.00 biweekly, and increased to $150.00 per week (also paid biweekly). He covered the hours of 6:00 p.m. through midnight, six days a week, but this entailed arriving around an hour earlier and staying an hour later than the open hours of the lounge. He said that the amount paid was "realistically" the amount his mother could afford because there wasn't much money coming in. Claimant said that when he went home, he slept until around noon.

Claimant was given a total of six job referrals for security guard positions by the vocational counselor in two letters, dated June 29 and July 29th. However, although the cover letter of these referrals instructs the claimant to contact the employers, none are listed. The attachments simply list job openings records at the Texas Workforce Commission; the vocational counselor, (Ms. J), testified that these were sedentary to light-duty security positions which would not require the applicant to accost intruders but merely to call law enforcement in the case of suspicious activity. The claimant said he contacted Ms. J and asked her not to forward security job positions because they involved work beyond his physical capability. Claimant testified that he was released with restrictions not to lift over 15 to 20 pounds, with no prolonged standing, bending, or lifting. The claimant said he did not search for other employment during the quarter because he already had a full-time job and that he had no time to search for other employment.

As the claimant correctly points out, there is no requirement in the SIBS statute or administrative rules that a claimant who is employed full time seek better employment or employment at better pay. Texas Workers' Compensation Commission Appeal No.

970699, decided June 4, 1997. That decision quotes from Texas Workers' Compensation Commission Appeal No. 962451, decided January 14, 1997, that:

> [A] claimant who actually has a job during the filing period is not required to be engaged in an active search for employment and the failure to do so is not determinative of the good faith job search criterion. Texas Workers' Compensation Commission Appeal No. 951045, decided August 8, 1995. Section 408.144(c) expressly states that an employee who does not accept an offered job that he or she is physically capable of performing, and that is geographically accessible, will nevertheless have the offered (but not accepted) wages attributed to him or her. This indicates to us that the intent of the legislature was first and foremost to have the employee restored to gainful employment, the physical capabilities and geographical proximity being the primary thresholds that must be met. SIBS is paid not only for unemployment but for underemployment, *i.e.*, less than 80% of the wage made in employment at the time of injury. The fact that subsequent employment might pay less than the previously held job was clearly anticipated and provided for.

The decision in Appeal No. 970699, *supra*, reversed and rendered a determination in favor of claimant's eligibility for SIBS and expressly rejected the hearing officer's decision that the claimant was "obligated to seek a better position." We note that this reversal was done under the facts of that case; however, nevertheless, to the extent that the hearing officer here opines that there is an obligation in general under the statute to seek a higher paying job, his reasoning would be erroneous. But we do not read his decision as indicating that this is the sole basis for his determination, regardless of how the finding of fact is worded.

This case introduces another variable because the claimant's work in this case was for less than minimum wage for his mother. While it may be, as the claimant testified, that the wages he received were about as much as his mother could afford to pay, they were likely less than he would have received doing comparable work for an unrelated employer. We believe that the hearing officer could, and did, consider in this case that employment in the family business was held in the spirit of tiding the claimant over between jobs and consequently the requirement to search for employment remained viable. While the sounder way to determine the issue might have been, as the carrier's appeal suggests, to hold that the lower pay under these circumstances was not the "direct result" of his impairment, we will not substitute our judgment for that of the hearing officer merely to "tinker" with his reasoning and fact finding.

We reject the carrier's cross-appeal, although the result in this case is not changed. In our view, Section 408.143(c), providing that a carrier is relieved of liability for the period of time that there is a "failure to file" a statement of earnings and job search efforts, cannot be extended to encompass the situation where there are additional wages earned or additional contacts made after the date that the TWCC-52 is filed. While we have in the

past held that there are situations where a TWCC-52 is so incomplete that it was, in effect, not filed, it is clear that these cases involved an intentional nondisclosure so that the TWCC-52 was inaccurate or misleading on the date it was filed. Texas Workers' Compensation Commission Appeal No. 941629, decided January 20, 1995. In fact, the Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 970435, decided April 24, 1997, has specifically held that equating an incomplete TWCC-52 to non-filing should be reserved only for "clear and intentional cases" of nondisclosure, in the absence of a statutory or administrative rule sanction where a timely filed TWCC-52 merely omits some information brought forward at a later time.

So that no doubt can remain where it is argued that a claimant should have "supplemented" his TWCC-52 with facts occurring after the date of filing, we hold that a TWCC-52 which is accurate when filed, as here, with no proven intent to mislead or conceal, cannot be equated with a "failure to file" under Section 408.143(c) for purposes of absolving the carrier of liability for the period of time between filing of the TWCC-52 and providing the additional information.

Finally, we agree that we cannot consider new information raised for the first time on appeal, including the argument that Ms. J's status as a witness was not disclosed to the claimant. She testified without objection at the CCH, and there is no action of the hearing officer that we can therefore say constituted "error." Nor may we consider allegations that the carrier offered to settle the case at the BRC. The hearing officer must consider the facts that are presented to him at the CCH, and we review his determination of that record, and do not make fresh determinations of fact at the Appeals Panel level.

For the reasons stated above, we affirm the decision and order of the hearing officer on all points appealed.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge