APPEAL NO. 980156
FILED MARCH 13, 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 (CCH) was held on December 30, 1997, with hearing officer. With respect to the issues before her, the hearing officer determined that appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first and second compensable quarters because claimant's underemployment was not a direct result of his compensable injury. The hearing officer's determinations on a good faith effort to obtain employment were not appealed and have hence become final. Section 410.169.

Claimant appealed, contending that the reason he was laid off by the employer was due to his injury, that his underemployment with a subsequent employer was because he was unable to do some of the work because of his compensable injury and that claimant's loss of seniority with the original employer was due to the compensable injury. Claimant requests that we "reform" the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

First, we note that there were no stipulations and that many of the hearing officer's determinations regarding jurisdiction, venue, and commutation of impairment income benefits (IIBS) are not supported by the evidence. However, as those determinations have not been appealed, they have become final. Section 410.169.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the 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 (AWW) 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 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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, and amount of, [SIBS]."

The hearing officer, in unchallenged determinations, determined that claimant has made a good faith effort to obtain employment commensurate with his abilities during the periods at issue. A medical report supports the determinations that claimant sustained a compensable back, right arm and shoulder injury on _____, reached maximum

medical improvement (MMI) on July 2, 1996 (the hearing officer indicates an April 19, 1996, date of MMI, but the only medical report shows July 2, 1996), with a 17% IR. The parties and the hearing officer accept that the filing period for the first quarter was from January 12 through April 11, 1997, with the filing period for the second quarter being April 12 through July 11, 1997.

After claimant's injury and a period of recovery, claimant returned to his job as a truck driver at his preinjury wage for the employer. Claimant testified that he would occasionally miss some time from work so he could see the doctor for continuing treatment for his compensable injury. Claimant conceded that he may have missed one or two other days also. Claimant apparently (based on a memo in the record) was counseled about his performance and attendance on July 1, 1996, and was instructed to meet with his supervisor after he finished his route on August 1, 1996. For whatever reason (claimant contended that there was a misunderstanding and the dispatcher told him to go home on August 1), claimant did not keep that appointment and the employer, by memo dated August 2, 1996, terminated claimant's employment for "insubordination" for failing to keep the appointment. Claimant was terminated three days short of having worked for the employer 10 years (claimant acknowledged receipt of the memo on August 9, 1996).

At some time, apparently around January 1, 1997, claimant secured employment with. (Employer L), as a truck driver. Claimant testified that his beginning pay was $7.00 an hour (compared to his preinjury wage of $12.50 an hour) and that when Employer L did not have driving work then he would be required to work in a warehouse doing heavy lifting, which he was unable to do, due to his injury and arm impairment. In a sequence of 15 pay periods, claimant does not have check stubs for three weeks and claimant contends that during those weeks there was no driving work, that he was unable to work in the warehouse and that he did not get paid. There is some evidence that claimant may have said at some point that he lost those stubs. Carrier presented evidence that claimant was paid during the "missing" weeks. Claimant continued to work for Employer L during the filing period for the first compensable quarter and six weeks into the filing period for the second compensable quarter.

Claimant subsequently quit work for Employer L and obtained a truck driving job with (Employer WTD) at $8.00 an hour, doing much the same work as he had with the original employer. There was considerable testimony and speculation why claimant was only making $8.00 an hour with the employer when his previous wage had been $12.50 an hour. The hearing officer could, and apparently did, believe that claimant's higher wage with the employer was due to claimant's 10 years of employment, seniority and commensurate wage increases. The hearing officer, in the Statement of the Evidence, commented:

> [Claimant] testified at the hearing that his impairment did not keep him from performing his preinjury job. The reason Claimant is earning less now is not due to his injury. Therefore, it is concluded that Claimant's impairment has no impact on his inability to earn wages equivalent to his preinjury wages, and the direct result requirement for obtaining [SIBS] cannot be met.

Claimant, in the appeal and at the CCH, contends that when work with Employer L "was slow and they did not need a truck driver the Claimant was offered a job helping with other tasks but these required heavy lifting. . . ." and that claimant "knows no reason why [Employer L] would fraudulently state that the Claimant worked more time than he actually did. . . ." There was clearly a conflict in the evidence regarding the weeks and amounts claimant was paid by Employer L. We have often noted that the hearing officer is the sole judge of the weight and credibility to be given to the evidence (Section 410.165(a)) and that as the fact finder the hearing officer resolves inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Further, the hearing officer, as the trier of fact, may believe all, part or none of the testimony of any witness, including the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Here, the hearing officer obviously believed, and is supported by sufficient evidence, that claimant was terminated by the employer for failing to meet with the supervisor and that the reason claimant was underemployed with Employer L and Employer WTD was for other reasons than claimant's compensable impairment. We understand that claimant contends that his termination was a direct result of his compensable injury and that claimant testified about what "really took place" on August 1, 1996. However, the hearing officer had all this information available in making her decision and determined that the reason for claimant's termination was claimant's "insubordination." The hearing officer's determination on that point is supported by the employer's memos of August 2, 1996.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge