APPEAL NO. 980210
FILED MARCH 20, 1998

Following a contested case hearing (CCH) held on January 5, 1998, 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 finding that during the filing periods for the 10th and 11th compensable quarters the appellant (claimant) failed to make a good faith attempt to obtain employment commensurate with his ability to work and by concluding that claimant is not entitled to supplemental income benefits (SIBS) for those quarters. The hearing officer also determined that claimant's average weekly earnings for the 11th quarter for SIBS were $65.44. Claimant has appealed the adverse SIBS determination for the 11th compensable quarter, contending that his evidence established that he satisfied the requirement for making a good faith effort, during the filing period for that quarter, to obtain employment commensurate with his ability to work. Claimant also asserts that he received ineffective assistance from the Texas Workers' Compensation Commission (Commission) ombudsman who assisted him at the hearing, that he did not receive a detailed booklet informing him on how to obtain SIBS, and that not prevailing for the 10th and 11th compensable quarters precludes the payment of any more SIBS by the respondent (carrier). The carrier's response sets forth the evidence the carrier feels sufficiently supports the challenged findings.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable injury on _____, that he reached maximum medical improvement on November 19, 1993, with an impairment rating of 24%, that he did not commute any portion of the impairment income benefits, and that the filing periods for the 10th and 11th compensable quarters were from April 14 through July 13, 1997, and from July 14 through October 12, 1997.

Claimant, who indicated he was ___ years of age, testified that after injuring his lumbar spine at work in 1992, he returned to work at the employer's lumber mill as a security guard in 1994; that sometime later, with his doctor's approval, he obtained a higher-paying position with the employer as a trimmer saw operator; that he worked at that job for about six months to April 8, 1997, when he stopped working because the employer did not want him working at that position while taking medicine that made him drowsy and because his doctor, (Dr, M), increased his lifting restriction from 35 to 15 pounds. Claimant indicated that his employment with the employer had not been terminated and that he could return to the trimmer saw operator job if he avoided medicine that made him drowsy. He said he had not looked for other employment during the 10th quarter filing period because he was "getting ready for surgery," which he said was scheduled for July 1997, and because he could hardly stand or walk due to his back and legs although he also agreed that he was "not 100% disabled" during that period. Claimant conceded that in April 1997

his doctor recommended spinal surgery and that he decided not to get it scheduled before July 1997 to give him time to pay off some bills. He did not take the position that during the 10th quarter filing period he was unable to perform any type of work at all.

Dr. M wrote on March 27, 1997, that claimant was on light duty at work, that he has a herniated disc at L5-S1, that his symptoms are worsening, and that he will stay on the same restrictions at work. On April 15, 1997, Dr. M reported that claimant is willing to proceed with surgery if (Dr. F) thinks he would benefit, that he gave claimant a note to go back to light-duty work with no pushing, pulling, or lifting of more than 10 pounds, and no bending or twisting of the waist, and that claimant is on medications that cause drowsiness.

Claimant further testified that in late August 1997, he contacted a friend of his father's who owned a car lot and was hired to drive cars on the car lot part-time for $50.00 per week, working between two to four hours per day. He said that on dates during the 11th quarter which he could not recall but which apparently followed his obtaining the part-time job, he sought further employment, unsuccessfully, at a home designing business operated by a friend and at the office of his former attorney. His Statement of Employment Status (TWCC-52) indicated that he sought work at these places answering the telephone, filing papers, and running errands. Claimant also indicated that during the 11th quarter filing period he looked at newspaper employment ads but saw none within his restrictions. He said he underwent spinal surgery on October 6, 1997. Claimant also stated that he had not received SIBS for the seventh and eighth compensable quarters because, as he put it, "I overstated my wages," apparently referring to his wages exceeding 80% of his preinjury AWW during the filing periods for those quarters.

Claimant also testified that sometime before April 1997 he purchased several disability insurance policies.

(Ms. B), a human resources specialist for the employer, testified that the disability insurance polices were "outside" policies, that claimant had her complete the top portions of the insurance forms and she listed the injury date for his work-related injury, and that he later returned and advised that the insurers would not pay him because the injury was preexisting and asked her to change the injury date to a date in (month/year), a date he claimed to have injured his neck in a fall from a ladder at home. She said she declined to change the dates. Ms. B also said that after his compensable back injury, claimant worked for the employer from August 1994 to April 8, 1997; that claimant stopped working on April 8, 1997, because the employer did not want him to continue at his position while taking medicine that caused drowsiness; and that he would be off work until his restrictions changed back to what they were before Dr. M increased the lifting restriction in April 1997 or until he had the surgery. She further stated that claimant indicated in April 1997 that he preferred to wait until July 1997 for the surgery.

(Mr. N), the employer's human resources manager, testified that he met with claimant, the latter's supervisor, and Ms. B on or about April 8, 1997, and discussed the issue of claimant's working while taking medicine that made him drowsy. Mr. N said he

understood that claimant would be on that medicine until he had surgery and that he encouraged claimant to schedule the surgery but that claimant wanted to first pay some debts. He also stated that claimant had, before 1997, twice previously postponed the surgery.

Dr. M wrote on August 21, 1997, that claimant wanted another letter dictated stating he is "100% disabled from April 8 to the present" but that he, Dr. M, wrote about that matter on July 9th, that claimant can do light duty and is on some medications that can possibly cause drowsiness, and that "this pretty much addresses all of these questions."

Pertinent to the filing period for the 11th quarter, the hearing officer found that claimant had the ability to perform light to sedentary work and was able to work full time, that he made only three job contacts, that the employment he accepted was for only two to four hours per day and was not commensurate with his ability to work, and that he did not make a good faith effort to obtain and retain employment commensurate with his ability to work. The latter is one of the statutory requirements for entitlement to SIBS. *See* Sections 408.142 and 408.143.

Whether claimant made a good faith attempt to obtain employment commensurate with his ability to work was a question of fact for the hearing officer to resolve and it is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who 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)). As an appellate reviewing tribunal, we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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).

Claimant indicated that the part-time job he obtained at the car lot was the first of the jobs he sought during the filing period for the 11th quarter. He did not testify as to the amount of time he spent after obtaining that job looking for work at the other two businesses nor whether he made any follow-up efforts nor whether he sought any jobs with the employer that he could work while on medication, such as the security guard job he voluntarily gave up. In considering the good faith attempt criterion, the hearing officer can consider not only the number of potential employers contacted but also the manner in which a job search is undertaken with regard to timing, forethought, and diligence. Texas ' Compensation Commission Appeal No. 941741, decided February 9, 1995. We note that the carrier's response treated claimant's request for review as having also appealed the 10th quarter determination. The hearing officer could consider the evidence that established that during the filing period for the 10th quarter, claimant was released for light duty and conceded that he did not look for any work because he was "getting ready for surgery."

We do not find merit in claimant's assertions concerning the ombudsman's assistance, namely, that "he really didn't know what was going on." Claimant did not raise this issue at the hearing. Further, he acknowledge on the record that he had sufficient opportunity to avail himself of the ombudsman's assistance in preparing for the hearing and was ready to proceed with the ombudsman's assistance.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

DISSENTING OPINION:

I fully understand the basis upon which my colleagues have affirmed this decision, and cannot fault their reasoning vis a vis our disinclination, as an appellate body, to second guess the hearing officer. Nevertheless, there come those decisions, on rare occasions, that reach a result so at odds with the objectives inherent in the remedial workers' compensation statute that they cry out to be "second guessed." This is one of those decisions.

It seems to me that the bigger picture of all of the evidence and the statutory intent of supplemental income benefits (SIBS) have not been incorporated into the decision in this case, and because of this, the denial of SIBS for the 11th quarter, resulting in foreclosure of SIBS entirely in the future, is manifestly unjust. This injured worker did something that a lot of SIBS applicants have not - he returned to work. The medical evidence indicates that his problems, and his pain, waxed and waned over a period of five years. Nevertheless, although the claimant could not do what he did before the injury, he sought to be productive, albeit in an "underemployed" capacity as a security guard. He did not opt to say "I can't work because I hurt." When an opportunity arose to better himself, claimant proactively sought his doctor's clearance to work at a more intense job, at increased pay, and then moved for two quarters out of the system as his paycheck increased. This is the type of transition that the Appeals Panel has many times underscored to be the objective of SIBS.

But the trajectory to full employment does not always continue on an upward course, and did not in this case. It may be inferred that due to claimant's increasing pain, and what his doctor has described as his "worsening" condition, he needed pain medication which made him drowsy. The employer became legitimately concerned about the safety implications of medication causing drowsiness, and due to this, claimant had to leave his trimmer position. Around this same time, he opted for the previously recommended surgical alternative, and this was set for July 1997. Then the second -opinion process was invoked, throwing the timetable of surgery and return to work into limbo. It is this dispute process, triggered by the carrier's disinclination to pay for the spinal surgery without a second look, and its implications for the ability to look or hunt for meaningful employment, that I do not believe was considered at all by the hearing officer and should have been.

In my common experience, and, I would guess, the hearing officer's, there are few employers who would be likely to hire an applicant for whom surgery and a four-to-six week recovery period was imminent. Nevertheless, the claimant, who could have sat home and undergone brief weekly forays into the job hunting market to qualify for SIBS, actually found at least part time employment of a nature that could be readily abandoned, and he targeted two other prospective employers who would be most likely (not unlikely) to let him work given the uncertainties hanging over his ability to work as a result of the need for surgery, due entirely to his impairment. I believe that such targeting under the circumstances underscores, and does not refute, the good faith nature of the search. I am especially troubled in this case by the imposition (as indicated in the hearing officer's discussion) of a standard that claimant's underemployment was inadequate because he was not working up to his "endurance" level. The existence of such a level appears to me to have been imposed by the hearing officer rather than compelled by the medical evidence. In my opinion, it was error for the hearing officer to conclude that light duty meant ONLY fewer duties in an eight-hour work day, and to then find that claimant's temporary part-time employment (pending surgery) was inadequate as a good faith effort only because it was fewer than eight hours a day. If the SIBS statute is read as a whole, larger than its individual phrases, then as a matter of sound administrative policy we should not implement it in a way that penalizes a worker for taking "the first step" to resume employment (having lost the full-time job through no fault of his own) when that step is first to part-time employment. A decision which does so fails as a correct legal interpretation of the workers' compensation law and its underlying remedial, beneficial purpose. For all these reasons, I would reverse the hearing officer's decision as to the 11th quarter and render a decision that the claimant was eligible for SIBS.

Susan M. Kelley
Appeals Judge