APPEAL NO. 980295
FILED MARCH 30, 1998

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 4, 1997, a contested case hearing was held in (City), Texas, with (hearing officer) presiding as hearing officer. The record was held open for an additional medical report and was closed on January 23, 1998. With regard to the issues before her, the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the first and second compensable quarters, having made a good faith effort to obtain employment commensurate with claimant's "limited ability to work" and that claimant's underemployment was a direct result of her impairment.

Appellant (carrier) appeals, citing two Appeals Panel decisions, extracting what it considers "rules" involving underemployment SIBS cases. Carrier requests that we reverse the hearing officer's decision and render a decision that claimant is not entitled to SIBS for the quarters at issue. Claimant's response, which states a receipt of carrier's appeal on February 17, 1998, appears to have originally been mailed timely on March 3, 1998, without postage. The response was untimely resent (more than 15 days after the appeal was served) by facsimile transmission on March 9, 1998, with "Claimant's Motion for Late Filing of Claimant's Response Brief." Section 410.202 does not allow for extension of appeals and responses, or late filings, beyond the allotted 15 days. Consequently, we will not consider claimant's response or brief in support thereof.

DECISION

Affirmed.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (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 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 (employer)ed 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 parties stipulated that claimant sustained a compensable (neck and back) injury on (1995 injury), that claimant reached maximum medical improvement (MMI) on

March 18, 1996, with a 20% IR, that IIBS were not commuted and that the filing period for the first compensable quarter was from February 1 through May 2, 1997, with the filing period for the second compensable quarter being from May 3 through August 1, 1997. How claimant was injured was not developed, but it is undisputed that claimant has not had surgery and that no surgery is contemplated.

Claimant, at the time of her injury in 1995, was working full time (37½ hours a week) for the employer, a music distribution company. In addition, claimant was working an unspecified number of hours part time for (employer) (doing pre-wiring for security alarm systems). After her injury, claimant apparently returned to work for the employer and was subsequently terminated from employment in January 1996 for unspecified reasons. Claimant reached MMI on March 18, 1996, with the first quarter filing period beginning on February 1, 1997. On her Statement of Employment Status (TWCC-52) for the first quarter, claimant listed no job contacts but reported $707.72 wages earned working for (employer) between February 15 and April 20, 1997. On April 21st, claimant was taken off work until further notice by her treating doctor, Dr. B. For the second quarter filing period, claimant reported three job contacts (one of which resulted in claimant's being hired after the end of the second quarter filing period) and $918.00 wages from (employer). Claimant testified that she worked as much as her physical restrictions allowed and that she sought assistance from both the Texas Workforce Commission (TWC) and the Texas Rehabilitation Commission (TRC). Claimant also testified that she is 46 years old, has a high school education with one year of junior college and is a single parent with a daughter in college.

The medical evidence includes a handwritten note, dated January 12, 1996, from Dr. B releasing claimant to "2-4 hours 3 times per week for light duty." Another report, dated May 12, 1997, repeats those restrictions. In a subsequent report, dated June 18, 1997, Dr. B precludes heavy lifting and states that "bending, twisting, lifting, sitting, pushing, reaching above head aggravates her condition" (Dr. B does not think claimant is at MMI yet). In another report, also dated June 18, 1997, Dr. B takes claimant off work "due to muscle spasms causing increased pain of cervical/lumbar strain/sprain." Again, in a report dated July 18, 1997, Dr. B takes claimant off work "due to muscle spasms" and states that claimant "will be released to light duty when symptoms subside."

A Vocational Evaluation Report performed June 9 through 12, 1997, notes physical limitations of no repetitive bending, "may not be released to work" pending another functional capacity evaluation (FCE) and suggests developing computer skills for work in an office setting. Claimant was classified as having a "light-duty" job classification. An FCE, performed November 19, 1997 (after the filing periods in question), concluded that claimant was unable to return to her former employment, was qualified at a light-duty level and recommended stretching, reconditioning and work hardening programs.

Dr. S, examined claimant at carrier's request and, in a report dated May 13, 1997, concluded that claimant is "able to return to light duty work" with a 20-pound lifting restriction. Dr. S also recommended an FCE. In another report dated December 10, 1997, made available to both parties by the hearing officer, Dr. S was of the opinion that claimant had the ability to work full time, with restrictions, during both filing periods at issue.

The hearing officer, in her Statement of the Evidence, notes that she found claimant to be a credible witness and a very hard worker, who was working two jobs with a daughter in college. The hearing officer concludes:

> A review of all of the evidence convinces me that Claimant is a hard-working, credible witness who has consistently demonstrated that honesty of purpose that constitutes a good faith effort during both the relevant filing periods.

Carrier, in its appeal, correctly states that this "is an underemployment case." Carrier cites two Appeals Panel decisions as, if not controlling, precedent. In Texas Workers' Compensation Commission Appeal No. 961469, decided September 11, 1996, the Appeals Panel affirmed the hearing officer's determinations of entitlement to SIBS for the first quarter and non-entitlement for the second and third quarters. Carrier incorrectly states that the "Appeals Panel drew an analogy between the facts of that case [an underemployment case] and the 'no ability' cases." What we said was that "[w]e analogize claimant's contention to be somewhat akin . . . ." (Emphasis added.) We then set out some general principles. What provoked our comments in that case was that the doctor in that case had limited claimant to working 20 to 24 hours a week. A fair inference would be that this would mean four or five hours a day, five or six days a week. In that case, however, claimant worked a full eight hours on Tuesday, another eight hours on Wednesday and four hours on Sunday, with no explanation or rationale why the injured employee was capable of working full eight-hour days on Tuesday and Wednesday, but was unable to work on Thursday, Friday, Saturday or Monday, and only a half day on Sunday. In affirming the hearing officer, it appeared to us that claimant was working the minimum 20 hours a week prescribed by his doctor and no more. We suggested the specific facts of that case warranted some explanation why the claimant could work eight hours some days and none on others. We distinguish that case from the present case where Dr. B restricted claimant to light duty, four or five hours per day, two or three days a week. Carrier over-reads Appeal No. 961469 as standing for the absolute proposition "that the claimant [must] affirmatively demonstrate, through medical evidence, that his hourly limitation be based upon something more than mere conclusion." Each case is fact specific and, in this case, the doctor's limitation of light duty a few hours a day for a few days a week is supported by the evidence and does not raise the unanswered questions how a claimant can work full time two days, back to back, but not the rest of the week.

Similarly, in Texas Workers' Compensation Commission Appeal No. 960480, decided April 24, 1996, there was some difference of medical opinion how much the claimant could work, with three to six hours a day (around 15 hours a week) as the minimum. Although claimant testified, in that case, that he worked five and one-half hours a day, in fact, claimant only averaged 13½ hours a week, which we noted to be less than three hours a day. The Appeals Panel held, as noted by carrier, that:

> with claimant's present job clearly not rising to the level that was medically specified, the question of good faith should have been considered in terms of the attempt thereafter to find other employment. Claimant only testified to reading the newspaper and talking, informally, with one acquaintance about a job. . . . These efforts do not rise to a level of a good faith attempt to find employment commensurate with the ability to work.

We reject carrier's contention that either or both of the cited cases have established firm fast rules that medical evidence must affirmatively demonstrate more than a conclusion of the number of hours claimant is able to work (that depends on medical judgment) and that the claimant "must work or look for work to the full extent of the hourly limitations" which remains a consideration for the hearing officer in determining a good faith effort to seek employment commensurate with the claimant's ability. We cannot emphasize too strongly that many, if not most, of these cases are very fact specific and caution readers from taking one specific fact situation to establish a firm "rule" to be applied in all cases. We have many times recited the general principles for hearing officers to use in applying the good faith requirements in Section 408.142 and Section 408.143.

In this particular case, the claimant was working part time, apparently within the restrictions imposed by the treating doctor, and the doctor, from time to time, took claimant off work due to muscle spasms until those spasms subsided. Claimant apparently cooperated in the medical evaluations and FCEs. As noted, this is an underemployment case and, in the filing period for the second quarter, claimant was successful in one of her job contacts in obtaining subsequent employment (during the filing period for the third compensable quarter). Further, claimant's earnings from part-time work with (employer) were increasing with each quarter. These are all factors that the hearing officer could consider in making her good faith determinations. The hearing officer clearly found claimant credible in her efforts, that claimant's efforts were in accordance with the treating doctor's restrictions, and that she was attempting to obtain employment commensurate with her ability to work.

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:

Susan M. Kelley
Appeals Judge

Christopher L. Rhodes
Appeals Judge