

APPEAL NO. 980432

On February 2, 1998, a contested case hearing (CCH) was held with a hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). The issue at the CCH was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the eighth quarter, which was from November 13, 1997, to February 11, 1998. The claimant requests review and reversal of the hearing officer's decision that he is not entitled to SIBS for the eighth quarter. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that 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 (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. Section 408.143(a) provides that after the Commission's initial determination of SIBS, the employee must file a statement with the insurance carrier stating: (1) that the employee has earned less than 80% of the employee's AWW as a direct result of the employee's impairment; (2) the amount of wages the employee earned in the filing period; and (3) that the employee has in good faith sought employment commensurate with the employee's ability to work. Section 408.143(b) provides in part that the statement required under that section must be filed quarterly on a form and in the manner provided by the Commission.

Pursuant to Tex. W.C. Comm, 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 claimant during the prior filing period. Rule 130.104(a) provides that an employee initially determined by the Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. Rule 130.101 provides that "underemployment" occurs when the injured employee's average weekly earnings during a filing period are less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury. The claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The claimant fell at work on _____, and broke his left hip. He was in traction for about seven weeks following the injury and in September 1994 he had surgery for a left hip replacement. He said that he returned to work on a limited basis following the seven weeks of traction and that after his hip replacement he needed to use a cane for awhile, his left hip still hurts, his left leg is shorter than the right leg, he uses a built-up shoe on his left foot, he limps, and he is unable to climb. The claimant worked as an outside salesman for the employer, selling hoses and parts, both before and after his injury. The parties stipulated that the claimant reached maximum medical improvement with a 15% IR, that he did not elect to commute IIBS, that his preinjury AWW was \$1,202.33, and that the filing period for the eighth quarter was from August 14 to November 12, 1997 (the filing period). The only disputed SIBS criterion is whether the claimant's underemployment during the filing period was a direct result of the impairment from his compensable injury. We find no merit in the claimant's contention that because he was underemployed as a result of his impairment at the time that IIBS ended, he does not need to meet the direct result criterion for SIBS for the eighth quarter. Section 408.143 and Rule 130.104(a) make clear that the claimant must meet the direct result criterion for SIBS for each quarter.

In February 1997 (Dr. H) wrote that the claimant continued to have problems with his left hip and left knee, that the claimant was taking medications, and that the claimant should have additional physical therapy. There is no appeal of the hearing officer's findings that the claimant's average weekly earnings during the filing period were \$763.06 and that during the filing period the claimant earned less than 80% of his AWW. The claimant is paid straight commission for his sales. He said that a few weeks before his injury of _____, he made a sales proposal to one of his long-time customers and that in May 1993, while he was in traction, he found out that he had lost much of that customer's business to a competitor of the employer. He said that that competitor had a wider variety of items to sell to that customer than did the employer. He said that after his injury he also lost all of the sales business of three other customers and much of the business from a fifth customer, all of whom went with competitors of the employer. He estimated that after his injury, he lost about 35 to 40% of his income because of the loss of the five customers.

The claimant testified that the loss of the five customer accounts he mentioned at the CCH was due to his compensable injury because his injury prevented him from servicing those accounts and interacting with those customers while he was in traction and during the period of his hip replacement. He also said that due to his injury he has been unable to try and obtain customer accounts from sea container businesses and chemical plants because of his inability to climb to take measurements of items. However, he said that the employer was not active in selling items to sea container businesses. He also said that he has been getting new accounts after his injury and during the filing period, but that the income from the new accounts has not replaced the income he lost when he lost the five accounts he mentioned at the CCH. He acknowledged that prior to his injury he had lost customer accounts to competitors and that after his injury he had obtained new accounts by taking customers away from competitors. (K B), a vocational specialist hired by the carrier, testified that she talked to the claimant's manager about the loss of the

account that the claimant said represented 20% of his income and that she was told by the manager that the loss of that account had nothing to do with the claimant's injury or being off work from the injury.

The hearing officer found that the claimant's underemployment during the filing period was not a direct result of his impairment from his compensable injury, but instead was due to competitive reasons. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's finding that the claimant's underemployment during the filing period was not a direct result of his impairment from his compensable injury is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The hearing officer's finding against the claimant on the direct result criterion for SIBS supports her conclusion that the claimant is not entitled to SIBS for the eighth quarter.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge