

APPEAL NO. 982400

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). On September 15, 1998, a contested case hearing (CCH) was held. With respect to the issue before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the ninth compensable quarter, that claimant had a total inability to work ("retained no ability") during the applicable filing period and that claimant's unemployment was a direct result of his impairment.

Appellant (carrier) appeals, contending that the hearing officer's findings are against the great weight and preponderance of the evidence, that the hearing officer "failed to understand the applicability" of certain Appeals Panel decisions and that the claimant had "intentionally, deliberately, and deceitfully failed to follow his" doctor's orders. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling 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 employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

Although the facts in this case are a little different, they are largely undisputed. The hearing officer made unappealed factual findings that claimant sustained a compensable (low back) injury on _____; that claimant has an impairment rating (IR) "equal to or greater than fifteen percent," and that impairment income benefits have not been commuted. There was neither a stipulation or finding of when the filing period for the ninth quarter was, but the parties and the hearing officer generally accept it was the 90 days prior to July 1, 1998, or roughly April 1 through June 30, 1998.

Claimant testified that he had had three spinal surgeries due to the compensable injury and, while one or two may have provided temporary relief, they did not correct his condition and that at least one was a failed surgery where the "bone graft didn't take."

Claimant was scheduled for a fourth spinal surgery on June 1, 1998. A day or two before June 1st, claimant called the doctor scheduled to do the surgery, telling him that he had been in a motor vehicle accident (MVA) when, in fact, he had not, and had sustained fictitious injuries which were being treated by a fictitious doctor. The doctor then informed carrier's adjuster. Claimant testified that he was undergoing stress from a divorce and that he was not mentally and emotionally ready for a fourth spinal surgery so he invented the MVA pretext to delay the scheduled surgery. Claimant testified that about two weeks later, he notified the carrier and the doctor that the information that he had given them was not true and the surgery was rescheduled for October 1, 1998. Claimant testified that his condition has not changed since May 1998 when he fabricated the MVA in order to delay the scheduled surgery.

Carrier's position at the CCH, and on appeal, is that the false information claimant gave impeded, delayed and aggravated his medical treatment and caused additional damage or harm to claimant sufficient "to break the chain of causation." Carrier cites Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993, and Texas Workers' Compensation Commission Appeal No. 94257, decided April 18, 1994. We agree with the hearing officer that the cases carrier cites are inapplicable to the case at hand. In Appeal No. 93612, *supra*, the issue essentially was whether the addiction to Tylenol #4 required methadone treatment (and whether the carrier in that case was liable for the methadone treatment) and the IR. Appeal No. 94257, *supra*, is an extent-of-injury question whether certain cervical problems were self-inflicted. In that case, the Appeals Panel stated "in the context of damage resulting from drug taken for a compensable injury, damage or harm that results from the failure of a claimant to comply with doctor's instructions is not included within the scope of the original compensable injury" (emphasis added), citing Appeal No. 93612, *supra*. Citation to those cases is out of context and inapplicable to the instant case.

The issue in this case before the hearing officer was whether claimant has complied with the good faith and direct result requirement of Section 408.143(a) and Rule 130.104. Carrier argues that the hearing officer erred in her decision because she only applied "one prong of the two-prong test established by the Appeals Panel." First of all, the requirements for SIBS are established by statute (in this case Section 408.143(a)) and rule, not by the Appeals Panel. Second, the hearing officer, in her discussion, was only responding to carrier's contentions raised at the CCH ("the only basis for Carrier's dispute"). The hearing officer made findings of fact on both requirements and incorporated them in her conclusion of law. On the good faith requirement, the Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not seek work at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence. Texas Workers'

Compensation Commission Appeal No. 950173, decided March 17, 1995. See also Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to light duty does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. In this case, carrier apparently conceded that claimant had a total inability to work until June 1, 1998, when he used a ruse to delay surgery. There is absolutely no medical evidence that claimant's condition changed, or changed for the worse. Had claimant had surgery on June 1, 1998, as initially scheduled, claimant would still have a total inability to work through the end of the filing period. Carrier speculates that had claimant had surgery on June 1st as scheduled, "his pain would have improved, thus allowing him some ability to work." While that may, or may not, be accurate for some time in the future, certainly there is no medical evidence (nor does common sense dictate) that had claimant had the fourth spinal surgery on June 1st, he would have been sufficiently recovered to have any ability to work during the filing period at issue, and the only period of time before the hearing officer.

Similarly, on the direct result requirement, the reason claimant was unable to work in June 1998 was not because claimant delayed surgery, but rather because of his debilitating back condition. Whether claimant would have recovered from the scheduled June 1st surgery, and perhaps achieved some sort of work status, sooner than he would from the October surgery is a matter of speculation at this time. It is absolutely clear that, June 1st surgery or no, claimant was unable to work in June 1998 as a direct result of his impairment, not as a result of delaying surgery. We see no medical evidence in the record, and carrier points to none, which indicates that claimant's medical condition worsened due to claimant's delay of surgery. The hearing officer's comment that "at best, merely a scintilla of evidence . . . suggest[s] that Claimant's medical condition worsened on account of his having delayed his surgery . . ." is accurate and, if anything, gives carrier the benefit of any doubt. As carrier states, the carrier does not have the burden of proof. Carrier, however, goes on to say it has "raised some evidence of damage or harm as a result of the Claimant's intentional and deceitful actions" without specifying what that evidence might be. There was certainly no such evidence as it pertains to the filing period at issue. A medical report of May 11, 1994, indicates one of claimant's surgeries "definitely helped his pain," but claimant testified that was temporary in 1994 and there is no evidence that surgery on June 1 (or as elsewhere suggested, on June 4), 1998, would have changed claimant's condition during the filing period.

Carrier also contends the hearing officer "failed to understand the causation issue." We disagree and, as addressed above, there is no evidence that claimant's "intentional deceitful actions" had any effect on the matter or that the reason claimant was unemployed during the filing period was caused by anything other than claimant's compensable injury. Just because claimant lied does not change the fact that claimant's inability to seek or

obtain employment, during the filing period at issue here, was for any reason other than claimant's compensable impairment.

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 clearly wrong or 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:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge