APPEAL NO. 982880
FILED JANUARY 21, 1999

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 September 4, October 12, and November 13, 1998, in _____, Texas, with (hearing officer) presiding as hearing officer. The first session was continued when the respondent (claimant) requested more time to obtain an attorney. He did not telephonically appear at the second session. The issues at the CCH ultimately concerned whether the claimant was entitled to supplemental income benefits (SIBS) for the third, fourth, and fifth quarters of eligibility. The hearing officer held that he was. As an issue was also raised as to whether the appellant (carrier) was relieved from liability for the claimant's late filing of his Statement of Employment Status (TWCC-52) applications for these quarters, the hearing officer held that the carrier was relieved from payment for most of the SIBS otherwise due, and that SIBS should be paid for the period from March 26 through April 10, 1998, the very last part of the fifth quarter. On an issue raised at the third session of the CCH as to whether the claimant had good cause for the failure to attend the second session, the hearing officer held that he did not show good cause.

The carrier has appealed the decision that the claimant would otherwise be entitled to SIBS for the quarters in issue. Claimant was employed, but the carrier argued that he had the obligation to continue to search for employment and as he did not, he failed to make a good faith search for employment. The carrier further argues that because the claimant did not list on his third quarter application any other prospective employers than the one with whom he accepted offered employment, he did not make a good faith search. The carrier argues that the claimant's underemployment or unemployment directly results from moving to Chicago. The carrier argues that it should have been allowed to question the claimant about his legal residency status over the sustained objection of the claimant. The carrier also argues that the hearing officer should have made a ruling on its relevance objection to an exhibit of the claimant, and that it was error to admit that document by a finding of good cause for failure to timely exchange. Finally, the carrier argues that the finding of no good cause for failure to appear at the second session of the CCH should result in an adverse decision. There is no appeal or response from the claimant.

DECISION

Affirmed, as sufficiently supported by the record on appealed issues.

The claimant was injured on (date of injury). Claimant testified that he fell and injured his back, and had surgery also on his left shoulder as a result of the accident. The record was not favored with medical records showing the nature of the accident, but a medical "off work" slip provided by claimant from his doctor in Illinois, where he had moved by the time of the CCH, refers to being placed on "total temporary disability" due to neck and back pain. We note that the carrier's primary theory of defense in the hearing was that claimant did not make a good faith search for employment commensurate with his ability to work. Carrier also argued that the underemployment could not be the direct result of claimant's impairment because he had not seen a doctor in 16 months.

The filing periods for the quarters in issue ran in total from April 11, 1997, through January 9, 1998. For most of that time, claimant was employed, at wages less than 80% of his stipulated preinjury average weekly wage. Claimant said he searched and began such employment with (new employer), delivering tamales, on May 10, 1997. Claimant said he was under a restriction of no lifting over 30 pounds. Claimant said, however, that his position called for him to exceed this limit on occasion, to the point where he wasn't able to do the work and was let go on December 26, 1997. Claimant said that although he did not list other job contacts he made prior to accepting employment with this employer, he in fact made such contacts. He did not search while he was actually employed.

Claimant said that his request to the adjuster for another doctor in Chicago, where he lived, was refused by the adjuster, who told him he had no right to a doctor now that he had moved. He also said he was informed by the adjuster that he had no further right to benefits. Claimant said he never received any TWCC-52 forms from the carrier, although it was established that he was paid the second quarter of SIBS. However, claimant agreed he was furnished the forms by an employee of the Texas Workers' Compensation Commission (Commission). The off-work slips submitted by the claimant are dated November 10, 1998, and indicate that the claimant started treating with this doctor on August 24, 1998. The carrier objected to the records because they had not been exchanged. Questioning of the claimant indicated that they were provided to the carrier shortly after received. The hearing officer found good cause for failure to exchange within 15 days after the benefit review conference (BRC).

The carrier also objected to relevance. The hearing officer's response was that while the records did not appear to be relevant, she would admit them and give them the weight to which they were entitled. It is apparent from the decision that they were given little, if any, weight. Nevertheless, the carrier pressed for a "specific" ruling on his relevance objection and a somewhat circular discussion ensued in which the hearing officer said she had made her ruling and reminded him she would give the documents only the weight to which they were entitled.

Later in the CCH, as the carrier attempted to question claimant about his legal residency status, an objection was made to relevance and sustained. The carrier responded that it believed this evidence went to any inability to find a job. Perhaps because of this argument, the hearing officer responded that claimant's status had not affected his ability to find employment, and she doubted the relevance because of this. The claimant testified enough without objection that he was not a legal resident but was "fixing" that, although he had his green card. Claimant said he had lived in the United States for 10 years.

The carrier's attorney asked the claimant about proof of his wages; claimant responded that the carrier's first attorney had agreed to accept the amounts he stated on the TWCC-52s. After discussing the issues, the carrier's attorney agreed to accept the amounts stated in the TWCC-52s as claimant's wages. The hearing officer stated that she would add the issues regarding relieving the carrier of liability for late filing of the TWCC-52 forms. The hearing was adjourned to allow the ombudsman and the claimant to talk, and although the hearing officer stated that she would resume the hearing, it was not resumed on the tape. The hearing officer issued an order that day setting a prehearing conference and continuing the CCH and adding the issues she determined should have been reported from the BRC.

The TWCC-52s in issue are all date-stamped as received by the carrier on March 25, 1998. The carrier agrees on appeal that if claimant is held entitled to the fifth quarter, the carrier is relieved from liability for benefits due up until that date. Claimant said that he had been provided these forms by another field office of the Commission on a date he could not recall. There was no testimony one way or the other about whether the claimant searched for employment after he was asked to leave his job on December 26, 1997, until the end of the quarter on January 9, 1998.

We observe at the outset that this was not a well-developed case; gaps in the record exist and it appears that both parties believed that the matters that were covered in the "several" BRCs (as stated by the hearing officer by reference) were within the

record before the hearing officer. The claimant never addressed the issue of why he did not attend, by telephone, the October session of the CCH, and it was determined against him as a result. The claimant testified, without objection, that he was told by the adjuster he could not have a doctor out of state. Near the end of the CCH, the carrier's attorney referred to this as a "new" conspiracy theory but his attempts to develop the matter from claimant further were cut off by the hearing officer, who questioned the relevance of this line of questioning. Nothing was offered as to whether the carrier mailed the TWCC-52s to the claimant. The bulk of carrier's case was questioning the claimant, who already had a job during most of the filing periods in issue, about why he was not still searching for employment, generating a line of questions which were somewhat ambiguous in English and apparently did not translate well, as claimant was clearly confused. Finally, further complication was added by the fact that the hearing officer appeared to be of the conviction that the tardy filing of the TWCC-52s by claimant, or the fact that he worked, would be dispositive of the issues which led to cutting off of testimony which would nevertheless provide some insight into "direct result."

The hearing officer admonished counsel for the carrier that since the law was clear that carrier was not liable if claimant was tardy in filing his TWCC-52 forms, she did not understand why he was belaboring "all this other stuff." However, although the amount of actual SIBS ordered is small, we conclude that carrier was concerned with the issue of entitlement due to the prospect that the claimant might, in the future, be subject to being declared permanently ineligible for SIBS if he was not entitled for four quarters in a row. Consequently, the entitlement of the claimant to SIBS for the quarters in issue is not moot just because the carrier was relieved from liability due to late filing of the TWCC-52s, as statements of the hearing officer appear to indicate. On the matter of whether claimant was required to search for employment, we repeat that an injured employee is required to search for employment commensurate with the ability to work in good faith in order to continue to qualify for SIBS. Section 408.143(a)(3). We have held that the good faith effort necessary for SIBS is to obtain employment commensurate with the ability to work, not to obtain employment at a certain wage scale. Texas Workers' Compensation Commission Appeal No. 960946, decided July 1, 1996. We have also held that the fact that an injured worker accepts employment that results from a search makes a prima facie case that the search leading to the offer was made in good faith, absent evidence of collusion between the worker and the prospective employer. Texas Workers' Compensation Commission Appeal No. 971349, decided August 25, 1997. The hearing officer's resolution of the "good faith job search"

issue is in line with previous decisions and sufficiently supported by the record. The short period of time after claimant left his job until the end of the filing period for the fifth quarter would not reverse the "quarterly" approach taken by the hearing officer, even if it had been put into evidence that claimant did not search for employment in this short time. Moreover, the apparent "gap" between moving to Chicago and accepting employment there was accounted for by testimony from claimant that he searched for employment, which evidently led to obtaining a job.

On the evidentiary matters, we cannot agree that there was error in the hearing officer not issuing a "specific" ruling on the relevance of the doctor's letters. The formal rules of evidence do not apply to our hearings, and the clear import of the hearing officer's announcement at the CCH was that she would likely not accord much weight to these statements. She appears not to have done so.

However, we agree that there was error, albeit not reversible error, in the cutting off of questioning about the claimant's immigration status. We characterize this as error that is not reversible because the claimant testified, during part of the questioning not objected to, that although he lacked legal residency he had a "green card," which we have considered as part of our review of this case. Contrary to the hearing officer's statements, we agree that such evidence can be relevant to the analysis of the "direct result" criteria. While a hearing officer is free to infer that unemployment or underemployment did not directly result from lack of legal residency, the possibility of this inference should not be used circularly to exclude testimony as "irrelevant." The better approach to have taken would parallel that which the hearing officer took to admission of the November 1998 doctor's notes--to admit it and then determine weight. Because an impairment need not be the sole cause of unemployment or underemployment, admission of a full record on this matter would not have ensured a different result than that reached.

Finally, the sanction for failure to appear without good cause at a CCH is an administrative violation under Section 410.156. A party is not deprived of an adjudication on the merits of the case for failure to attend. Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995.

While the evidence on many points is marginally sufficient to support the findings of the hearing officer on entitlement to SIBS in the disputed quarters, particularly the "direct result" criterion, the decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That standard not being met in this case, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge