

APPEAL NO. 990055

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 December 15, 1998. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 13th, 14th, and 15th compensable quarters, whether the claimant has permanently lost entitlement to SIBS, and whether the compensable injury was a producing cause of the claimant's diagnosed bilateral cubital tunnel syndrome and right carpal tunnel syndrome. The parties agreed that the claimant was not entitled to 13th quarter SIBS, and the hearing officer determined that the claimant was entitled to SIBS for the 14th and 15th quarters. The hearing officer also determined that the claimant had not permanently lost entitlement to SIBS, and that the compensable injury extended to the stated conditions. The appellant (carrier) urges error in several findings of fact and conclusions of law arguing that they are supported by no evidence or are against the great weight and preponderance of the evidence. No response is on file.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth fairly and in some detail the evidence in this case and it will only be briefly summarized here. Succinctly, the claimant sustained a compensable back injury on \_\_\_\_\_, attempting to free a truck that was stuck. He subsequently had spinal surgery in February 1993, was certified at maximum medical improvement on January 18, 1994, with an impairment rating of 16%. Medical records show that he continued to have problems with his back and that his condition deteriorated in 1997 and 1998, leading to another back surgery in August 1998. The claimant testified that during the filing periods for the 14th and 15th quarters (December 17, 1997, to June 16, 1998) he worked one to two days a week, here and there, in a light-duty capacity with people who were aware of his injured condition. He testified that he had to earn some money because "I gotta' eat" and "I had to do something to survive." He acknowledged that sometimes when he would ride with or go on a trip with one of the employers, he would essentially do no work but would be told to go on the trip and he'd be paid and could drink some beer. The claimant's earnings were not set out in the Statement of Employment Status (TWCC-52), however, there is a notation that he is working. Although there is evidence that the claimant was released to light to sedentary work in 1997, records from his treating doctor also indicate that the claimant is "going to remain disabled from work" although he "is going to try to continue working light duty." In May 1998, a medical report documents claimant's progressively worsening radicular leg pain and increasing back pain and a June 4, 1998, report indicates that the claimant is disabled from working, at this point. The treating doctor also provided a no work statement retroactively to May 1, 1998. After procedural delays, the claimant underwent surgery in August. Immediately following surgery, the claimant experienced numbness and the inability to control his hand and his wrist felt dead. He stated that the doctors were concerned and initially thought he had a stroke during the surgery. His condition was later diagnosed as bilateral cubital tunnel

syndrome and right carpal tunnel syndrome. Medical records from his doctor indicate that the condition resulted from, and during, the back surgery as a part of the treatment for his compensable back injury and that it is "presumably due to positioning by anesthesia." The hearing officer states that the evidence did not show that the positioning was improper, rather that the condition resulted during the proper and necessary treatment of the claimant's back injury.

The hearing officer determined that the claimant was entitled to SIBS for two of the three quarters in issue, finding his underemployment and inability to work was a direct result of his impairment and that he attempted in good faith to obtain employment commensurate with his ability to work from December 17, 1997, to May 1, 1998, and that he was unable to perform any labor from May 1, 1998, to June 16, 1998. The hearing officer found that he has not been unentitled to SIBS for 12 consecutive months. She also found that as a result of positioning during surgery for his compensable back injury he sustained bilateral cubital tunnel syndrome and right carpal tunnel syndrome. The carrier urges that these findings, and the corresponding conclusions of law, are not supported by any evidence or are against the great weight of the evidence, arguing that evidence that the claimant would ride along and drink beer was not work or employment; that the treating doctor's off-work excuse was improperly backdated to May 1, 1998; that the claimant did not testify that he only worked in order to obtain money for necessities; and that the medical and other records show the claimant had some ability to work without him looking for work.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. If there is no ability to work at all, then seeking employment in good faith commensurate with this inability can be satisfied though no work was sought during the particular time. Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994. These determinations are essentially questions of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

It can be said that there was some conflict and inconsistency in the evidence and testimony regarding the claimant's entitlement to SIBS for the three quarters. Of course, resolving conflict and inconsistency is the responsibility of the hearing officer in arriving at factual findings. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). When determining whether there is a sufficient evidentiary basis to uphold a decision, we review the record of the proceeding to see if there is any evidence in support of the findings and, if so, whether the findings are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. We do not find that to be the situation here as there is probative evidence in the testimony of the claimant and the medical records to support the limited ability to work

during part of the filing periods and no ability to work during the latter part of the second filing period. Clearly, the claimant had serious ongoing back problems leading to the necessity of a second surgery in August 1998. His testimony outlines his condition, his attempts to work the best he could even though he was very limited, and that his condition continued to worsen to where he was not able to work as stated by his doctor. It is apparent that the hearing officer found the claimant to be credible and gave his testimony significant weight. Section 410.165(a). Although earlier medical records in 1997 indicated an ability to work in a restricted capacity, it was also shown that the claimant's condition worsened. We conclude there was a sufficient basis for the hearing officer to find and conclude as she did in the appealed findings and conclusions.

Regarding the issue of whether the compensable injury was a producing cause of the diagnosed bilateral cubital tunnel syndrome and right carpal tunnel syndrome because of the surgery for the back injury, we have held that an injury sustained as a result of treatment for a compensable injury is compensable. Texas Workers' Compensation Commission Appeal No. 92540, decided November 19, 1992; Texas Workers' Compensation Commission Appeal No. 92583, decided December 7, 1992 (Unpublished); Texas Workers' Compensation Commission Appeal No. 951544, decided October 26, 1995. The determinations of the hearing officer are supported by the evidence and her findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order are affirmed.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge