APPEAL NO. 990075

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 17, 1998, a contested case hearing (CCH) was held. With respect to the only issue before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the fourth compensable quarter, that claimant was working within his restrictions and that claimant's underemployment was a direct result of his impairment.

Appellant (carrier) appeals a number of the findings, essentially arguing that: (1) claimant had failed or refused to cooperate with the Texas Rehabilitation Commission (TRC) as required by Section 408.150(b); (2) claimant failed to prove that he earned less than 80% of his preinjury wage; and (3) claimant failed to make a good faith effort to seek work commensurate with his ability because the good faith requirement "generally spans the whole filing period" and claimant had the ability "to seek greater part time work." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

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 (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. 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 based 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 low back injury on _____, that claimant has a 15% IR, that IIBS were not commuted and that the filing period for the fourth quarter was from July 8 through October 6, 1998. Claimant had been employed as a derrick man on a drilling rig, performing heavy labor at the time of his injury. A medical record established that claimant had "obliquely oriented transverse process fractures on the left at L2, L3, and L4." Claimant apparently did not have surgery.

Claimant's treating doctor is Dr. T, who, in a progress note dated June 26, 1998, commented that claimant still had lower back pain, "cannot do any heavy lifting at this time" and referred claimant to a functional capacity evaluation (FCE). The FCE commented that

some of claimant's tolerance to positions had decreased. Based on the FCE, in a progress note dated August 20, 1998, Dr. T established restrictions that claimant continue "working half duty job" with no lifting "more than 30 pounds and occasionally 40 pounds" for at least the next six months. It is undisputed that claimant had obtained part-time employment with a well service company in January 1998. The hearing officer recites:

> The check stubs provided for the thirteen weeks comprising the filing period show that Claimant worked an average of approximately 26 hours each week, with approximately 34 hours being the most hours worked and approximately 16 hours being the least number of hours worked.

Claimant testified that the work with the well service company met his restrictions and was much lighter than his preinjury work as a derrick man, that he usually worked half days Monday through Friday but sometimes worked full days because he needs the work and the job sometimes requires longer hours and that he is unable to return to work on a drilling rig.

The hearing officer comments:

> Claimant's job during the filing period was within his restrictions and within his doctor's orders. Considering his doctor's restrictions and the [FCE] performed during the filing period, Claimant is clearly working within his restrictions and is not required to continue to look for work in excess of those restrictions. For these reasons, Claimant has shown that he made a good faith effort to obtain or retain employment during the relevant filing period, commensurate with his ability to work.

Carrier appeals the hearing officer's decision on the basis that claimant has failed to cooperate with the TRC and consequently is not entitled to SIBS. Section 408.150(a) provides that the Texas Workers' Compensation Commission (Commission) shall refer a claimant to the TRC if the Commission determines that the claimant could be assisted by vocational rehabilitation or training "in returning to employment or returning to employment more nearly approximating the employee's preinjury employment." Section 408.150(b) provides that by refusing to cooperate with the TRC, an employee loses entitlement to SIBS. Carrier offered into evidence a Commission letter dated September 23, 1997 (EES-20 letter) which recites the language of Section 408.150 and a referral letter dated September 24, 1997. Claimant admits that he did not contact the TRC. Claimant, however, was very vague as to whether he received those letters. The hearing officer made no findings, and did not comment on claimant's failure to contact the TRC or even whether claimant received the referral letters. In any event, it is undisputed that shortly after those letters were sent, claimant was successful in obtaining employment with the well service company that met his restrictions, that was a job that he could do and that allowed him to return to the workforce. We believe the purpose of Section 408.150(a) has been met in that the claimant has returned to employment "more nearly approximating the employee's preinjury employment." We would further note that to require the claimant to stop his employment with the well service company and enter into full-time retraining with

TRC would actually cost the carrier more SIBS because carrier would not be entitled to the set off for claimant's part-time employment. We will not endorse the use of the referral provision in Section 408.150 as a means of denying claimant SIBS when the purpose of that provision has been met through other efforts.

Carrier also contends that claimant has not met the legal standard of Section 408.142(a)(2) in that claimant failed to prove that he was earning less than 80 percent of his preinjury AWW as a direct result of his impairment. Claimant listed the amounts that he received from the well service company on his Statement of Employment Status (TWCC-52). Also in evidence are copies of the actual checks that he received during the filing period. These checks list the name of the payor, doing business as (dba) the well service company, and have handwritten payee and amount. Carrier complains that this is the net amount and that it was entitled to a set off of the gross wages. This issue was apparently raised at the benefit review conference and claimant's hours worked each week of the filing period were recomputed and the number of hours was multiplied by the undisputed $7.00 an hour claimant was earning. Again, although this point was raised at the CCH, the hearing officer makes no findings and does not comment on this point. We will, therefore, infer that the hearing officer determined that claimant met his burden of proving that his earnings were less than 80% of his preinjury wage by providing evidence of the number of hours worked multiplied by the undisputed $7.00 hourly wage as establishing a gross amount to which the carrier is entitled to as a set off. The hearing officer apparently believed that claimant had met his burden of proving his gross wages through the manner indicated and we decline to hold that to be 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).

Claimant testified that he made no other efforts to seek other employment during the filing period and that he did not work for one week of the filing period because his boss (apparently the owner of the well service company) was not present. (The testimony was that the boss was attending to his mother who was ill in another city.) Carrier argues that claimant is not entitled to SIBS because he did not seek employment "throughout the entire filing period." Whether this constituted a lack of good faith effort to seek employment commensurate with his ability is a factual determination for the hearing officer. The hearing officer obviously did not believe this amounted to a lack of good faith, just as it would not have been a lack of good faith if weather or some other act of God had precluded claimant's working for that employer for a short period of time.

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:

_____
Susan M. Kelley
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge