

## APPEAL NO. 990134

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 25, 1998. In August 1998 the dispute over the appellant's (claimant) impairment rating was resolved. The issues at the hearing were whether the claimant is entitled to supplemental income benefits (SIBS) for the first through the 10th quarters. The claimant and the respondent (self-insured) stipulated that the claimant sustained a compensable injury to her neck and right shoulder on \_\_\_\_\_; that her impairment rating is 15%; that the filing period for the first quarter for SIBS began on May 26, 1996, and ended on August 24, 1996; that the filing periods for the second through the 10th quarters began on August 25, 1996, included 90 days each, and ended on November 21, 1998. It is undisputed that the claimant did not seek employment during those filing periods and did not work during those filing periods. The hearing officer determined that the claimant's unemployment during those filing periods was a direct result of her impairment from the compensable injury. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The hearing officer determined that during the filing periods for SIBS for the first through the 10th quarters the claimant had the ability to perform some work, that during those filing periods the claimant did not in good faith seek employment commensurate with her ability to work, and that she is not entitled to SIBS for the first through the 10th quarters. The claimant appealed, urged that the medical evidence shows that she had no ability to work, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she is entitled to SIBS for the first through the 10th quarters. The self-insured responded, urged that the evidence is sufficient to establish that the claimant had some ability to work during the filing periods for the first through the 10th quarters, and requested that the decision of the hearing officer be affirmed.

### DECISION

We affirm.

The Decision and Order of the hearing officer contains a six-page Statement of the Evidence that includes detailed summaries of medical reports from doctors. The claimant had a discectomy and fusion at C5-6 and C6-7 on May 1, 1995. The claimant testified that she was not able to work during the filing periods because of her pain, the medication she was taking, and her depression. The medical information on the ability of the claimant to work was conflicting. On October 30, 1998, a Texas Workers' Compensation Commission benefit review officer ordered that the claimant be examined by Dr. D and that he render an opinion on the ability of the claimant to work "05/26/96 to the present and continuing." In a letter dated November 23, 1998, Dr. D wrote:

Based on my review of records, personal interview and physical examination I believe that [claimant] is capable of performing some type of gainful employment although this would be limited. I do not think she can return

back to work as an assembler since this requires too much repetitive motion. However, she could return back to a limited role, say a sedentary position where she has some restrictions in both material and non-material activities. I would place her on restrictions of no lifting more than 5 pounds. This lifting would need to be limited to only waist to shoulder level. She could not lift anything above her shoulder. She would also need to be limited to simple maneuvers such as sitting and standing. She would need to be given the freedom to frequently change positions to perform some type of stretching maneuvers in order to decrease the chance of muscle stiffness and spasms in the posterior cervical paraspinal region. Basically she would need to be restricted from performing any type of climbing, stooping, bending, kneeling or reaching out in front of her. She could handle sedentary work at a desk level but again would need to be given allowance to frequently change positions. I would limit her continuous sitting to no more than 20 minutes at one time with instructions to stand and perform stretching activities.

These restrictions would certainly limit her in regards to returning back to gainful employment but I don't think she is completely disabled from performing some type of job.

Therefore, in summary I believe that [claimant] had the ability to work from the time period of 5/26/96 to the present and continuing. This particular type of job would have to be limited in terms of both material and non-material duties primarily of a sedentary nature but with the above restrictions she could perform gainful employment.

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be judged against employment generally, not just the previous job where the injury occurred. In Texas Workers' Compensation Commission Appeal No. 941439, decided December 9, 1994, the Appeals Panel stated that the claimant's inability to do any work must be supported by medical evidence. In addition, in Appeal No. 941382, *supra*, we stated that medical evidence should demonstrate that the doctor examined the claimant and that the doctor considered the specific impairment and its impact on employment generally.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the

weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer considered the evidence and found that the claimant had the ability to perform some work during the filing periods for the first through the 10th quarters for SIBS, that during those filing periods she did not look for work and did not seek employment commensurate with her ability to work, and that she is not entitled to SIBS for the first through the 10th quarters. Those determinations of the hearing officer are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge