APPEAL NO. 990152

On December 29, 1998, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (claimant) requests reversal of the hearing officer's decision that he is not entitled to supplemental income benefits (SIBS) for the 10th quarter. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 408.142(a) provides that 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. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the claimant during the prior filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). An injured worker initially determined by the Texas Workers' Compensation Commission (Commission) to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. Rule 130.104(a). The claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement with an IR of 15% or greater; that he did not commute IIBS; that he was initially determined by the Commission to be entitled to SIBS; and that the 10th quarter was from July 28 to October 26, 1998. The filing period for the 10th quarter was from April 28 to July 27, 1998 (the filing period).

On _____, claimant was working for, which claimant referred to as (employer), when he injured his back lifting a computer. A report in evidence states that he was working as a computer sales representative when he was injured. In September 1997, claimant began employment with (new employer) as a "commission sales representative" and continued working for new employer for about one year.

With regard to the filing period, claimant testified that he was employed by new employer on a commission basis throughout the filing period and was terminated in October 1998, that he sold computers and computer-related equipment to businesses, that he

would find customers in the newspaper and business journal, that he made telephone sales calls to customers, that he actively pursued the approximately 300 customers on the customer list attached to his Statement of Employment Status (TWCC-52) for the 10th quarter, that he made less than 80% of his preinjury AWW, that his low commissions do not reflect the time and effort he put forth in trying to makes sales, that he would sometimes make rush deliveries of software, that heavy items were delivered to customers by a delivery service, that he worked at home and at the office, that after he got injections in June or July he worked at home, that he found out about other employment opportunities by word of mouth and by reading the newspaper want ads, that he sent a letter and his resume to 20 to 30 potential employers, that he could only recall the name of one of the companies he sent his resume to, that most of the job advertisements would only give a post office box number or fax number and not a company name, that he did not get any interviews, that his job search was for another position as a computer salesperson either salaried or on commission, and that he was on medications and used a Galvanic stimulator prescribed by Dr. C.

Claimant also said that two of the potential employers he contacted called him to prescreen him and to let him know that their jobs would require him to relocate. Claimant said he was not prepared to relocate. Claimant further testified that he went to the Texas Rehabilitation Commission (TRC) in December 1998 to see if retraining is possible and that he had an appointment scheduled with a TRC representative on January 4, 1999. Claimant said he was not employed at the time of the CCH and that he last worked for new employer on October 28, 1998. When asked about his low commissions, claimant said that people were not buying and that dramatic price drops in computer equipment that people had already purchased made them shy away from buying more computer equipment. Claimant said that he believes he still owes new employer about $50.00 from a $6,000 advance on commissions from 1997 and that he made "zero dollars this whole year."

In a transcribed recorded statement taken on June 11, 1998, MI, who works for new employer and is apparently in a management position, said that at that time claimant was working for new employer as a corporate salesperson and had worked for new employer for about a year, that claimant gets paid on commission, that for the last couple of months claimant had been working from claimant's home, that claimant had not sold very much and must want very little money, that claimant was not performing enough work to continue to work for new employer, that he had given claimant notice that June or July would be claimant's last month with new employer, that claimant's commissions are adjusted for a previous "draw" (apparently the advance on commissions), and that claimant told him that he has a back problem.

In a chart note dated October 21, 1998, a doctor, possibly Dr. M, wrote that claimant had had three injections from Dr. C, that his back was doing a good bit better, that he had been helped with the Galvanic stimulator, that he still had some back pain with any attempts at heavy use of his back, and that he should undergo a functional capacity evaluation (FCE). Claimant underwent an FCE on November 12, 1998, and the evaluator, an occupational therapist, wrote that claimant's then current physical demand level was

"restricted medium level (30 lbs.)" and that his required physical demand level was "light level per DOT (20 lbs.)" and "heavy level per client (70 lbs)." The evaluator recommended that claimant continue medical follow-up and possibly retrain for alternative jobs. The evaluator noted that claimant is 36 years of age and had received conservative treatment since his injury. The evaluator wrote that claimant "is currently functioning at 4-6 hours of restricted medium (30 lbs.) safe work capacity level and current job as a Computer Representative required light (20 lbs.) level per DOT, heavy level (70 lbs.) per client." He also wrote that claimant did not meet "the critical demands of the job" in that he demonstrated deficits in repetitive lifting, stooping, kneeling, crouching, ascending/descending stairs, work endurance and work tolerance.

In his TWCC-52 for the 10th quarter, claimant marked that he had not earned any wages during the 90 days before the start date of the quarter, wrote that he was still paying back advanced commissions, noted that he returned to work on September 15, 1997, and marked that he earned less than 80% of his preinjury AWW because of the impairment from his injury. He did not list any employment contacts. Attached to the TWCC-52 is his list of approximately 300 customer contacts for computer sales. Also attached to the TWCC-52 are "commission due detail" documents which indicate that: (1) claimant's sales total in May 1998 was $865.94 and his commission was $13.00; (2) claimant's sales total in June 1998 was $5,628.85 and his commission was $296.20; and (3) claimant's sales total in July 1998 was $5,325.00 and his commission was $225.00. Thus, claimant made about $534.00 in commissions on about $11,800 in sales.

The hearing officer found that claimant did not attempt in good faith to obtain employment commensurate with his ability to work and that his inability to return to work earning wages equivalent to at least 80% of his preinjury wage during the filing period for the 10th quarter was not a direct result of his impairment. The hearing officer concluded that claimant is not entitled to SIBS for the 10th quarter. Claimant disagrees with the adverse findings on the good faith and direct result criteria for SIBS and contends that he acted in good faith because he was employed full time by new employer and looked for higher-paying jobs during the filing period and that his inability to earn 80% of his preinjury AWW is directly related to the period of absence from the marketplace caused by his injury. He states that there was a dramatic change in the marketplace during that absence which had a direct bearing on his ability to earn at least 80% of his preinjury AWW. Claimant also notes that the same hearing officer ruled in his favor for the ninth quarter and states that nothing has changed since then, except that he had a loss of his short-term memory at the CCH because he was unable to get his medication refilled.

In Texas Workers' Compensation Commission Appeal No. 982436, decided November 23, 1998 (Unpublished), the Appeals Panel affirmed the hearing officer's decision that claimant was entitled to SIBS for the ninth quarter. During the filing period for the ninth quarter, which was essentially February, March, and April 1998, claimant made $1,426.00 in commissions on over $38,000.00 in sales. In Appeal No. 982436, the Appeals Panel stated that "there is no absolute requirement that a claimant who is working full time must also be actively engaged in a job-seeking effort for higher pay before a hearing officer

may find that he or she acted in good faith" and noted that the job seach generally need not be at a certain wage scale or level in order to constitute good faith, but that a hearing officer could consider that as a factor in determining whether a good faith effort was made. In Texas Workers' Compensation Commission Appeal No. 941053, decided September 20, 1994, the Appeals Panel noted that eligibility for each quarter of SIBS is dependent upon the facts pertinent to that quarter and that a ruling on a specific quarter does not guarantee benefits for every subsequent quarter.

Whether claimant made a good faith effort to obtain employment commensurate with his ability to work during the filing period for the 10th quarter and whether his inability to earn 80% of his preinjury AWW during that filing period was a direct result of his impairment were fact questions for the hearing officer to determine from the evidence presented at the CCH. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. The hearing officer was not compelled to accept claimant's testimony concerning his efforts to make computer sales on a commission basis during the filing period. She could consider MI's statement as well as the evidence on sales and commissions. Likewise, with claimant only being able to recall the name of one other company he applied at, the hearing officer did not have to believe his testimony concerning 20 to 30 other job contacts. Claimant's own testimony concerning a slow market and potential buyers wary of dramatic price changes could be taken to be contrary to an assertion that his inability to earn 80% of his preinjury AWW was a direct result of his impairment during the filing period.

An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

We do not consider on appeal the documents attached to claimant's appeal which were not made a part of the CCH record. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. In addition, claimant has not shown that the documents attached to his appeal meet the test for newly discovered evidence as set out in Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge