APPEAL NO. 990185

On June 17, July 22, and December 15, 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). With respect to the issues at the CCH, the hearing officer decided that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the first through the seventh quarters and that the claimant did not timely file a Statement of Employment Status (TWCC-52) for the second through the fifth quarters. Claimant appeals the hearing officer's decision. 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)). Claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

It is undisputed that claimant sustained a compensable injury on_____; that she reached maximum medical improvement on April 8, 1995, with a 19% IR; and that she did not commute IIBS. The first quarter began on May 12, 1996, and the seventh quarter ended on February 7, 1998. The filing period for each quarter was the 90-day period preceding each quarter. Rule 130.101. The filing period for the first quarter began on February 11, 1996, and the filing period for the seventh quarter ended on November 8, 1997. It is undisputed that during the filing periods for the first through the seventh quarters claimant's average weekly earnings were less than 80% of her preinjury AWW of $716.26.

Claimant has a bachelor's degree in speech communications and a cosmetology license. Claimant testified that she began working for (employer) in 1980 and that she injured her back and neck when sorting copies on an "overhead" shelf at her desk on _____, while working for the employer. She said she had a previous back injury, that she has not had surgery on her back and neck, and that her doctors told her she is not a surgical candidate. According to documents in evidence, she has not worked for the employer since October 1994. In a written statement, claimant said her then treating doctor, Dr. T, took her off work at that time for treatment of her injury. MRI scans done in

December 1995 showed a very mild L5-S1 disc bulge/protrusion, mild bulging at L3-4, mild disc desiccation and degenerative spondylosis at three lumbar levels, and a small C6-7 disc protrusion. In a note dated October 30, 1995, Dr. T released claimant to light-duty work, without specifying restrictions, but stating she was released for an employer functional capacity evaluation (FCE) and job placement and that she had home maintenance program instructions. Claimant said Dr. T told her that her restrictions were no lifting over 20 pounds and no extensive sitting or standing and that she had to be able to exercise.

Claimant said that the employer gave her an FCE in December 1995 and was not able to determine her "abilities" and that the employer could find nothing for her to do. Claimant changed treating doctors to Dr. B and, on January 25, 1996, Dr. B wrote that claimant does not have a cervical or lumbar spine problem that is amenable to surgery, that she had had a great deal of physical therapy, and that he and she had decided she would make another visit to the employer to see if some lighter or limited duty was available with a reasonable expectation that claimant would gradually return to full duty in her original position. Claimant acknowledged that the employer's stated reason for terminating her on January 26, 1996, was falsification of records, but she said that was not true and that she had "won" her "unemployment," apparently referring to unemployment benefits. Several reports of Dr. B state claimant complained of back, neck, and shoulder pain and that she has myofascial pain and does water therapy exercises.

The claimant's TWCC-52 for the first quarter lists 26 employment contacts, her TWCC-52 for the second quarter lists 11 employment contacts, her TWCC-52 for the third quarter lists 25 employment contacts, her TWCC-52 for the fourth quarter lists 12 employment contacts, her TWCC-52 for the fifth quarter lists 12 employment contacts, her TWCC-52 for the sixth quarter lists five employment contacts, and her TWCC-52 for the seventh quarter lists three employment contacts. She applied several times to several of the same employers.

There are several letters thanking claimant for her job applications. There are several letters showing claimant was in contact with the Texas Rehabilitation Commission (TRC) and with a company to whom TRC referred her to help find her a job. There are several copies of job applications. There are numerous documents in claimant's job search notebook which reflect that claimant was contacting many companies which advertise that people who send them money for a mailing list and/or instructions will make lots of money at home and claimant listed these as job contacts. Claimant said she paid money to only two of these type companies. Her testimony about sending $500.00 to one of those type companies was initially excluded due to failing to include that company in an answer to an interrogatory about such payments. Claimant complains of that ruling but has not shown reversible error. Claimant's testimony about the $500.00 payment was later elicited on both cross-examination and direct examination without objection and claimant referred to it as a "pyramid-type deal" and that she lost her investment. Claimant also listed employment contacts with universities, computer companies, federal and state agencies, construction companies, communications companies, television networks, banks, and other companies.

She indicated that she mainly looked for clerical work but said she also applied for other positions.

There does not appear to be any medical document that limits claimant to part-time work and claimant noted on a Texas Employment Commission form in February 1996 that she was restricted to light-duty work but that she was available for full-time employment of 30 or more hours per week. During several of the relevant filing periods, including the filing period for the fourth quarter, claimant wrote that she applied at (the school district). She said she became employed as a substitute school teacher and substitute clerical worker for the school district on February 7, 1997, which was two days before the filing period for the fifth quarter began. She said she was paid $50.00 per day as a substitute clerical worker and $60.00 a day as a substitute teacher. Claimant listed no wages on her TWCC-52 for the fifth quarter but said that she worked three to four days a week, and sometimes five days a week, for the school district during the filing period for the fifth quarter. The wage information for the filing period for the fifth quarter is set out in her TWCC-52 for the sixth quarter and that information reflects that the claimant normally worked between one and three days for the school district during the filing period for the fifth quarter.

Claimant said she continued to work for the school district during the filing period for the sixth quarter and that her hours varied. Wage information on her TWCC-52 for the sixth quarter reflects continued part-time work in the filing period for that quarter. She said that the school district was on a year-round schedule but that there was a break for several weeks, starting on June 30th, during the filing period for the sixth quarter and that during that time she worked part time for a computer company in a clerical position. She said that during that time she also worked part time for an airline company pulling records for two weeks but did not list that wage information on her TWCC-52 because she said that information was not available when she completed that form.

Claimant said that during the filing period for the seventh quarter she worked full time for the school district as a substitute clerical worker. Wage information on her TWCC-52 for that quarter reflects that she worked part time for at least half the filing period for the seventh quarter and possibly full time for the balance of that filing period.

EH, carrier's adjustor, testified that many of claimant's job-contact entries failed to give adequate information for her to contact the companies and that eight of the employers listed by claimant said claimant had not contacted them. KB, a case manager hired by carrier, testified that the school district informed her that claimant had limited herself to substitute teaching at only two schools, that several of the employers listed in claimant's job-search notebook said that claimant had not contacted them, and that some of the documents in that notebook represented pyramid schemes and chain letters.

With respect to the issues of whether claimant is entitled to SIBS for the first through the seventh quarters, the hearing officer found that during the filing periods for those quarters claimant did not make a good faith effort to obtain employment and that her "unemployment/underemployment" was not a direct result of her impairment from her

compensable injury. The hearing officer concluded that claimant is not entitled to SIBS for the first through the seventh quarters. Whether claimant made a good faith effort to obtain employment commensurate with her ability to work and whether her unemployment or inability to earn at least 80% of her preinjury AWW were a direct result of her impairment from her compensable injury were fact questions for the hearing officer to determine from the evidence presented. The hearing officer states in her decision that claimant did not present herself as a credible witness and that she did not believe her testimony. The hearing officer further states that claimant did not prove that she made a good faith effort to find employment commensurate with her ability to work, including when working part time as a substitute teacher. The hearing officer 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). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witnesses. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's findings and decision are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the issues of whether claimant timely filed a TWCC-52 for the second through the fifth quarters, we note that the benefit review conference report states that the Texas Workers' Compensation Commission (Commission) made an initial determination that claimant was not entitled to SIBS for the first quarter. Thus, under Rule 130.104(f), the Commission was to enclose a TWCC-52 with instructions for claiming delayed entitlement to SIBS with the notice of nonentitlement. This is not a case of continuing entitlement to SIBS where carrier would have been required to provide claimant a TWCC-52. Failure to file a TWCC-52 relieves the carrier of liability for SIBS for the period during which it is not filed. Section 408.143(c).

Claimant testified that she timely filed her TWCC-52s with carrier for the second through the fifth quarters and that those were sent to carrier by regular mail. She said that when carrier told her it had not received her TWCC-52s, she sent the TWCC-52s for the second through the fifth quarters to carrier by facsimile transmission on May 23, 1997, which was about two weeks into the fifth quarter. EH testified that when claimant called her and asked if she had received the TWCC-52s, she searched the carrier's claim file and computer file and found that the TWCC-52s had not been received by carrier. EH said claimant then faxed the TWCC-52s for the second through the fifth quarters to carrier on May 23, 1997, and that that was the date carrier first received those TWCC-52s. The copies of the TWCC-52s in evidence for the second through the fifth quarters do not show a date received by the carrier earlier than May 23, 1997, although each is dated by claimant within the filing period preceding the quarter to which each TWCC-52 applies. The hearing officer found that claimant first filed her TWCC-52s for the second through the fifth quarters with carrier on May 23, 1997, and she concluded that claimant did not timely file a TWCC-52 for the second through the fifth quarters. We conclude that the hearing officer's findings and decision on the issue regarding timely filing of the TWCC-52s are supported by

sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer decided that claimant is not entitled to SIBS for the eighth quarter. Although entitlement to eighth quarter SIBS was not an issue before the hearing officer, we do not find reversible error in her ruling on that quarter under the particular circumstances presented because Section 408.146(c) provides that an employee who is not entitled to SIBS for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. Thus, since claimant has been found not to be entitled to SIBS for the first four quarters of SIBS, she would not be entitled to SIBS after the fourth quarter under Section 408.146(c).

Claimant complains about being assisted by more than one ombudsman. The same ombudsman assisted claimant at the first two settings of the CCH and another ombudsman assisted claimant at the last setting of the CCH. Claimant made no objection at the last setting of the CCH about having a different ombudsman assist her at the last setting and thus we do not address that matter for the first time on appeal. Claimant states that she was not allowed to take notes. At one point, the hearing officer asked claimant not to write on "those" while claimant was testifying with the use of her exhibits and apparently the hearing officer was asking claimant not to write on the exhibits. We do not find error in that instruction.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge