APPEAL NO. 990373

On February 2, 1999, 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 issue at the CCH was whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the 21st quarter. The claimant requests reversal of the hearing officer's decision that he is not entitled to SIBS for the 21st quarter. No response was received from the carrier.

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 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 employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent 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.

Claimant testified that he is 59 years of age and that he injured his back and neck on _____, while working as a laborer doing construction work for (employer 1) and that he has been treated by Dr. H since his injury. The parties stipulated that on _____, claimant sustained a compensable injury; that he reached maximum medical improvement on November 23, 1992; that he has a 19% IR; that he did not commute IIBS; and that the 21st quarter was from November 12, 1998, to February 10, 1999. The filing period for the 21st quarter was from August 14 to November 11, 1998 (the filing period).

Claimant testified that on March 18, 1998, he began working for the (employer 2) as a dishwasher; that in (subsequent date of injury) he injured his back, arm, and knees when he fell from a ladder while cleaning walls at (employer 2); that he reported that injury to (employer 2) on April 26, 1998; that he is pursuing a workers' compensation claim for that

injury but has not received workers' compensation benefits for that injury; that he was sent to Dr. J (phonetic spelling) for that injury; that he missed a few weeks of work due to that injury; that Dr. J released him to return to his regular duties at (employer 2); that he kept his appointments with Dr. J; that he went back to work at (employer 2); that he worked at (employer 2) for four or five months; that his work at (employer 2) included scrubbing mats and trash cans; that he quit working for (employer 2) because the work he was doing there bothered his back and because (employer 2) had reduced his work hours to 14 hours a week and he could not pay his rent and child support on what he was earning there; that after he quit his job at (employer 2) he looked for full-time work; that he looked for work during the filing period; that he did not work during the filing period; that he sees Dr. H about once a month for back complaints; that during the filing period he took pain medication prescribed by Dr. H every day; and that he did not tell Dr. H about his injury in (subsequent date of injury) at (employer 2).

In a letter dated January 29, 1999, the executive assistant of (employer 2) wrote that claimant was employed as a dishwasher by (employer 2) from March 18, 1998 until July 3, 1998; that on April 26, 1998, claimant reported a work-related injury; that claimant stated that he was cleaning the walls and fell from a ladder; that claimant was treated by a physician and released to his regular duties on May 12, 1998; that claimant failed to keep his follow-up appointments; that claimant failed to show up for some of his scheduled shifts and eventually just stopped reporting to work; and that claimant's hours were not reduced by his manager.

In a report dated November 11, 1998, for a date of visit of November 9, 1998, Dr. H stated a date of injury of "3/30/1992," diagnosed claimant as having a thoracic sprain and lumbar disc syndrome, wrote that claimant was still experiencing lower back pain, and stated that the treatment plan was an exercise program. Dr. H also prescribed medication. No report from Dr. J is in evidence.

Claimant's Statement of Employment Status (TWCC-52) for the 21st quarter lists 45 employment contacts, 39 of which were in the filing period. According to the TWCC-52, claimant applied for positions as a dishwasher and janitor, and any position that was available. Claimant said that he had the people he contacted about employment fill out the TWCC-52 and sign it and it appears from the different types of handwriting and signatures on the TWCC-52 that that is what occurred.

The hearing officer found that during the filing period the claimant did not make good faith efforts to look for work commensurate with his ability to work and that he failed to prove that his unemployment during the filing period was a direct result of his impairment. The hearing officer concluded that claimant is not entitled to SIBS for the 21st quarter. The claimant contends that the hearing officer's decision is contrary to the great weight of the evidence. In Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panel pointed out that the hearing officer, as the trier of fact, must sometimes assess whether undeniable job contacts made with prospective employers

constitute a true search to re-enter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS. In the instant case, the hearing officer could consider the claimant's testimony concerning his job search during the filing period; Dr. H's report; the information on the TWCC-52; and the evidence that claimant had a job shortly before the filing period began, that he claimed that he was injured on that job, that the doctor who treated him for that claimed injury apparently released him to return to his regular work duties at that job, and that he continued to work at that job until he quit. While claimant said that his hours were reduced at (employer 2), there is evidence to the contrary. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge