

APPEAL NO. 990448

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 8, 1999. The (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the first, second, and third quarters, and that the respondent (carrier) was otherwise relieved of liability for a portion of second quarter SIBS due to the claimant's late filing of a Statement of Employment Status (TWCC-52) for this quarter. The claimant appeals these determinations, expressing his disagreement with them. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. We will not consider documents attached to the claimant's appeal but not offered into evidence at the CCH. See Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993.

DECISION

Affirmed.

The claimant sustained a compensable low back injury (described in the medical records as a "huge rupture" at L4-5). He reached maximum medical improvement on March 14, 1996, and was assigned a 36% impairment rating (IR). He subsequently moved to (state 1) and testified by telephone at the CCH.

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 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. 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 first SIBS quarter began on April 10, 1998, and the third SIBS quarter ended on January 7, 1999. The filing period for each quarter was the preceding 90 days. At issue in this case was whether the claimant met the good faith job search and direct result criteria for SIBS entitlement.

During the filing periods, the claimant was released to sedentary duty with a 15 to 20-pound lifting restriction. His employment efforts consisted solely in the development of his own business. He testified that in July 1997, when he had the necessary equipment, he "actively" started his home-based business, which involved compiling and selling mailing lists and "how-to" books. He said he works an aggregate of four to five hours per day at the business with frequent rests and that his wife assists him. He has yet to make any

profit at this business, but is "excited" about his prospects for 1999, once he is able to add more equipment, and has a "feeling" his efforts will be profitable. He described his business development efforts as advertising in tabloids.

Attached to his TWCC-52 for first quarter SIBS, was a statement of expenses for this quarter (\$1410.96) and income (\$858.00). He did not attach any figures to his second quarter TWCC-52, but wrote on the form that his business income was "very little" and his expenses were "huge." Similarly, on his TWCC-52 for the third quarter, he wrote that he had a "lot" of business expenses and "very little" income. He testified that he would accept outside employment if any were available in the "small town" where he lived.

The claimant had the burden of proving his entitlement to SIBS for each quarter claimed. Whether he made the required good faith job search and whether his underemployment was a direct result of his impairment were questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. The Appeals Panel has generally defined good faith as a subjective notion characterized by honesty of purpose and being faithful to one's obligations. Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993. A claimant's self-employment efforts may constitute a good faith job search. Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994. We have also recognized in self-employment cases, that a claimant must establish that he or she made efforts to solicit customers and develop the business. Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995; Texas Workers' Compensation Commission Appeal No. 950303, decided April 12, 1995. In Texas Workers' Compensation Commission Appeal No. 970203, decided March 20, 1997, we affirmed the determination of the hearing officer, who, in finding a good faith job search in the context of self-employment commented:

In such a case, the dispositive inquiry is whether the injured worker has made a good faith effort to build, promote, and manage the self-employment business in such a manner that it eventually will become profitable, and, in the event that the injured worker has done so, it will be found that the injured worker's search for employment was made in good faith.

In the case we now consider, the hearing officer commented in her decision and order that the claimant had "to provide specific information concerning the gross income, business expenses, and the net income of the business." Having failed to do so, she found that he "did not provide sufficient evidence to show that he made a good faith effort to build, promote, and manage the self-employment business in such a manner that it eventually will become profitable." Finding of Fact No. 4. While some financial information was provided with the application for first quarter SIBS, none was provided with the applications for second or third quarter SIBS. No business plan was offered by the claimant, nor did he discuss plans to make the business viable. Even though by the end of the third quarter filing period the "business" was more than one year old, the claimant could

say no more than that he had a "feeling" that 1999 would be a profitable year. In his appeal, the claimant offered that he was working "very diligently at it within my limitations and restrictions," provided some additional information that he did not present to the hearing officer, and invited the Appeals Panel to examine his bank records. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence presented at the CCH sufficient to support the finding that the claimant did not make the required good faith job search. In the absence of such an effort, we also find the evidence sufficient to support the determination that the claimant's underemployment in each filing period at issue was not a direct result of his impairment.

With regard to the finding of late filing for second quarter SIBS, Section 408.143 (a) provides that the statement must be filed with the carrier. Failure to do so relieves the carrier of liability for SIBS for the period of the late filing. The second SIBS quarter began July 10, 1998. The claimant testified that he mistakenly sent the form to the field office of the Texas Workers' Compensation Commission (Commission) and not to the carrier until August 26, 1998, after he discovered his mistake, and that the carrier never sent him a TWCC-52 to fill out in time to apply for second quarter SIBS. There was no evidence presented that the Commission ever determined that the claimant was entitled to first quarter SIBS. Therefore, this is not a case of continuing entitlement to SIBS, and the carrier was under no obligation to provide a TWCC-52 to the claimant for second quarter SIBS. Thus, its presumptive failure to do so did not relieve the claimant of the effects of failing to timely file the form. See Texas Workers' Compensation Commission Appeal No. 960343, decided April 8, 1996. Under these circumstances, the undisputed evidence of when the claimant sent the second quarter TWCC-52 to the carrier was sufficient to support the hearing officer's determination that the claimant's failure to timely file the form relieved the carrier of liability it otherwise would have had for SIBS for the period of the late filing.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge