

APPEAL NO. 990570

On February 16, 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 appellant (claimant) is entitled to supplemental income benefits (SIBS) for the second quarter. The claimant requests reversal of the hearing officer's decision that he is not entitled to SIBS for the second 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)). Underemployment occurs when the injured employee's average weekly earnings during a filing period are less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury. Rule 130.101. The claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The record reflects that claimant declined the assistance of an ombudsman. The parties stipulated that claimant sustained a compensable injury on _____; that claimant has an IR of 26%; that the second quarter was from November 7, 1998, to February 5, 1999; and that the filing period for the second quarter was from August 8 to November 6, 1998 (the filing period).

Claimant is 69 years of age. He sustained a work-related injury to his left hand in an accident with a band saw on _____. Dr. E, claimant's treating doctor, reports that claimant had multiple lacerations and a fracture to his index finger, long finger, and thumb of his left hand, and that he had many procedures and a long course of therapy to save his fingers. Claimant said that Dr. E had to reattach a finger to his left hand. The hearing officer notes in his decision that claimant is right handed.

Claimant is the president and part owner of (employer), and JJM is the vice-president and other owner of employer. They have been in business since about 1971. Claimant's injury occurred while working for the employer. Claimant said that he and JM were bricklayers and that the only skill he has is being a bricklayer. Claimant said that he earned approximately \$600.00 a week prior to his injury, that before his injury the employer

employed 10 to 14 employees, that after his injury the business deteriorated because he was unable to hold up his end of the business, that at the present time the employer has no employees except for himself, that he no longer participates in the management of the employer, that there is a minimal amount of money in an employer account but he does not know how much money, that the employer owns a yard where equipment that the employer owns is kept, that the yard and equipment need to be maintained, that before his injury laborers use to maintain the yard and equipment, that Dr. E has limited him to four hours of work a day, that four hours of work a day is all he is capable of doing, and that he has lost the ability to use his left hand.

Claimant further testified that during the filing period he began working for the employer part time performing light maintenance work in the yard and on the equipment, that he is paid minimum wage for his maintenance work, that he keeps his own hours, that he writes himself a check each week for the hours he worked, that possibly there is more maintenance work to be done than the hours he works, that he did not look for work other than his maintenance job for the employer during the filing period, that he thinks that JM did one or two small jobs last year, that he thinks that JM is now retired, that the employer corporation has not dissolved, that it has been a while since the employer did a job, and that there would be no point in bidding for a job since the employer does not have the manpower to do a job and he has not kept up with price structures to bid jobs.

Claimant's Statement of Employment Status (TWCC-52) for the second quarter reflects that he started working on August 14, 1998. Wage information for the filing period for the second quarter is listed on the TWCC-52 for that quarter, although wage information for a few weeks of the filing period for the second quarter is listed on the TWCC-52 for the third quarter. According to wage information in evidence, claimant earned \$1,107.25 during the filing period, which results in average weekly earnings of \$85.15 (total earnings divided by the 13 weeks in the filing period), and he worked from 15.5 hours to 20 hours per week from August 14, 1998, to the end of the filing period, November 6, 1998. It is undisputed that claimant's average weekly earnings during the filing period were less than 80% of his preinjury AWW.

Claimant underwent a functional capacity evaluation (FCE) in December 1997. The FCE report was admitted into evidence without objection. Claimant states in his appeal that he has never seen the December 1997 FCE report. The record reflects that the December 1997 FCE report was shown to claimant during cross-examination and at that time he said that that was the first time he had seen it. However, it had already been admitted into evidence without objection. The December 1997 FCE report notes that in an eight-hour workday, claimant can stand, walk, sit, and drive without restrictions; that he can lift/ carry 10 pounds frequently and 30 pounds occasionally; that no restrictions are listed for use of his right hand, that he has no restrictions for repetitive movement of his feet; that he can frequently bend, squat, kneel, climb, reach, twist, rotate, and crawl; that he cannot perform simple grasping, pushing, pulling, or fine manipulation with his left hand; and that he was released to return to work without any restriction noted on the number of hours a day he could work. The report appears to be signed by Dr. E.

In a report dated July 17, 1998, Dr. E wrote that claimant's wounds had healed; that he has substantially limited motion of his left hand; that he is unable to make a fist with his left hand, grip with his thumb with much force, or straighten out his index and long fingers completely; that his thumb only flexes to the base of his long finger; that it is not anticipated that he will get any better; that his permanent disability is limited use of his left hand; that the limitations of his left hand are that he is unable to grip, carry objects, use a hammer, or other tools of his trade; and that he was formerly a bricklayer and has been unable to work as a bricklayer since his injury.

In a report dated September 23, 1998, Dr. E wrote that claimant presented for another evaluation of his left-hand injury, that he is no longer able to use his left hand for working, that he has loss of range of motion and of sensation of his left hand, that he has occasional triggering of the left hand, that he is currently working odd jobs such as maintenance and painting, and that claimant is limited to working only half days in some type of light-duty work since his right hand is the only one that can be used.

In a report dated January 13, 1999, Dr. E repeated much of what is in his September 23rd report and added that claimant is unable to extend the index finger of his left hand, he has minimal strength in the fingers of his left hand, he has loss of sensation along the radial border of his index finger and half of his thumb tip, and that he, Dr. E, had advised claimant that it is possible for claimant to do minimal work for about half a day but that he cannot use his left hand for any manual heavy work.

In Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996, the Appeals Panel noted that medical evidence from the filing period is clearly relevant, but that other medical evidence from outside the filing period, especially that which is relatively close to the filing period, may be relevant to the condition of the claimant during the filing period. Thus, in determining the weight to be given to Dr. E's report of September 23, 1998, wherein Dr. E states that claimant can no longer use his left hand for working and is limited to working only half days doing light duty, the hearing officer could consider the December 1997 FCE report and Dr. E's report of July 17, 1998, both of which contain limitations on the use of claimant's left hand but neither of which mentions any limitations on the number of hours claimant can work during a day.

In Texas Workers' Compensation Commission Appeal No. 951770, decided December 4, 1995, the Appeals Panel noted that in determining good faith in an underemployment case, the hearing officer may consider the kind of work being done and the number of hours worked, and that decision cites several Appeals Panel decisions for the proposition that "the good faith effort necessary for SIBS must be to obtain employment commensurate with the ability to work, not to return to the previous employment or to employment at a certain wage scale." In Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996, the Appeals Panel noted that, in common usage, good faith is a term ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intent to defraud, and, generally speaking, means being faithful to one's duty or obligation. In the instant case, claimant, as president and part owner of the

employer, hired himself to do part-time, light-duty maintenance work at minimum wage for the employer. The hearing officer wrote in his decision that the claimant had organized his affairs so as to be entitled to SIBS.

The hearing officer found that claimant did not attempt in good faith to obtain employment commensurate with his ability to work and that claimant was not unemployed or underemployed as a direct result of his impairment. The hearing officer concluded that claimant is not entitled to SIBS for the second quarter. Whether claimant attempted in good faith to obtain employment commensurate with his ability to work and whether he was unemployed or underemployed as a direct result of his impairment were fact questions for the hearing officer to determine from the evidence presented. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of 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 witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of the evidence or substitute its judgement for the trier of fact. Appeal No. 950084. 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 contrary to the overwhelming weight of the evidence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge