APPEAL NO. 990601

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 2, 1998, a contested case hearing (CCH) was held. There were a number of issues arising out of the appellant's (claimant) undisputed _____, injury, incurred in the course and scope of employment with (employer). The issues involved whether the claimant had lumbar and pectoral injuries that were part of the _____, injury, whether he had waived the right to assert extent of injury to those areas, whether he had waived the right to dispute the designated doctor's impairment rating (IR), what his IR was, whether he was entitled to supplemental income benefits (SIBS) for his first, second, and third quarters of eligibility, and whether untimely filing of a Statement of Employment Status (TWCC-52) for the third quarter caused the respondent (carrier) to be relieved of liability for some of those benefits. Two of these issues were added at the CCH on a finding of good cause by the hearing officer.

The hearing officer found that the report of the designated doctor on IR had not been overcome by the great weight of contrary medical evidence, and that claimant's IR was 27% with a date of maximum medical improvement of May 6, 1997. He held also that claimant had waited too long to raise the issue of inclusion of a lumbar injury in his IR and had thus consequently waived a dispute. He found that claimant's alleged lumbar and pectoral injuries were not related to the _____, injury. He found that while claimant's unemployment was the direct result of his impairment, he had not made a good faith effort to find employment commensurate with his ability to work. In so finding, the hearing officer rejected the claimant's contention that he was without ability to work. He noted that, in any case, the carrier would be relieved of liability for the third quarter because claimant did not file his TWCC-52 until September 22, 1998.

The claimant disputes the hearing officer's decision through disputing enumerated conclusions of law. He argues that there are numerous medical records which note that the claimant had back pain or lumbar pain and the hearing officer erred in his determination that the lumbar injury is not part of the compensable injury. The claimant further asserts that he was unable to work during the qualifying periods for each of the disputed SIBS quarters and is thus entitled to SIBS. The claimant asserts there has been no waiver of the ability to raise extent of injury. The claimant, however, agrees that 27% is his correct IR and does not appeal it, or the finding that he waived a dispute to it, but asserts that the entire amount of impairment income benefits (IIBS) due has not been paid. The carrier responds by reciting the evidence in favor of the decision. The carrier points out that no dispute over the extent of injury was raised until after the ending of the impairment period. The carrier states that having only sought one job during three quarters, the claimant failed to make a search in good faith for employment he was capable of performing. The carrier asks that matters not raised at the CCH not be considered, and that the decision be affirmed.

DECISION

Affirmed.

At the outset, we note that even if the matter of nonpayment of benefits in accordance with the IR in this case had been timely raised in the CCH below, this is a matter primarily within the purview of the Compliance and Practices Division. If all IIBS due were not paid, a complaint may be filed with that division of the Texas Workers' Compensation Commission. We will not take that matter up for the first time on appeal.

The claimant was in a "bucket" on a forklift and suspended in the air when the bucket suddenly dropped, causing claimant to be jolted, on _____. (The recited distance of the fall ranges from claimant's testimony that it was 10-12 feet to his answers to interrogatories in an earlier proceeding in which he stated the bucket fell 6 to 8 feet.) Claimant said he sought treatment from the employer's recommended clinic within 10 days (the medical records show March 7, 1994, was the date treatment was first sought), but continued to work until on or about July 1, 1994. The SIBS filing periods ran from October 29, 1997, through July 27, 1998, inclusive. Claimant agreed that he essentially sought employment with one employer, during the second quarter, although he also said he may have gone around to a few places not listed on any of his TWCC-52 forms but no one would take an application.

The hearing officer has summarized the pertinent medical evidence and we incorporate that summary, which we will not repeat. Although those records indicate intermittent complaints of lower back pain, treatment for claimant was focused largely on his cervical and shoulder areas. The claimant's explanation for any omission in the medical records of treatment for the lower back was that his doctors determined they had to concentrate on relieving his shoulder or his cervical injuries first before they could address his back. However, there was no medical opinion or evidence offered that there would be medical reasons for not treating the entire injury. Claimant had shoulder and neck surgery. His treating doctor at the time of the CCH, Dr. G, assessed a 29% IR on May 6, 1997, 10% of which included lumbar IR. On November 22, 1997, he was examined by the designated doctor, Dr. W, and given a 27% IR. Dr. W noted claimant's complaints of low back pain since the injury. Dr. W evidently regarded the impaired areas as the neck and shoulder, although it does not appear that he examined the lumbar spine for range of motion.

If there was any dispute that followed specifically to reconcile the two IRs, there is no evidence of it in this record. It was the hearing officer at this CCH who added the express issue of the claimant's proper IR.

As the hearing officer pointed out, there are notations, off and on, throughout the medical records, that claimant had low back pain. However, his treatment, and most of his recited complaints, centered on his neck and his shoulder. Claimant went through another CCH involving the issue of disability in 1995, and answered interrogatories from the carrier in that proceeding. He was represented at that time by another attorney. When asked to

describe the claim injury in one question, claimant answered with reference to his neck and shoulder. He stated that he first felt he had answered the literal question truthfully, but then said it was incomplete, likely due to omissions made by his then-attorney's office staff. Claimant had not read the interrogatories, he stated, previously to signing them under oath.

Dr. G wrote in February 1998 that the claimant has no ability to undertake or even to seek gainful employment. Dr. G judged that claimant was totally and medically disabled. He stated that claimant had a lumbar herniated disc. Claimant testified that he had not had a lumbar MRI because it was not approved.

While claimant testified there were things he could do around the house, he said he could perform such functions for no more than one-half hour and would usually "pay for it" thereafter. Claimant also said that mowing the lawn was done by his wife. A videotape was offered, taken of the claimant on April 21, 1998, at about 1:30 p.m. in the afternoon over about one and one-half hours that day (according to the timer). Claimant is shown doing some work on a rider lawnmower, and bending from the waist. He drives his truck and empties an apparently full gas can into another truck, then drives away. He is then shown riding the rider lawnmower. Claimant had a possible heart attack in January 1997 while changing a water pump on a car.

EXTENT OF INJURY AND WAIVER

The claimant has not appealed the determination of the hearing officer that he waived his right to dispute the designated doctor's IR, but he has appealed the finding that he has waived a dispute over extent of injury. The claimant has also agreed that the 27% IR of the designated doctor is the correct one. In this case, these disputes are two sides of the same coin. There was no showing, or contention, that the lumbar injury is a new one that has suddenly manifested and that the claimant could not have, at a much earlier point, brought forward an extent-of-injury issue. The hearing officer has cited Texas Workers' Compensation Commission Appeal No. 951494, decided October 20, 1995, as support for his determination that the claimant cannot now, years after his injury and the designated doctor's report, reopen the matter of whether he also injured his lumbar spine for the first time during a SIBS dispute. We agree.

Whether pain represents a new injury, part of the original injury, referred pain, or a condition apart from an injury are all factual matters that are the hearing officer's responsibility to resolve. In this case, he appears to have considered that the claimant was not asserting a lower back injury when logic and common experience might appear it would have been brought forward. The evidence in this case was conflicting, but we do not agree that the hearing officer's determination regarding the asserted pectoral injury (about which there is almost no medical information) and lumbar injury are against the great weight and preponderance of the evidence.

We would observe that as claimant has agreed to the designated doctor's IR, and his claim for SIBS depends upon more than just the lumbar injury, it would appear that the

primary benefit to be obtained by the claimant from seeking to bring the lumbar condition within the compensable injury is for purposes of medical treatment. Notwithstanding the determination of the hearing officer, whether any treatment for the low back could be said to constitute reasonable and necessary treatment of other aspects of the compensable injury is a determination to be made within the medical review process.

ENTITLEMENT TO SIBS

Regarding the ineligibility of the claimant for SIBS, we emphasize that in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. We have held that the burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and that a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994. While the fact that medical evidence is "conclusory" does not in and of itself provide a basis for rejecting such evidence, we would note that doctor's statements that fail to supply an explanation as to why the asserted inability to work is "total," leave the fact finder free to consider other evidence (such as the videotape in this case) that show even a limited ability to work.

It is incumbent upon claimant's doctors to work with the claimant to determine what he can do, not what he cannot do, so that he may make a tailored search. This is important because income benefits do not last forever, and will end 401 weeks after the date of injury. Section 408.083. Furthermore, new SIBS rules, effective January 31, 1999, require that specific, continuous, and verifiable job search efforts be made to prove entitlement to SIBS.

Having reviewed the evidence on SIBS, we cannot agree that the decision of the hearing officer is not sufficiently supported, and we affirm his decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge