APPEAL NO. 990635

On March 4, 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 issues at the CCH were whether respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBS) for the sixth, seventh, and eighth quarters. Appellant/cross-respondent (carrier) requests reversal of the hearing officer's decision that claimant is entitled to SIBS for the sixth and seventh quarters. Claimant requests reversal of the hearing officer's decision that she is not entitled to SIBS for the eighth quarter.

DECISION

Reversed and remanded.

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 claimant during the filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). An employee initially determined by the Texas Workers' Compensation Commission (Commission) to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable 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).

This case concerns an assertion of no ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he had no ability to work at all during the filing period, 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. In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, the Appeals Panel stressed the need for medical evidence to affirmatively show an inability to work if that was being relied on by claimant, and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred."

With regard to the direct result criterion for SIBS, in Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996, the Appeals Panel noted that a finding that a claimant's unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury." Claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant has a 29% IR; that the sixth quarter was from February 27 to May 28, 1998; that the seventh quarter was from May 29 to August 27, 1998; that the eighth quarter was from August 28 to November 26, 1998; that during the filing periods for the seventh and eighth quarters claimant earned no wages and did not attempt to obtain employment; and that during the filing period for the sixth quarter claimant earned no wages. The parties did not stipulate as to the filing periods. The filing period for each quarter was the 90-day period preceding each quarter. Rules 130.101 and 130.102. Thus, the filing period for the sixth quarter was from November 28, 1997, to February 26, 1998; the filing period for the seventh quarter was from February 27 to May 28, 1998; and the filing period for the eighth quarter was from May 29 to August 27, 1998.

Claimant's testimony did not cover what her job was at the time of her injury. The ombudsman said in the opening statement that claimant's job at the time of her injury was making egg rolls. Dr. Y notes in his report of July 27, 1995, that he was the designated doctor chosen by the Commission. He reported that claimant reached maximum medical improvement on July 25, 1995, with a 29% IR. Dr. Y noted that claimant was working for the employer, a food company, on _____, when she slipped and fell at work, striking her back against the corner of a wall; that subsequently an MRI revealed that claimant has bilateral avascular necrosis (BAN) of her hips and she had core decompressions of both hips; and that the 29% IR was for impairment of claimant's lower extremities due to bilateral hip impairment, including the BAN.

Claimant testified that after her injury, the Texas Rehabilitation Commission (TRC) paid for her training at a technical school, apparently to become an electronics technician; that while going to the technical school she worked part time for an electronics company; that the time period that she went to technical school and worked part time could have been in 1997; that her job at the electronics company was to monitor defective chips on computer boards; that she did not complete her electronics training; that she was not able to do the work of an electronics technician because an electronics technician must lift boxes; that she moved to (city 1); that she has not worked since she moved to (city 1); that before she moved to (city 1), her treating doctor in (city 2), Dr. K, told her that she needed hip surgery; and that between November 1997 and August 1998 a typical day for her consisted of doing very light cleaning at home, going to "school," and sometimes cooking at home. When claimant was asked how many hours "were you" taking at school, claimant

said she is going to school full time, but that she schedules her classes such that there are intervals of time long enough for her to go home and rest before starting another class.

On July 28, 1997, Dr. K wrote that claimant had increased pain in her left hip, that she felt more comfortable using a cane, and that the prognosis was "good for light duty only mainly sedentary type." Dr. K gave the same prognosis on August 5, 1997. On September 17, 1997, Dr. K wrote that claimant was moving to (city 1), that she would continue her education, that she would search for a part time job in (city 1), and that he was referring claimant to Dr. R in (city 1). Dr. K stated a prognosis of "fair to poor at present status with only mainly sitting jobs."

On November 24, 1997, Dr. R wrote that claimant was 37 years of age at that time, that her bilateral hip pain was getting worse, that claimant works as an electronics technician, that he suspected that claimant has BAN, and that claimant's options are to live with it or to have surgery, but that he could not discuss surgery because claimant may be pregnant and he did not have x-rays. On February 2, 1998, Dr. R wrote that claimant was pregnant and was expecting her baby in September, that there was no treatment he could offer her because of her pregnancy, that claimant would probably be worse over the ensuing months because of the added weight, that "she is obviously not able to work," and that once claimant had her baby, he would have x-rays of her hips done. On March 3, 1998, Dr. R wrote that claimant told him that she worked as an electronics technician until May when she moved to (city 1), that claimant was looking for a job, that he discussed with claimant that "it is probably unreasonable for her to try to seek work while she is pregnant with the underlying hip condition that she has," that he was going to write a prescription for a walker, that he suspected that at some point claimant would need hip replacements, and that he did not think claimant "is fit to work."

On May 12, 1998, Dr. R wrote that claimant had pain in both hips and was using a walker, that he was not surprised that her pain had gotten worse with the weight gain during her pregnancy, that claimant "is currently unfit to work," that claimant is a technician who stands on her feet, and that "I think even if she were not pregnant she would not be able to do that given the avascular changes in her hip and the pain that she was having before the pregnancy." Dr. R also noted on May 12, 1998, that claimant was unable to work secondary to the BAN of her hips. On May 19, 1998, Dr. R wrote that, with regard to his report of May 12th, claimant is not a technician at the present time and had not worked for the past six or seven months and that claimant had misunderstood the question he had asked, apparently about her previous job before moving to (city 1). It is unclear exactly when claimant moved to (city 1).

On August 25, 1998, Dr. R wrote that claimant had delivered her baby; that her hips felt a little better now that she was not pregnant; that she still had pain in both hips; that he would probably recommend bilateral hip replacements; that, in his opinion, without surgical intervention claimant is not going to be able to return to any type of gainful employment because of the significant degree of avascular necrosis of both hips; that it would be reasonable to perform the surgery on claimant when claimant's baby is between six and

nine months of age as her baby would not require as much care then; and that "I do believe the patient is unable to work until she has hip replacement surgery." On October 6, 1998, Dr. R wrote that claimant wanted to try to postpone the hip replacement surgery as long as possible because of her young age and he concurred with that; that claimant's pregnancy had aggravated her symptoms, but her prior inability to work was based upon the avascular change in her hips; that he thought that claimant could now be released to work in the "ideal job"; and that the ideal job would be a sedentary desk job, which would allow her to get up and stretch when her hips are symptomatic. Claimant said that Dr. R released her to work based on her request and that he told her that her work would have to be "lighter work." On October 29, 1998, Dr. R was asked whether claimant's inability to work was due to her pregnancy or the compensable injury, and Dr. R replied that the BAN of claimant's hips prevents her from working.

Claimant's Statement of Employment Status (TWCC-52) for the sixth quarter reflects that she contacted four employers about employment during the filing period for that quarter. No employment contacts are noted on the TWCC-52s for the seventh and eighth quarters.

The carrier contends that the hearing officer erred in finding that during the filing periods for the sixth and seventh quarters, claimant's unemployment was a direct result of her impairment. Carrier contends that the sole cause of claimant's inability to work during the filing periods for the sixth and seventh quarters was the claimant's pregnancy. The Appeals Panel has held that a claimant's unemployment or underemployment must be a direct result of the impairment, but the impairment need not be the sole cause of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996. Dr. R's reports provide some evidence that claimant's unemployment during the filing periods for the sixth and seventh quarters was a direct result of her impairment. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). We conclude that the hearing officer's finding that during the filing periods for the sixth and seventh quarters, claimant's unemployment was a direct result of her impairment is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The carrier contends that the hearing officer erred in finding that during the filing periods for the sixth and seventh quarters, claimant had "no ability to work, which was a good faith attempt to obtain employment commensurate with her ability to work." Carrier contends claimant was able to work "during both quarters in question." The hearing officer's Statement of the Evidence reflects that he considered Dr. R's opinion regarding claimant's ability to work; however, there is no mention by the hearing officer of claimant's testimony that from November 1997 to August 1998, which was approximately the filing periods for the quarters in issue, she was attending school full time. In Texas Workers' Compensation Commission Appeal No. 961476, decided September 11, 1996, the Appeals Panel (Judge Kilgore dissenting), in reversing a hearing officer's decision that the claimant in that case was unable to work and was entitled to SIBS, noted that the doctors had failed to explain how the claimant in that case could pursue a full-time course of college classes

during the filing period and yet have no ability to do any work of any type, not even part time sedentary work. The claimant's testimony in the instant case was very abbreviated and there was not much evidence developed on her school attendance. For example, it is unknown what type of school she was attending during the filing periods, what her hours of classes were, and whether there was involvement of the TRC, as there apparently was in her electronics technician training that occurred prior to the filing periods. In Texas Workers' Compensation Commission Appeal No. 981804, decided September 14, 1998, the Appeals Panel affirmed a hearing officer's decision that the claimant in that case had met the good faith criterion and was entitled to SIBS where, during the filing period, the claimant was in college full time as a result of a referral from and support of the TRC, performed clinical duties three days a week as required by her course of study, and studied during the week. *See also* Texas Workers' Compensation Commission Appeal No. 951580, decided November 1, 1995. We reverse the hearing officer's finding that claimant had no ability to work during the filing periods for the sixth and seventh quarters and his decision that claimant is entitled to SIBS for the sixth and seventh quarters, and remand the case to the hearing officer for further consideration and development of the evidence on the good faith SIBS criterion for the sixth and seventh quarters.

There is no appeal of the hearing officer's finding that during the filing period for the eighth quarter, claimant's unemployment was a direct result of her impairment. The claimant appeals the hearing officer's finding that during the filing period for the eighth quarter, she did not attempt in good faith to obtain employment commensurate with her ability to work. The hearing officer found that claimant had no ability to work until October 6, 1998, but that she had an ability to work from "10-6-98 to the end of the period, 11-26-98." It is clear from this latter finding that in determining the good faith criterion for SIBS for the eighth quarter, the hearing officer used the time period of the eighth quarter itself (August 28 to November 26, 1998), instead of the filing period for the eighth quarter (May 29 to August 27, 1998). Consequently, we must reverse the hearing officer's finding that during the filing period for the eighth quarter claimant did not attempt in good faith to obtain employment commensurate with her ability to work and his decision that claimant is not entitled to SIBS for the eighth quarter, and remand the case to the hearing officer to make findings on the good faith criterion for SIBS for the eighth quarter, based on the filing period for the eighth quarter. Our remand is also for the further consideration and development of the evidence on the good faith SIBS criterion for the eighth quarter. The hearing officer should make clear in his decision what the filing periods for the quarters in dispute were.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge