

APPEAL NO. 990648

On March 8, 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: (1) whether appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 9th, 10th, and 11th quarters; and (2) whether claimant permanently lost entitlement to SIBS because she was not entitled to SIBS for 12 consecutive months. Claimant requests reversal of the hearing officer's decision that she is not entitled to SIBS for the 11th quarter. Respondent/cross-appellant (carrier) requests reversal of the hearing officer's decision that claimant is entitled to SIBS for the 9th and 10th quarters and that claimant has not permanently lost entitlement to SIBS.

DECISION

We affirm the hearing officer's decision that claimant is entitled to SIBS for the 9th and 10th quarters and that she has not permanently lost entitlement to SIBS. Because claimant's request for appeal was not timely filed with the Texas Workers' Compensation Commission (Commission), the decision of the hearing officer that claimant is not entitled to SIBS for the 11th quarter has become final under Section 410.169.

Section 410.202(a) provides that "[t]o appeal the decision of a hearing officer, a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a) (Rule 143.3(a)). Rule 143.3(c) provides that a request for review shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision.

Records of the Commission reflect that the hearing officer's decision was distributed to the parties on March 11, 1999. Claimant states in her appeal that she received the hearing officer's decision on March 15, 1999. The 15th day after March 15, 1999, was Tuesday, March 30, 1999. The envelope in which claimant's request for appeal was mailed to the Commission is postmarked April 1, 1999. The request for appeal was received by the Commission on April 5, 1999. Because claimant's request for appeal was not mailed on or before March 30th, it was not timely filed with the Commission. Claimant's request for appeal would also not be timely filed if the five-day deemed receipt provision in Rule 102.5(h) were applied, because the 15th day after March 16th was March 31st. Claimant's response to carrier's request for appeal, in which claimant requests affirmance of the decision on the 9th and 10th quarters but reversal of the decision on the 11th quarter, was timely filed as a response but was not timely filed as a request for appeal because the envelope in which it was mailed to the Commission is postmarked April 2nd. Section 410.169 provides that a decision of a hearing officer regarding benefits is final in the

absence of a timely appeal by a party. Since claimant did not timely appeal the hearing officer's decision on the 11th quarter, the hearing officer's decision on the 11th quarter is final and we do not address the issue of entitlement to 11th quarter SIBS.

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. Rule 130.102(b). An employee that is initially determined by the 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 130.101 provides that 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. Claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. Section 408.146(c) provides that an employee who is not entitled to SIBS for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury.

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 "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 of intent to defraud, and, generally speaking, means being faithful to one's duty or obligation. 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." In Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996, the Appeals Panel stated that the 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.

Claimant is 39 years of age. She sustained a compensable injury on _____. Claimant testified that on that date she slipped and fell on a wet floor at work and injured her hands, arms, elbows, shoulders, buttocks, lower back, and hips. Dr. BL report of May 22, 1997, lists in the section entitled "History of Treatment for the Injury" multiple surgeries, including right ulnar nerve and right carpal tunnel release surgery in January 1994, left carpal tunnel release surgery in April 1994, left ulnar nerve surgery in June 1994, right shoulder rotator cuff repair in October 1994, right wrist surgery in January 1995, and right shoulder surgery in March 1997. Claimant said that she also had left knee surgery. The parties stipulated that claimant has a 17% IR; that she did not commute IIBS; that the 9th quarter was from July 16 to October 14, 1998, with a filing period of April 16 to July 15, 1998; and that the 10th quarter was from October 15, 1998, to January 13, 1999, with a filing period of July 16 to October 14, 1998. The parties also stipulated that claimant's earnings during the filing periods for the 9th and 10th quarters were not at least 80% of her preinjury AWW.

Claimant underwent a functional capacity evaluation by Dr. BL at carrier's request on May 22, 1997, and Dr. BL reported that claimant would qualify for a light-work category and that she should be restricted from frequent overhead work and should avoid repetitive flexion and extension of her hands and wrists. Claimant said that Dr. B was her initial treating doctor, that Dr. V is her current treating doctor, that Dr. B treats her for her back, that Dr. V treats her for her hands, and that Dr. W treats her for her shoulders. She said that Dr. B, Dr. V, and Dr. W have not released her to return to work. Dr. B noted in a report dated March 12, 1998, that claimant had also injured her knee when she fell on _____, and that she had had knee surgery in 1997. Dr. B diagnosed claimant as having "degenerative lumbar disc with mechanical back pain and left radicular components" and wrote that he did not believe claimant is able to work. Dr. B wrote in April 1998 that he believes that claimant's current back complaints date back to her 1993 injury and noted that claimant remained unable to work.

Dr. W wrote in July 1998 that he was treating claimant for postoperative ankylosis of her right shoulder, that the acromioclavicular arthropathy he performed on claimant's right shoulder in March 1997 was due to her fall in April 1993, and that claimant had undergone physical therapy and injections without much success. Dr. B noted in October 1998 that claimant had been denied treatment for her lower back so she remained unable to work. Dr. B wrote in December 1998 that claimant remained unable to work due to a disabling injury she had to her lumbar spine after a fall on _____. Dr. V wrote in January 1999 that he gave claimant a cortisone injection in her left elbow.

Claimant testified that she is disabled due to her back and shoulder condition. She testified that during the filing periods for the 9th and 10th quarters, she purchased cases of a dietary supplement and resold it from her home, placed advertisements for the sale of that product by herself in a newspaper, and had teenagers distribute over 2,000 fliers advertising that she sold that product. She put into evidence copies of checks and receipts for the newspaper advertisements and copies of charges for the fliers. Her Statement of Employment Status (TWCC-52) for the 9th quarter reflects that she earned \$861.00 during

the filing period for that quarter. Two TWCC-52s for the 10th quarter were in evidence, one reflects no earnings during the filing period for that quarter and the other reflects earnings of \$513.00 for the filing period for that quarter. Claimant testified that the earnings shown on the TWCC-52 for the 9th quarter and the earnings shown on the TWCC-52 for the 10th quarter (the one that reflected earnings) were from the sale of the dietary supplement.

Claimant said that during the filing periods for the 9th and 10th quarters she was unable to perform the shipping clerk job she had when she was injured because of her pain and weakness, her inability to bend and stoop to lift packages, and her inability to load packages on the trucks. Claimant said that she has arthritis of her knees; that in June 1998 she had outpatient surgery for a throat condition unrelated to her injury, from which she recuperated for about six weeks; and that in the latter part of the summer 1998 she underwent an outpatient diagnostic test for colon cancer. A vocational specialist working for the carrier sent claimant a list of job leads on April 21, 1998, and she noted in another letter that the testing for colon cancer was negative. Claimant said she did not look for work other than the sale of the dietary supplement during the filing periods for the 9th and 10th quarters. Carrier presented no evidence concerning nonentitlement to SIBS in previous quarters.

The hearing officer found that during the filing periods for the 9th and 10th quarters, claimant had an ability to work with restrictions. Carrier requests reversal of the hearing officer's findings that during the filing periods for the 9th and 10th quarters, claimant attempted in good faith to obtain employment commensurate with her ability to work and that her decrease in earnings during those filing periods was a direct result of her impairment from her _____, compensable injury. Carrier also requests reversal of the hearing officer's conclusions that claimant is entitled to SIBS for the 9th and 10th quarters and that she has not permanently lost entitlement to SIBS. Whether claimant attempted in good faith to obtain employment commensurate with her ability to work and whether her unemployment or underemployment was a direct result of her impairment were fact questions for the hearing officer to determine from the evidence presented. The hearing officer could consider the claimant's work restrictions and her efforts at self-employment in determining those matters.

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. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of 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 appealed findings, conclusions, and decision are supported by sufficient evidence and are

not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge