

APPEAL NO. 990667

On March 3, 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 (claimant) is entitled to supplemental income benefits (SIBS) for the fifth and sixth quarters. Appellant (self-insured) requests reversal of the hearing officer's decision that claimant is entitled to SIBS for the sixth quarter. No response was received from claimant. There is no appeal of the hearing officer's decision that claimant is not entitled to SIBS for the fifth quarter.

DECISION

Affirmed as reformed herein.

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 prior 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 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. 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 on _____, claimant sustained a compensable injury to her low back, legs, and knees; that she has a 19% IR; that she was entitled to SIBS for the first two quarters; and that the filing period for the fifth quarter began on May 2, 1998. The fifth quarter was from August 1 to October 31, 1998, and the sixth quarter was from November 1, 1998, to January 30, 1999. The filing period for the sixth quarter was from August 1 to October 31, 1998.

Claimant listed 17 employment contacts on her Statement of Employment Status (TWCC-52) for the sixth quarter and there is no appeal of the hearing officer's finding that, during the filing period for the sixth quarter, claimant attempted in good faith to obtain employment commensurate with her ability to work.

Self-insured appeals the hearing officer's finding that, during the filing period for the sixth quarter, claimant had not returned to work as a direct result of her impairment. Claimant was injured while working as a teacher's aide. She testified about her limitations on sitting and standing following her injury. While she testified that none of the employers she contacted indicated to her that they did not hire her because of her impairment, the Appeals Panel has stated that it is unreasonable to expect a potential employer to state that the reason they are not hiring an applicant is because the applicant has an impairment. Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993. 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. Whether claimant's unemployment during the filing period for the sixth quarter was a direct result of her impairment from her compensable injury was a question of fact to be determined by the hearing officer. 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. 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We do not find the hearing officer's finding on the direct result criterion for SIBS entitlement for the sixth quarter to be so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust and thus that finding is affirmed.

For dates of injury before September 1, 1995, Section 408.083 provides that an employee's eligibility for temporary income benefits, IIBS, and SIBS terminates on the expiration of 401 weeks after the date of injury. See *also* Rule 130.106(b). Self-insured contends that the 401 weeks ended on December 3, 1998, and that claimant is not entitled to SIBS for any portion of the sixth quarter beyond that date. We agree. Thus, the hearing officer's decision on entitlement to sixth quarter SIBS is reformed as follows: The claimant is entitled to SIBS for the sixth quarter for the period of November 1 to December 3, 1998.

As reformed, the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge