

APPEAL NO. 990699

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 5, 1999. He (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter. The appellant (carrier) appeals this determination and requests that the hearing officer's determination be reversed. The carrier asserts that the claimant did not make a good faith effort to seek employment commensurate with her ability to work, that the claimant's underemployment was not a direct result of the impairment from the compensable injury, that the hearing officer erred in calculating the claimant's SIBS rate for the eighth quarter, and that the hearing officer erred in awarding the claimant's attorney fees to be paid by the carrier for the eighth quarter. The claimant responds, urging affirmance.

DECISION

Affirmed.

The parties stipulated at the CCH that on _____, the claimant sustained a compensable hernia injury, which resulted in a 24% impairment rating (IR), and the filing period for the eighth compensable quarter (filing period) began on August 26, 1998. As a result of the hernia, the claimant testified that she had surgery with the use of mesh, which was not successful. The mesh migrated within the abdominal muscles to the liver, necessitating another surgery in which the mesh had to be cut out of the liver and most of her abdominal muscles removed. The claimant testified that during the filing period, she received eight to nine weeks of physical therapy, acupuncture, biofeedback, and was involved in a home exercise program two times daily. The claimant testified that her treating doctor is Dr. Z, who has instructed her to not sit for more than 30 minutes without a break, and not to lift more than three pounds until physical rehabilitation is completed. The claimant testified that no doctor has released her to return to work, but she is working anyway, to the best of her capacity. The claimant stated that she is unable to work six hours straight and that her treatment schedule and work schedule combined are greater than 40 hours per week.

During the filing period, the claimant was self-employed. The claimant's business consists of a computer service. The claimant stated that she has had two clients for over one year. She performs typing and bookkeeping for one client, and produces a monthly newsletter for another client, working 40 hours per month for \$200.00 and additional hours at \$7.50. The claimant testified that during the filing period she concentrated her efforts in seeking new customers, such as a contract with a group of doctors to write their medical literature and brochures. The claimant obtained a new customer during the filing period, performing typing services, as a result of advertising her services in the newspaper. The claimant testified that during the filing period, she investigated becoming a notary public and has applied to become a notary public, although outside the filing period. The claimant stated that she did not know if during the filing period any advertisements ran in the

newspaper, but she did put up a flier approximately once a month in the local grocery store. The claimant explained that she did not advertise in the city 1 newspaper because her advertised service is free pick up and delivery and if she obtained a small job in City 1, it would decrease her profits because she would be spending much of her time driving. The claimant testified that she cannot keep regular work hours because she lives in City 2, Texas, and travels to City 1, Texas, twice a week for physical therapy, which takes all day; she spends an hour every morning and every afternoon in the home exercise program, and an hour a day doing biofeedback.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. Whether the claimant made a good faith effort to seek employment commensurate with her ability to work and her underemployment was a direct result of her impairment during the filing period presented the hearing officer with questions of fact to resolve.

The carrier argues the claimant did not meet the good faith requirement because the claimant's efforts at self-employment were minimal, she worked less than 40 hours per month during the filing period without showing that is all she could perform, she posted a flier in a single grocery store once a month, she made no other efforts to advertise, and she refused to advertise in the City 1 area, instead focusing her efforts in the small town in which she lives. The hearing officer determined that the claimant satisfied the good faith requirement through self-employment. We have previously recognized that self-employment may satisfy the SIBS good faith requirement. Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996. In doing so, we noted that in self-employment cases, the claimant must establish that she made efforts to solicit business or customers in the filing period in order to sustain her burden of proof. Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994; Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995; Texas Workers' Compensation Commission Appeal No. 950303, decided April 12, 1995. In this instance, there is evidence that during the filing period the claimant made efforts to attract new business. Specifically, she obtained a new customer, she posted a flier at the grocery store once a month, and she had many telephone conversations and meetings in an effort to obtain a contract with a group of doctors to write medical literature and brochures. The hearing officer found that during the filing period, the claimant was self-employed in a genuine business endeavor and that the claimant attempted in good faith to obtain employment commensurate with her ability to work. We find the evidence sufficient to support the findings of the hearing officer.

The carrier contends that because the claimant unduly restricted her job search, made no additional contacts, and made very limited efforts to advertise, her underemployment should be found not to be a direct result of the impairment from the

claimant's compensable injury. The hearing officer found that the claimant sustained a serious injury with lasting effects that precluded her from returning to the type of work she did when she was injured. The claimant testified that she could no longer perform her previous job. The hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing period, she could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

The carrier argues the hearing officer incorrectly determined the amount of wages used to calculate the claimant's SIBS rate. The hearing officer made the following finding of fact:

FINDING OF FACT

8. During the filing period, the Claimant was self-employed in a genuine business endeavor, using the cash basis of accounting. During the filing period, the Claimant received a total income from self-employment in the amount of \$810.13, which was less than 80% of her [AWW].

During the CCH, the claimant stated that she was not sure whether she should reflect the wages earned or the wages received on the Statement of Employment Status (TWCC-52). The carrier asserts SIBS should be calculated using the weekly wage the claimant earned during the reporting period, not the weekly wage the claimant was paid during the reporting period. The carrier is essentially arguing that the accrual method of accounting should be adopted.

Section 408.144(b) states that SIBS are to be calculated by "subtracting the weekly wage the employee earned during the reporting period . . ." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.101 AND 130.102 (Rules 130.101 and 130.102) indicate SIBS are to be calculated by adding actual and offered wages for each week of the filing period. "Actual wages" is not defined. Although inapplicable in this case, the new SIBS rule, defines wages as "all forms of remuneration payable for personal services rendered during the qualifying period . . ." See Rule 130.101(8), effective January 31, 1999. The carrier cites Johnson County v. Crosier, 211 S.W.2d 299 (Tex. Civ. App.-Waco, 1948) in support of its position; however, we distinguish that case because it did not involve application of the Texas Workers' Compensation Act. In this case, if the claimant were to report wages earned on the TWCC-52, her SIBS rate would be calculated based on that amount, even though it is possible she may never actually receive payment for such services. We interpret "actual wages" to mean those wages paid to the claimant, and we acknowledge that in some factual situations this may benefit the carrier and in others, the claimant. The hearing officer calculated the amount of "actual wages" during the filing period to be \$810.13. He arrived at this amount after determining the wages the claimant was paid

during the eighth quarter filing period, and deducting \$583.75 which was received in the eighth quarter filing period, but reported on the TWCC-52 for the seventh quarter filing period. We find the evidence sufficient to support the finding of the hearing officer.

The carrier asserts that the hearing officer erred in determining that the carrier is liable for attorney's fees for the eighth compensable quarter. We do not find the hearing officer's decision regarding carrier's liability for claimant's attorney's fees to be contrary to applicable law as contended by the carrier. See Section 408.147(c) and Texas Workers' Compensation Commission Appeal No. 961981, decided November 18, 1996.

The hearing officer's findings sufficiently support his determination that the claimant is entitled to SIBS for the eighth compensable quarter less the amount of \$810.13 in wages she earned in her underemployment, and carrier is required to pay any attorney fees approved by the Texas Workers' Compensation Commission for the claimant's attorney for services regarding this dispute. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer's decision and order are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge