APPEAL NO. 990856

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 29, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) is not entitled to supplemental income benefits (SIBS) for the second, third, fifth, sixth, and seventh quarters; that he is entitled to SIBS for the fourth quarter; that the appellant (carrier) would be relieved of liability for SIBS for the fifth and sixth quarters because of the claimant's failure to timely file a Statement of Employment Status (TWCC-52) for those quarters; that the claimant has not permanently lost entitlement to SIBS because there has not been 12 consecutive months where he was not entitled to SIBS; that the compensable injury of _____, is a producing cause of the claimant's temporomandibular joint (TMJ) injury; and that the carrier waived its right to contest compensability of the TMJ injury by failing to do so within 60 days of November 10, 1998, the date it received written notice of that injury. In its appeal, the carrier asserts error in the hearing officer's determinations that the claimant is entitled to SIBS for the fourth quarter, that the claimant has not permanently lost entitlement to SIBS, that the compensable injury is a producing cause of the TMJ injury, and that it has waived its right to contest the compensability of the TMJ injury. The appeals file does not contain a response to the carrier's appeal from the claimant. In addition, the claimant did not appeal the determinations that he is not entitled to second, third, fifth, sixth, and seventh quarter SIBS or the determination that carrier would be relieved of liability for fifth and sixth quarter SIBS by the claimant's failure to timely file his TWCC-52 for those quarters. Accordingly, those determinations have become final. Section 410.169.

DECISION

Affirmed.

Given the limited nature of the issues before us on appeal, our factual recitation will be limited to those facts most germane to those issues. The parties stipulated that the claimant sustained a compensable injury on _____, when he was struck on the right side of his head by a 70-pound brake caliper, in the course and scope of his employment with (employer). The parties also stipulated that the claimant was assigned a 15% or higher impairment rating for his compensable injury; that he did not commute his impairment income benefits; that the fourth quarter of SIBS ran from March 9 to June 7, 1998, with a corresponding filing period of December 8, 1997, to March 8, 1998; and that the claimant was employed during the filing period for the fourth quarter but earned less than 80% of his preinjury average weekly wage (AWW).

The claimant testified that he began working part time at (employer 2) on October 15, 1997, and that he continued to work there until December 30, 1997. He stated that on December 31, 1997, he began working full time for (employer 3) and that he continued to work for employer 3 through the end of the fourth quarter filing period. The claimant testified that in addition to working during the filing period, he completed seven other

applications and registered with the Texas Workforce Commission. The claimant testified that he earned $1,305.51 working for employer 3 in the filing period and that he also received $92.18 in his final check from employer 2.

The claimant testified that about two weeks after his injury, he began to experience problems with his jaw "locking" and with severe jaw pain, headaches, and dizziness. In a "To Whom it May Concern" letter of July 1, 1998, Dr. A, the claimant's treating doctor, stated that the claimant "has significant tenderness over the bilateral [TMJ] post his trauma on _____." Dr. A noted that the claimant's pain increases with activity such as chewing or talking. In progress notes of October 7, 1998, Dr. A diagnoses "TMJ, secondary to injury." In a letter of March 4, 1999, Dr. A stated:

> I . . . do feel that [claimant] has suffered severe injury to his [TMJ], secondary to the injury with the 70 pound brake caliper. I do feel that [claimant] is impaired and has considerable pain and malalignment, which will cause him indefinite difficulty. In regards to this, I have referred [claimant] back to his original E.N.T., [Dr. W], as well as other doctors including [Dr. WH] and [Dr. F], who agree that his injuries are the cause of his TMJ problems at this time.

In a report of November 2, 1998, Dr. F noted that he examined the claimant on October 14, 1998, and that the claimant gave a history of having been injured at work on _____, when he was struck on the right side of his head by a 70-pound weight. Dr. F stated "[i]t is my impression that this patient has a craniomandibular and dental component to his problem that involve alteration of the mechanics of the body as a result of the accident." That report indicates that it was faxed from the Texas Workers' Compensation Commission (Commission) field office handling the claimant's claim to the carrier on November 10, 1998. The adjuster representing the carrier at the hearing stated in her closing argument that the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting the TMJ injury on January 13, 1999; however, no such document was in evidence. In addition, there was no stipulation or agreement that the TWCC-21 was filed on that date and the carrier's representative did not ask the hearing officer to take official notice of Commission records that might have reflected when the carrier filed its contest.

Initially, we will consider the carrier's challenge to the hearing officer's determination that the claimant is entitled to SIBS for the fourth quarter. The hearing officer determined that the claimant satisfied the good faith requirement by seeking and obtaining employment within his restrictions throughout the filing period. The question of whether the claimant made a good faith effort to look for work commensurate with his abilities was a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight, credibility, relevance, and materiality of the evidence. Section 410.165. As the fact finder, the hearing officer was free to consider the fact that the claimant actually worked throughout the course of the filing period in resolving the good faith issue. Our review of the record does not demonstrate that the hearing officer's good faith determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or

manifestly unjust. Therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also asserts that the claimant did not report all of the wages he earned in the filing period; thus, it argues that he has not demonstrated that he was underemployed and that his failure to report all wages "constitutes a failure to file the application." With respect to its argument that the claimant did not establish his underemployment, we note that the carrier stipulated that the claimant earned less than 80% of his preinjury AWW during the fourth quarter filing period. That is, it stipulated that the claimant was underemployed within the meaning of the 1989 Act. We find no merit in the carrier's assertion that the claimant's alleged failure to report all of his wages is tantamount to a non-filing in this instance. In Texas Workers' Compensation Commission Appeal No. 980153, decided March 11, 1998, we noted that an incomplete TWCC-52 should only be equated to a non-filing in instances of "clear and intentional . . . nondisclosure," as opposed to cases where the omitted information is brought forward at a later date. *See also* Texas Workers' Compensation Commission Appeal No. 970435, decided April 24, 1997 (where we similarly cautioned against "wholesale application" of Texas Workers' Compensation Commission Appeal No. 941629, decided January 20, 1995, noting that the omission should be "akin to fraud"). There is no evidence that any failure to include the wage information on the claimant's TWCC-52 was a "clear and intentional nondisclosure." Accordingly, we reject the carrier's argument that it is relieved of liability for fourth quarter SIBS based upon the claimant's failure to timely file his TWCC-52. Given our affirmance of the hearing officer's determination that the claimant is entitled to SIBS for the fourth quarter, we likewise affirm his determination that the claimant has not permanently lost entitlement to SIBS under Section 408.146 as he has not yet been found not to be entitled to SIBS for 12 consecutive months.

The hearing officer determined that the claimant's compensable injury was a producing cause of the claimant's TMJ injury. That issue presented a question of fact. Both Dr. A and Dr. F related the claimant's TMJ injury to the compensable injury on _____. The hearing officer was acting within his province as the sole judge of the evidence in deciding to credit those causation opinions. Nothing in our review of the record demonstrates that the hearing officer's extent-of-injury determination is so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*.

Lastly, we consider the carrier's argument that the hearing officer erred in determining that it had waived its right to contest the TMJ injury by failing to do so within 60 days of November 10, 1998, the date it received its first written notice of that injury. As noted above, the carrier did not introduce any evidence as to when it filed its contest of the compensability of the TMJ injury. The adjuster stated in her closing argument that a TWCC-21 was filed with the Commission on January 13, 1999; however, her statement is not evidence of such a filing. In the absence of any evidence that the carrier ever filed a TWCC-21 contesting the compensability of the TMJ injury, we reject the argument that the hearing officer erred in finding that the carrier had waived its right to do so.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Judy L. Stephens
Appeals Judge