

APPEAL NO. 990898

On March 30, 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 issue at the CCH was whether respondent (claimant) is entitled to supplemental income benefits (SIBS) for the sixth quarter. Appellant (carrier) requests reversal of the hearing officer's decision that claimant is entitled to SIBS for the sixth quarter and requests that a decision be rendered in its favor. No response was received from claimant.

DECISION

Affirmed.

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 his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant was injured in the course and scope of his employment on _____; that he reached maximum medical improvement on December 17, 1996, with a 15% IR; that he did not commute IIBS; and that the filing period for the sixth quarter was from October 28, 1998, to January 26, 1999 (the filing period). The sixth quarter was from January 27 to April 27, 1999.

Claimant testified that he was injured at work on _____, when he threw trash into a dumpster. Dr. H, the designated doctor, assigned claimant a 15% IR for impairment of his right upper extremity and cervical spine. On January 14, 1998, Dr. B, who was claimant's treating doctor until sometime in December 1998, noted that claimant had been videotaped doing activities of daily living without any difficulties. A physical therapist wrote that a functional capacity evaluation (FCE) claimant underwent on January 29, 1998, demonstrated a light work level but noted that the FCE was invalid due to submaximum efforts. Dr. B released claimant to light-duty work in February 1998. An insurance

investigator reported in June 1998 that he observed claimant walking and lifting the hood of a car with no obvious signs of distress and that his movements did not appear to be restricted. Dr. W examined claimant at carrier's request and reported in September 1998 that claimant's condition is compatible with a release to work at a full-duty level with no repetitive lifting greater than 20 to 30 pounds.

Dr. B reported in October 1998 that claimant has a partly frozen right shoulder, weakness of his right grip, and reduced range of motion of his cervical spine. Dr. B also wrote in that report that claimant is unable to work at any job requiring lifting of more than 20 pounds or do any activities requiring repetitive use of his right arm, that he is unable to use his right arm at all, and that those limitations are permanent and are a direct result of his 1994 injury. Claimant said he changed treating doctors to Dr. SF in December 1998 and Dr. SF reported in that month that claimant is off work secondary to pain and inability to use his right arm. Dr. SF referred claimant to Dr. H, who wrote on January 22, 1999, that claimant is off work for his work injury through June 1999. Dr. SF wrote in February 1999 that she refused to continue treating claimant because of claimant's deceitfulness and refusal to pay his bill. Dr. SF noted that claimant was being treated for back pain but was supposed to have been treated for his right shoulder, wrist, and thumb. Dr. Stanton (Dr. S) reviewed claimant's medical records at carrier's request and reported in February 1999 that claimant could return to at least a moderate work level.

Claimant testified that he believed that he was able to do some work during the filing period. He said that during the filing period he looked for work which he believed he could do and that he went to the Texas Rehabilitation Commission (TRC) and the Texas Workforce Commission (TWC). Claimant listed 30 employment contacts during the filing period on his Statement of Employment Status (TWCC-52) and a supplemental document, in addition to listing his contacts with the TRC and the TWC. Many of the jobs listed involve food preparation, which claimant said that he believes he can do within his restrictions. The TRC sent claimant to a company for a vocational assessment which was begun on January 25, 1999, and completed in February 1999. The vocational assessment report recommended that claimant could benefit from obtaining a GED and from a pain management program. The assessment was delayed because of attendance problems on the part of claimant. Claimant said that he attended school through the 11th grade and that he is working toward getting his GED although financial problems prevented him from going to night classes.

The hearing officer found that, as a result of claimant's injury of _____, claimant has a frozen shoulder; that claimant has a limited education but is working on his GED; that claimant is cooperating with the TRC and the TWC; that during the filing period claimant had a limited ability to work; that during the filing period claimant made a good faith effort to find employment commensurate with his ability to work; and that claimant's unemployment is a direct result of his impairment from his compensable injury. The hearing officer concluded that claimant is entitled to SIBS for the sixth quarter. Whether claimant made a good faith effort to obtain employment commensurate with his ability to work and whether his unemployment during the filing period was a direct result of his injury were fact

questions for the hearing officer to determine from the evidence presented. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of 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. 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 conclude that the hearing officer's decision that claimant is entitled to SIBS for the sixth quarter is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

In the Statement of the Evidence portion of the decision, the hearing officer stated that claimant injured his right upper extremity, shoulder, neck, and back taking out the trash at work on _____. Carrier objects to that statement because it contends that claimant did not injure his back in his work-related injury, that it has never accepted a back injury as part of the compensable injury, and that it disputed a back injury as being part of the compensable injury. An issue as to the extent of claimant's injury was not before the hearing officer and thus we do not here rule on the correctness of the hearing officer's statement regarding the extent of the compensable injury. We note that the hearing officer's finding that during the filing period claimant had a "limited" ability to work is predicated on his finding regarding claimant's right shoulder, which was assigned impairment by the designated doctor and which carrier does not claim was not part of the compensable injury. Thus, if claimant's back is not part of the compensable injury, the carrier has not shown reversible error in the hearing officer's decision that claimant is entitled to SIBS for the sixth quarter.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge