

APPEAL NO. 991118

This appeal is brought 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 April 20, 1999. The appellant (claimant) and the respondent (self-insured) stipulated that the claimant has a 17% impairment rating for a left knee injury sustained on _____, and that the filing period for the 18th quarter for supplemental income benefits (SIBS) began on August 2, 1998. The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

5. The evidence failed to prove when the Claimant received a blank TWCC-52 [Statement of Employment Status] application form from the Self-insured for the eighteenth compensable quarter.
6. The claimant sent his TWCC-52 application for [SIBS] for the eighteenth compensable quarter with his TWCC-52 application for [SIBS] for the nineteenth quarter together to the Self-insured. The self-insured received both forms on February 9, 1999.
7. The first day of the eighteenth compensable quarter was November 1, 1998. The first day of the nineteenth compensable quarter was January 31, 1999.
8. During the filing period for the eighteenth compensable quarter, the Claimant's sole employment was working for his son for a period of six hours per week for eight weeks, earning \$30.47 per week, less than 80% of his average weekly wage [AWW]. The claimant was sick for five weeks in the filing period due to an infection in his left knee.
9. During the filing period for the nineteenth compensable quarter, the Claimant's sole employment was working for his son for a period of six hours per week for eleven weeks, earning \$30.47 per week, less than 80% of his [AWW].
10. During the filing periods for the eighteenth and nineteenth compensable quarters, the Claimant had an ability to perform some work, but did not make any attempt to obtain any other employment commensurate with his ability to work.
11. During the filing periods for the two compensable quarters, the Claimant's underemployment was not a direct result of his impairment from his compensable injury, but was due to his other medical problems.

CONCLUSIONS OF LAW

2. The Claimant is not entitled to [SIBS] for the eighteenth compensable quarter of November 1, 1998 through January 30, 1999.
3. The Carrier is relieved of liability for [SIBS] that may be owing for the eighteenth compensable quarter because of the Claimant's failure to timely file his TWCC-52 application after the end of the compensable quarter.
4. The Claimant is not entitled to [SIBS] for the nineteenth compensable quarter of January 31 through May 2, 1999.

The claimant appealed Findings of Fact Nos. 5, 8, 9, 10, and 11 and Conclusions of Law Nos. 2, 3, and 4 and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he is entitled to SIBS for the 18th and 19th quarters. The self-insured responded, essentially contending that the hearing officer properly applied the law and that the evidence is sufficient to support the decision of the hearing officer, and requesting that it be affirmed.

DECISION

We note several irregularities in the Decision and Order, make a clerical correction, and reverse Finding of Fact No. 10. However, we affirm the decision and order of the hearing officer.

The claimant's injury to his left knee is the reason he applied for SIBS for the 18th and 19th quarters. After the injury to his left knee, he also sustained a less serious injury to his right knee. In his appeal, the claimant points out that the hearing officer uses right knee in the statement of the evidence in his Decision and Order. It is obvious that that was the result of a clerical error and we reform the statement of the evidence to state left knee. The hearing officer was considering the compensable injury that is the subject of the request for SIBS and we perceive no reversible error in the clerical error.

We next address the determination that the claimant did not timely file the TWCC-52 for the 18th quarter and that the self-insured is relieved of liability for that quarter because of the late filing. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.105 (Rule 130.105) provides in part that a claimant who does not timely file a TWCC-52 with the carrier shall not receive SIBS for the period of time between the beginning date of the quarter and the date on which the form is received by the carrier unless the failure was due to the untimely mailing of the form by the carrier. In his testimony at the hearing and on appeal, the claimant says that he cannot remember when he received the TWCC-52 for the 18th quarter. An adjuster testified that the form was mailed when the SIBS for the 17th quarter were paid in a lump sum after a CCH; that she follows the policy to send a TWCC-52 with the last payment of a quarter for SIBS; and that she did not have the record of the payment

with her, but that she thought it was before Christmas 1998. In closing argument, the ombudsman said that the decision of the CCH for the 17th quarter was received on November 23, 1998, but the record does not contain evidence of that.

The burden was on the claimant to establish the exception in Rule 130.105. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The hearing officer's determinations concerning receipt of the TWCC-52 by the claimant and the carrier's being relieved of liability for SIBS for the 18th quarter are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support those determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We finally address the determinations that the claimant is not entitled to SIBS for the 18th and 19th quarters. The claimant's position at the CCH, the hearing officer's statement of the evidence, and Finding of Fact No. 10 are somewhat confusing. The claimant testified that his treating doctor told him that he could not work, but that his doctor agreed to let him work two hours a day three days a week with restrictions. Medical records from the treating doctor are consistent with that testimony concerning both points. A report of a functional capacity evaluation dated March 18, 1999, states that the claimant can perform sedentary work and does not contain a restriction on how many hours the claimant may work in a day.

The claimant has medical problems other than those related to the compensable injury to the left knee. In his Decision and Order, the hearing officer stated that the medical evidence did not meet the evidentiary requirement of specifically explaining in some detail how or why the claimant's impairment from the compensable injury prevented him from working at all and listed three Appeals Panel decisions. Apparently there is a clerical error in listing those decisions, because none of them are on point. In Texas Workers' Compensation Commission Appeal No. 980773, decided May 22, 1998, the Appeals Panel cited three of its decisions; stated that the hearing officer should consider the claimant's overall medical condition and not just the impairment from the compensable injury in determining whether the claimant had some ability to work during the filing period; and reversed the decision of the hearing officer and remanded for proper application of the law to the facts. In addition, the Appeals Panel stated that in making a determination concerning the direct result criterion, only the impairment from the compensable injury should be considered. In the case before us, the evidence is sufficient to support Finding of Fact No. 11 that during the two filing periods the claimant's underemployment was not a direct result of his impairment from the compensable injury, but was due to his other medical problems. Finding of Fact No. 11 is sufficient to support Conclusions of Law Nos. 2

and 4 that the claimant is not entitled to SIBS for the 18th and 19th quarters. We affirm Finding of Fact No. 11 and Conclusions of Law Nos. 2 and 4.

Finding of Fact No. 10 states:

During the filing periods for the eighteenth and nineteenth compensable quarters, the Claimant had an ability to perform some work, but did not make any attempt to obtain any other employment commensurate with his ability to work.

That finding of fact may be subject to more than one interpretation, especially when considered with comments of the hearing officer in his statement of the evidence. It is reasonable to interpret the finding of fact to be that during the filing periods the claimant had the ability to perform more work than he did working for his son. The report of the FCE dated March 18, 1998, states that the claimant has a history of problems with both knees, multilevel lumbar degenerative spine disease, balloon coronary angioplasty, cancer with removal of the penis, bilateral lower extremity edema, and depression. There is no indication that those conditions were not considered in rendering the FCE report that the claimant could perform sedentary work. However, because it appears that the hearing officer may have considered only the impairment from the compensable injury in making Finding of Fact No. 10, we reverse it. Because of the unusual circumstances of this case, do not remand for the hearing officer to make additional findings of fact.

We make the clerical correction mentioned earlier, reverse Finding of Fact No. 10, and affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge