

APPEAL NO. 991183

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 was held on April 28, 1999. It is undisputed that the Appeals Panel affirmed a determination that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the 12th quarter and that the filing period for the 13th quarter for SIBS began on March 3, 1998, and ended on June 1, 1998; that the filing period for the 14th quarter began on June 2, 1998, and ended on August 31, 1998; and that the filing period for the 15th quarter began on September 1, 1998, and ended on November 30, 1998. The hearing officer found that, during the filing periods for the 13th, 14th, and 15th quarters, the claimant did not attempt in good faith to obtain employment commensurate with her ability to work and that her unemployment was not a direct result of the impairment from the compensable injury and concluded that the claimant is not entitled to SIBS for those quarters. He also determined that the claimant ceased to be entitled to additional income benefits because she was not entitled to SIBS for 12 consecutive months. The claimant appealed those determinations, contended that the hearing officer ignored the claimant's psychological condition, urged that those determinations are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse those determinations and render a decision that she is entitled to SIBS for the 13th, 14th, and 15th quarters and that she has not lost entitlement to future SIBS. The respondent (carrier) replied; urged that the claimant did not meet her burden of proving that during the filing periods for the 13th and 14th quarters she had no ability to work; that during the filing period for the 15th quarter she in good faith sought employment commensurate with her ability to work; that during those three filing periods her unemployment was a direct result of her impairment from the compensable injury; that the determination that the claimant lost entitlement to future SIBS because she was not entitled to SIBS for 12 consecutive months is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust; and requested that those determinations be affirmed.

The hearing officer also determined that on August 19, 1998, the carrier received written notice that the claimant's compensable injury sustained on \_\_\_\_\_, extended to her right shoulder; that on October 3, 1998, the carrier timely contested the compensability of the claimed right shoulder injury; and that the carrier did not waive the right to contest compensability of the claimed right shoulder injury. The claimant appealed those determinations, contending that the carrier received written notice of the right shoulder injury in a response to a question in a written interrogatory that was received by the carrier on June 8, 1998. In its response, the carrier contended that the response to the question is not sufficient to put it on notice of a claimed injury to the right shoulder. The hearing officer also concluded that the claimant's compensable injury does not extend to or include an injury to the right shoulder. The carrier urged that the evidence is sufficient to support that determination.

## DECISION

We affirm in part and reverse and render in part.

We first address the determination that the claimant did not present credible information to show that the compensable injury extended to include the right shoulder. The claimant's position was that she injured her right shoulder because she "overused" her left shoulder in daily activities. The Appeals Panel has stated that injury to an arm, resulting from nonwork-related overuse of the arm because of injury to the other arm, does not result in the injury resulting from overuse becoming part of the compensable injury. See Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993, and Texas Workers' Compensation Commission Appeal No. 94532, decided June 15, 1994. The burden is on the claimant to prove by a preponderance of the evidence the extent of an injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. 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 evidence is sufficient to support the finding of fact that the claimant did not present credible information to show that the compensable injury extended to include the right shoulder and that finding is affirmed. 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).

We next address the determination that the carrier did not waive its right to contest the compensability of the claimed right shoulder injury. The claimant answered the interrogatory "[p]lease describe the nature and extent of the **claim injury**, including all parts of your body affected" with "multiple shoulder surgeries, pain in the left shoulder, arm, neck, hand, back, into my shoulder blade, depression, right shoulder pain." The interrogatory refers to the "claim injury," and asks the claimant to describe the nature and extent of the claim injury and to include body parts affected. In Texas Workers' Compensation Commission Appeal No. 93225, decided May 12, 1993, the Appeals Panel cited DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980) and stated that statutory notice requirements are fulfilled if the employer knows the general nature of the injury and that it is job related and that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §122.1(a) (Rule 122.1(a)) states that certain things should be included in a notice to the employer, that those details would be useful to an employer investigating a claimed injury, but that the rule does not expand the notice required in the statute as interpreted by case law. In Texas Workers' Compensation Commission Appeal No. 971298, decided August 18, 1997, the Appeals Panel stated that a specific diagnosis is not required for notice to be effective. The response to the interrogatory put the carrier on notice of a claimed right shoulder injury. We reverse the finding of fact that the carrier received written notice of the claimed right shoulder injury on August 19, 1998. We render a finding of fact that the carrier received written notice of the claimed right shoulder injury on June 8, 1998, and we render conclusions of law that the carrier waived the right to contest compensability of the claimed right shoulder injury and that the compensable injury includes an injury to the right shoulder.

The hearing officer did not make findings of fact that the claimant had some ability to work during the filing periods for the 13th and 14th quarters, but such findings are inferred from his statement of the evidence and other findings of fact. Dr. W, a chiropractor and the claimant's treating doctor, reported that the claimant was unable to work during those filing periods. Mr. S, a rehabilitationist, prepared a 67- page report of a rehabilitation assessment dated March 16, 1998. In a letter dated March 18, 1998, Mr. S stated that the bottom line was that the claimant was employable; that considering her job-related injury, she was employable; that when considering all of her limitations, depression was a major factor; and that considering all of her vocational handicaps including her depression, she is employable. In a letter to the attorney dated May 25, 1998, Dr. B, a psychiatrist, stated that he was unaware that he had ever provided the claimant with an off-work slip; that he was unaware of any documentation that he provided in regard to her fitness to return to work; and that, if a psychiatric fitness evaluation of the claimant for fitness to work is required, it would be better that it be provided by a psychiatrist evaluating her for that expressed purpose and who is not providing ongoing care. There is no indication that the hearing officer did not consider the claimant's depression in making his determinations concerning entitlement to SIBS. The evidence is sufficient to support the inferred determinations that the claimant had some ability to work during the filing periods for the 13th and 14th quarters. The claimant did not seek employment during the filing periods for the 13th and 14th quarters. She testified that she was not able to seek employment during the month of August 1998 because of three dental surgeries that she had. The evidence is sufficient to support the findings that during the filing periods for the 13th and 14th quarters the claimant did not in good faith seek employment commensurate with her ability to work and that her unemployment was not a direct result of her impairment from the compensable injury and the conclusion that she is not entitled to SIBS for the 13th and 14th quarters.

The claimant did not contend that during the filing period for the 15th quarter she had no ability to work. She testified that during that filing period she looked in the Sunday paper and found jobs that she thought that she was able to perform, that most of the jobs provided a number to fax a resume, that her son worked at a place that had a fax machine, that she had prepared a resume, that she gave the fax numbers and her resume to her son, and that he faxed the resumes to the prospective employers. She said that she also mailed her resume to some employers who did not provide a fax number. The claimant provided copies of fax activity reports that indicate the days and times that documents were faxed and the numbers to which they were faxed. She also had admitted into evidence copies of advertisements with notations of the dates that resumes were faxed. It appears that resumes were faxed to nine employers on September 8, 1998; 14 employers on September 14, 1998; seven employers on September 23, 1998; 18 employers on October 7, 1998; 27 employers on October 22, 1998; 12 employers on November 24, 1998; and 13 employers on November 25, 1998. The record contains four responses from employers to the claimant, including one from an employer who reportedly told a person who called on behalf of the carrier that it had no record of the claimant inquiring about a job. During the filing period, the claimant faxed resumes on seven days. In his statement of the evidence, the hearing officer stated that he had questions about the fax activity reports; that it seems obvious that the claimant was attempting to call a flurry of fax transmissions a good faith

effort spread over a three-month period; and that, if the claimant did fax 90 resumes, that was not sufficient to establish entitlement to SIBS for the 15th quarter. The claimant complains about the hearing officer's comments about the fax activity reports, but the hearing officer stated that, even if they were accurate, that was not sufficient to establish entitlement to SIBS for that quarter. The evidence is sufficient to support the determination that the claimant is not entitled to SIBS for the 15th quarter.

We reverse the determination that the carrier timely contested compensability of the claimed right shoulder injury and render a decision that the carrier did not timely contest compensability of the claimed right shoulder injury and that claimant's compensable injury extends to her right shoulder. That the compensable injury extends to the claimant's right shoulder would not cause different results on entitlement to SIBS for the 13th, 14th, and 15th quarters. We affirm the determinations that the claimant is not entitled to SIBS for the 13th, 14th, and 15th quarters and that, because the claimant was not entitled to SIBS for 12 consecutive months, she ceases to be entitled to any additional income benefits for the compensable injury.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Judy L. Stephens  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge