APPEAL NO. 991253

On May 6, 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 issues at the CCH were whether appellant (claimant) is entitled to supplemental income benefits (SIBS) for the third and fourth quarters. Claimant requests that the hearing officer's decision that he is not entitled to SIBS for the third and fourth quarters be reversed and that a decision be rendered in his favor on entitlement to SIBS for those quarters. The respondent (carrier) requests affirmance.

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). Claimant had the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable injury on _____; that claimant reached maximum medical improvement with an IR of 15% or more; that claimant did not commute IIBS; that the third quarter was from November 4, 1998, to February 2, 1999, with a filing period of August 5 to November 3, 1998; that the fourth quarter was from February 3 to May 4, 1999, with a filing period of November 4, 1998, to February 2, 1999; and that claimant did not have any earnings during the relevant filing periods. Although the hearing officer ruled in claimant's favor on the direct result criterion for SIBS for the quarters in issue, in order to be entitled to SIBS for the quarters in issue, claimant also had to establish that during the relevant filing periods he attempted in good faith to obtain employment commensurate with his ability to work. Section 408.143.

Claimant contended that he had no ability to work during the filing period for the fourth quarter. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that, if an employee established that he had no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. In Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996, the Appeals Panel stressed the need for medical evidence to affirmatively show an inability to

work if that was being relied on by claimant and, in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, the Appeals Panel noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred."

Claimant injured his back at work on _____, while working as a journeyman electrician. Claimant underwent a functional capacity evaluation (FCE) in June 1998 and the occupational therapist reported that claimant performed at a light level, that his electrican job is medium-level work, that due to a good deal of pain behavior and inconsistencies, it was difficult to determine objective functional levels, and that claimant appeared to have a good deal of symptom magnification. On July 29, 1998, claimant underwent a bilateral nerve root block to alleviate his symptoms and allow him to receive more physical therapy and weight reduction.

Claimant presented a list of 36 job contacts during the filing period for the third quarter. One of them is a contact with the (TRC) on October 15, 1998. Claimant said that he found his job leads in trade journals and that he contacted all of them by telephone and submitted a job application to one or two of them. He said he tried to obtain a light-duty desk job in the electrical field doing supervisory, estimating, or sales work because he cannot perform the electrical work he did at the time of his injury, which he described as heavy industrial and commercial electrical work. Claimant said that Dr. R, his treating doctor, told him that during the relevant filing periods he would not be able to work but that carrier told him that, if he did not look for work, he would not get SIBS. Claimant said that he was unable to look for work during the filing period for the fourth quarter because his back condition worsened. Claimant did not list any job contacts on his Statement of Employment Status (TWCC-52) for the fourth quarter.

At the request of the Texas Workers' Compensation Commission, Dr. B evaluated claimant and sent him for an FCE on January 5, 1999. Dr. B noted that Dr. S had seen claimant in September 1998 and that Dr. S's evaluation revealed significant signs of symptom magnification. Dr. B wrote that claimant is neurologically intact, that most of claimant's complaints are psychosomatic, that the FCE indicated that claimant can perform at a sedentary capacity, and that the FCE was invalid because claimant did not give maximal effort.

Dr. R, claimant's treating doctor, wrote in January 1999 that claimant was waiting for evaluations for possible surgical intervention. Dr. R wrote in February 1999 that claimant suffers from intractable low back pain and lower extremity pain secondary to spondylolisthesis at L5-S1 and compression of bilateral L5 nerve roots secondary to his work-related injury; that claimant has required medications, spinal injections, and physical therapy; that the spine surgeons who evaluated claimant have proposed a decompression and fusion; that claimant remains debilitated and unable to work; and that claimant requires aggressive therapy. Dr. R wrote in March 1999 that claimant had been advised by him to undergo spinal surgery, that claimant wishes to proceed with surgery, and that claimant is not capable of engaging in work activities which would involve repetitive or strenuous

exertion of the low back, including such activities as repeated standing or sitting. Dr. R wrote in April 1999 that claimant's symptoms have worsened since August 1998, that he has required more aggressive treatment, that he has severe limitations on physical activity because of his increased symptoms, that he encouraged claimant not to engage in work-related activities because of his severe symptoms, and that occurred in August 1998 and continued through the beginning of February 1999. Dr. R added that claimant will most likely require surgery to correct his severe spondylolisthesis.

Claimant said that he believes that he has been approved for surgery but that he has not had surgery because the doctors have told him that they cannot guarantee that surgery will not put him in a wheelchair and because he has been offered other options, such as more injections and more physical therapy. Claimant said that he stayed in contact with the TRC during the relevant filing periods. Claimant said that, prior to becoming a journeyman electrician, he had taken two years of college. He said that, after his injury, he went to the TRC and that the TRC enrolled him in college to obtain his master electrician license. Claimant said that, through the TRC, he attended one semester of college, from August 1996 through May 1997, but that his back pain prevented him from going to a second semester.

TA, a counselor at TRC, wrote on August 4, 1998, just before the start of the filing period for the third quarter, that claimant called him and told him he is in lots of pain and wants TRC to pay for him to go back to school and that he told claimant that TRC could not pay for more school because of claimant's low grade point average. Claimant said that he was told by his teacher that he had passing grades. TA's assistant wrote on October 13, 1998, that she called claimant that day and claimant told her that he did not feel that he could return to school until he had a determination on surgery. TA wrote on August 14, 1998, that claimant had qualified for TRC services in July 1996 and went to college from August 1996 through May 1997 to prepare for a master electrican license, that claimant is still on his caseload, that claimant has not been back to school due to his pain, that claimant said he has been going through physical therapy, and that claimant recently contacted TRC about future services.

TA's assistant wrote on December 15, 1998, that she called claimant with information for him to apply for a census job. Claimant said that he called about the census job and was told that it involved a lot of physical activity and that it may not be suitable for him because of his injury. Claimant said that at some unspecified time he called a school about teaching electrical applications and was told by someone that they were not sure he could be employed due to his restrictions. TA wrote in May 1999 that claimant had called him on August 4, 1998, to update him on his back problems and inform him that he wanted to go back to school; that his assistant called claimant on October 13, 1998; that his assistant called claimant on December 15, 1998, with the census job lead; and that claimant is still currently on his caseload but claimant claims to have chronic pain that has kept him from seeking employment or going back to school. Claimant said that he keeps TRC informed of his condition.

The hearing officer found that claimant had the ability to work sedentary work during the relevant filing periods and that, based on a totality of the evidence, claimant did not establish that he made a good faith effort to find employment during the relevant filing periods. The hearing officer concluded that claimant is not entitled to SIBS for the third and fourth quarters. Whether claimant had an ability to work during the relevant filing periods and whether he made a good faith effort to obtain employment commensurate with his ability to work were fact questions for the hearing officer to determine from the evidence presented.

In determining good faith the hearing officer can consider the manner in which a job search is undertaken with respect to timing, forethought, and diligence. Texas Workers' Compensation Commission Appeal No. 941741, decided February 9, 1995. In Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel rejected the contention that a certain number of job applications automatically constitutes a good faith effort to obtain employment and noted that, in common usage, good faith is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. In Texas Workers' Compensation Commission Appeal No. 960252, decided March 20, 1996, the Appeals Panels stated that in determining whether a claimant has attempted in good faith to obtain employment commensurate with his ability to work, the hearing officer must sometimes assess whether undeniable contacts made with prospective employers constitute a true search to reenter employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS. Texas Workers' Compensation Commission Appeal No. 961578, decided September 20, 1996, which is cited by claimant, is distinguishable from the facts of the instant case because, in Appeal No. 961578, the injured employee was attending college under TRC sponsership during the filing period in question and was also working part time during that filing period.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. 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. An appellate level body is not a fact finder and does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge