APPEAL NO. 991826

On July 28, 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 eighth quarter. The appellant (self-insured) requests that the hearing officer's decision that claimant is entitled to SIBS for the eighth quarter be reversed and that a decision be rendered in its favor or, in the alternative, remand the case to the hearing officer. Claimant 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 (AWW) 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.

The new SIBS rules, effective January 31, 1999, apply to qualifying periods beginning on or after January 31, 1999 (*see* new SIBS Rule 130.100(a)) and thus do not apply to this case since the filing period for the eighth quarter began on December 31, 1998. The SIBS rules in effect on the date the filing period for the eighth quarter began are applied. Entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by claimant during the filing period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)). Rule 130.104(a) provides that an injured employee initially determined by the Texas Workers' Compensation Commission (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. Rule 130.101 provides that "underemployment" occurs when the injured employee's average weekly earnings during a filing period are less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury. Claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that on _____, claimant was an employee of (self-insured); that claimant sustained a compensable injury on _____; that on March 6, 1996, claimant reached maximum medical improvement with a 23% IR; that claimant did not commute IIBS; that the filing period for the eighth quarter was from December 31, 1998, to March 31, 1999 (the filing period); that the eighth quarter was from April 1, 1999, to June

30, 1999; and that during the filing period for the eighth quarter, claimant did not earn wages for at least 90 days that were at least 80% of claimant's preinjury AWW. There is no appeal of the hearing officer's determination that during the filing period claimant's underemployment was a direct result of her impairment.

This is an underemployment case. In Texas Workers' Compensation Commission Appeal No. 951770, decided December 4, 1995, the Appeals Panel noted that in determining good faith in an underemployment case, the hearing officer may consider the kind of work being done and the number of hours worked, and that decision cites several of our decisions for the proposition that "the good faith effort necessary for SIBS must be to obtain employment commensurate with the ability to work, not to return to the previous employment or to employment at a certain wage scale." In Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996, the Appeals Panel noted that, in common usage, “good faith” is a term ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intent to defraud, and, generally speaking, means being faithful to one's duty or obligation. In Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996, the Appeals Panel stated that a claimant's unemployment or underemployment must be a direct result of the impairment, but the impairment need not be the sole cause of the unemployment or underemployment.

Medical reports reflect that claimant was working as a full-time salesperson in self-insured's men’s clothing department on _____, when she sustained an injury. Claimant said that her job required her to perform sales and stocking work and that she injured her neck and shoulders when stocking overhead. Dr. R performed a diskectomy and fusion on claimant's cervical spine at C5-6 in November 1994. Dr. C, the designated doctor, evaluated claimant in July 1996 and assigned her a 23% IR. Dr. C diagnosed claimant as having bilateral shoulder impingement, with possible rotator cuff tears, and noted the cervical surgery. Dr. C assigned impairment for claimant's cervical spine and for both shoulders. Claimant underwent a functional capacity evaluation (FCE) in October 1997 and the physical therapist reported that claimant was functioning at a sedentary work level. Claimant changed treating doctors to Dr. S around April 1998, and he wrote in May 1998 that claimant is unable to perform any occupational duties above the sedentary level secondary to cervical and arm pain. He noted that claimant appears to have significant cervical pathology, evidenced by nerve conduction studies. Dr. S also wrote in May 1998 that it would be unlikely that claimant could perform a full 40-hour workweek. Dr. S wrote in June 1998 that claimant's work restrictions are that she "may work up to 4 hours per day, and no more than 5 days per week," and stated that restrictions include: no bending or stooping, no extended overhead reaching, and no lifting over 10 pounds.

Dr. S referred claimant to Dr. CH, a neurosurgeon, who stated impressions of status postwork-related injury with progressive neck and bilateral arm pain with right-sided radiculopathy and paraesthesia, and progressive cervical spondylosis with spondylitic radiculopathy and early myelopathy due to bony changes and symptoms consistent with cervical spinal canal stenosis. Dr. CH recommended a CT myelogram of the cervical spine

and noted that, depending on the results of that test, claimant may be a candidate for further surgery.

Claimant underwent an FCE in August 1998 per order of the Commission and the therapist wrote that claimant's material handling tolerances are consistent with a sedentary work classification, but that the efforts demonstrated by claimant were not a reflection of her maximum capabilities. The Commission ordered claimant to be examined by Dr. D for the purpose of determining whether claimant is able to work more than four hours per day. In September 1998, Dr. D examined claimant and reviewed claimant's medical records, including reports of diagnostic tests and FCE results, and noted evidence of abnormalities in claimant's cervical spine and evidence of bilateral shoulder impingement syndrome with rotator cuff tendinitis. Dr. D wrote that "I do not think that she is cable [sic] of performing any more work than 20 hours per week." Dr. D also stated that "I think that a four-hour work day with 20 hours per week would be the upper limit that she could tolerate. This would be on a permanent basis."

According to Texas Workers' Compensation Commission Appeal No. 991179, decided July 15, 1999 (Unpublished), wherein the Appeals Panel affirmed a hearing officer's decision that claimant was entitled to SIBS for the seventh quarter, and which decision claimant put into evidence, (Dr. O) reviewed claimant's records in October 1998 and opined that claimant could work an eight-hour day with restrictions.

Claimant's Statement of Employment Status (TWCC-52) and attachments for the eighth quarter are in evidence.

Claimant testified that she is 56 years of age; that she went to high school through the 10th grade; that she started working for (employer 2) in September 1998 as a salesperson in the jewelry department; that she had to leave that job because she was unable to work the full days employer 2 wanted her to work because of pain; that she started working for (employer 3) in November 1998 as a salesperson in the jewelry department; that she worked for employer 3 during the filing period; that when she looked for work at employer 3 she told the manager that she wanted to start out at four hours per day and 20 hours per week and the manager told her that would be no problem; that Dr. S has not changed her work restrictions; that during the filing period she averaged 15.5 hours of work per week; that after Christmas her hours were cut but she talked to the manager and she got her hours back; that there was no week during the filing period that she did not work at all; that possibly a check is missing from her documentation; that when the manager would schedule her for less than four hours a day, she would ask to work four hours but was told “no”; and that sometimes she would work five hours per day if another employee did not show up.

Claimant further testified that she earns $7.50 per hour at employer 3; that she was scheduled to work Monday through Friday at employer 3 but that some weeks during the filing period she got scheduled for three or four days a week; that she did not look for work with other employers during the filing period and did not work for any employer other than

employer 3 during the filing period; that during the filing period she had to miss several days of work because of a CCH and deposition relating to self-insured's dispute of prior SIBS quarters; that she recently underwent another MRI; that additional surgery is being considered but is not scheduled; and that her neck, shoulders, and arms have gotten worse since the summer of 1998.

The hearing officer found that during the filing period for the eighth quarter claimant usually worked four hours a day, five days a week for employer 3; that during the filing period claimant had a limited ability to work up to 20 hours per week because of bilateral shoulder, arm, and neck pain; and that during the filing period claimant made a good faith effort to obtain employment commensurate with her ability to work. The hearing officer concluded that claimant is entitled to SIBS for the eighth quarter.

Self-insured contends that the evidence shows that claimant averaged 13 or 14 hours of work per week and that that was not a good faith effort to obtain employment commensurate with her ability to work because it was not the 20 hours per week that she was permitted to work by Dr. D. Claimant responds that the evidence shows that she averaged more than 15 hours of work per week and that she had to miss several days of work to attend proceedings due to self-insured's dispute of prior SIBS quarters.

Self-insured cites Texas Workers' Compensation Commission Appeal No. 960480, decided April 24, 1996, in support of its contention that claimant did not make a good faith effort. The claimant in Appeal No. 960480 was released to return to light-duty work for three to six hours a day and the hearing officer found that he averaged 13.5 hours per week during the filing period. The Appeals Panel held that the hearing officer's determination that the claimant attempted in good faith to obtain employment commensurate with his ability to work was not sufficiently supported by the evidence and reversed the hearing officer's decision that the claimant was entitled to SIBS. The Appeals Panel noted that the evidence showed that the claimant worked less than three hours per day and stated "[w]ith claimant's hours clearly not approaching the level specified by the most restrictive medical evidence of record, the claimant was obligated to continue to attempt in good faith to find employment commensurate with his ability to work" and that "with claimant's present job clearly not rising to the level that was medically specified, the question of good faith should have been considered in terms of the attempt thereafter to find other employment."

We think that the present case is distinguishable from the facts of Appeal No. 960480, in that, in considering the requirement to attempt in good faith to obtain employment commensurate with the ability to work in the instant case, the hearing officer could consider claimant's testimony that she was told by the manager at employer 3 that a work schedule of four hours per day and 20 hours per week would be no problem, that when her hours were cut after Christmas she asked for more hours, and that when she was scheduled to work for less than four hours per day, she asked for more hours.

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. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. 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 that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge