

APPEAL NO. 991888

On August 11, 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 17th and 18th quarters, and whether respondent (carrier) is relieved of liability for SIBS for the 17th quarter because of claimant's failure to file a Statement of Employment Status (TWCC-52) for that quarter. Claimant requests that the hearing officer's decision that he is not entitled to SIBS for the 17th and 18th quarters be reversed and that a decision be rendered in his favor. 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 the 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. Rule 130.104(a). Claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

Claimant testified that on _____, he hurt his lower back and right shoulder pushing a cart at work and that his restrictions include no heavy lifting or repetitive movements. The parties stipulated that claimant sustained a compensable injury on _____; that he reached maximum medical improvement on October 7, 1993, with a 21% IR; that he did not commute IIBS; that he is not entitled to SIBS for the 17th quarter; and that the 18th quarter was from March 15 to June 13, 1999. The filing period for the 18th quarter was from December 14, 1998, to March 14, 1999 (the filing period). The new SIBS rules effective for qualifying periods beginning on or after January 31, 1999, do not apply to this case. See new SIBS Rule 130.100(a), effective January 31, 1999. There is no appeal of the hearing officer's finding that claimant's unemployment during the filing

period was a direct result of his impairment. With regard to the 17th quarter, we find no merit in claimant's appeal of the hearing officer's decision that he is not entitled to SIBS for the 17th quarter because the parties stipulated at the CCH that claimant is not entitled to SIBS for that quarter.

Claimant listed approximately 40 job contacts for the filing period on attachments to his TWCC-52 for the 18th quarter and noted on that form that he earned no wages during the filing period. The job contacts are listed on 26 days of the 90-day filing period. Claimant said that he left job applications at some of the employers he listed on the TWCC-52 but could not recall which ones they were. Claimant said that he got most of his job leads from the newspaper but also went to places that displayed help wanted signs. He said he did not get any job interviews or job offers during the filing period. He said that during the filing period he also took classes to learn English. LV, carrier's claims representative, testified that she called all of the employers listed on claimant's TWCC-52 for the 18th quarter and that no employer on the list could verify that claimant had filled out a job application.

With regard to the good faith job search requirement for the 18th quarter, the hearing officer found that during the filing period: claimant had an ability to work with restrictions of no heavy lifting and no repetitive movements; that claimant earned no wages; that claimant made approximately 40 job contacts which resulted in no interviews or job offers; that claimant's efforts to find work lacked the objective manifestations of good faith with respect to timing, forethought, and diligence in his effort to reenter the workforce and find employment; and that claimant did not make a good faith effort to obtain employment commensurate with his ability to work. The hearing officer concluded that claimant is not entitled to SIBS for the 18th quarter. Claimant contends that the hearing officer's decision is contrary to the great weight of the evidence.

Whether claimant made a good faith attempt to obtain employment commensurate with his ability to work was a fact question 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 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. 960252, decided March 20, 1996, the Appeals Panel stated that in determining whether claimant has attempted in good faith to obtain employment commensurate with claimant's ability to work, the hearing officer must sometimes assess whether contacts with prospective employers constitute a true search to find employment or are done instead in a spirit of meeting, on paper, eligibility requirements for SIBS.

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. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084. 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:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge