APPEAL NO. 991923

On August 3, 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 appellant (claimant) is entitled to supplemental income benefits (SIBS) for the first and second quarters. Claimant requests that the hearing officer's decision that he is not entitled to SIBS for the first and second quarters be reversed and that a decision be rendered in his favor. 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 (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. Claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that on _____, claimant sustained a compensable injury to his low back; that he reached maximum medical improvement on April 21, 1998, with a 16% IR; that he did not commute IIBS; that his preinjury AWW was $532.84; that the first quarter was from March 24, 1999, to June 22, 1999, with a filing period of December 23, 1998, to March 23, 1999; and that the second quarter was from June 23, 1999, to September 21, 1999, with a qualifying period of March 11, 1999, to June 9, 1999. There is no appeal of the hearing officer's finding that during the filing period for the first quarter and the qualifying period for the second quarter, claimant was underemployed because claimant's earnings during those periods were less than 80% of claimant's AWW as a direct result of claimant's impairment.

Claimant testified that he worked as an equipment technician for (employer) and that he injured his lower back on _____, when he picked up an iron loop at a drilling rig. Claimant had lumbar surgery at L5-S1 in July 1996 and March 1997 and underwent a fusion with instrumentation in May 1998. Claimant said that Dr. T, his treating doctor, released him for restricted work duty in November 1998. Claimant said that on December 10, 1998, he found out that employer had terminated his employment. In a work status form dated January 13, 1999, Dr. T noted that claimant was released to return to work with restrictions of no stooping or bending at the waist, no lifting greater than 15 pounds, and

“no excessive [illegible] or climb stairs.“ Claimant said that he was to do no excessive standing or walking in addition to the listed restrictions. Dr. K examined claimant at carrier's request in May 1999 and he reported that, regarding work ability, claimant is in the "medium category." On June 1, 1999, claimant underwent a procedure for removal of a bone growth stimulator battery.

On his Statement of Employment Status (TWCC-52) for the first quarter, claimant listed 32 job contacts. The jobs listed are driver/operator and any job available. Claimant said that he filled out an application for each job and that all of the employers listed were taking applications. He also said that when he went in for an "interview" with certain employers, he found out that they were not taking applications.

Claimant's wife works as a demonstrator for a marketing company and demonstrates products in grocery and department stores. Claimant said that a truck he and his wife purchased in 1995 is in both of their names and that the truck was purchased for his wife's use. He said that on January 20, 1999, his wife leased the truck to (RRE), an oilfield "hot-shot" company. He said that he added equipment to the truck. He said that under the contract, his wife was to get 78% of the "line haul," which is the amount a customer pays for having an item hauled, and that he contracted with his wife for him to drive and maintain the truck and make customer contacts and that he would get 10% of the "net profits." He said that through his customer contacts, he secured hauling jobs. He said that RRE did not pay all that was owed under the contract.

Claimant said that on April 11, 1999, RRE terminated its contract with his wife and that on April 12, 1999, his wife contracted with (PT). Claimant said that under the PT contract, the "truck account" was to get 68% of the line haul. He said that he and his wife are signatories on the truck account. He said that he is an employee of PT and that PT pays him 10% of the line haul. He said that he is on call 24 hours a day and that he spends about 40 hours a week on contacting potential customers. He said that he hauls mostly small parts for oilfield equipment.

Claimant said that in mid-December 1998 he contacted the Texas Workforce Commission and that they referred about four jobs a week to him, but that the jobs were mostly for tractor-trailer drivers and that climbing the steps to get into the tractor would not comply with his doctor's work restrictions. Claimant also said that in December 1998 or January 1999 he contacted the Texas Rehabilitation Commission and that the only assistance offered was to go to college full time, which he did not think was a good idea because he needed to make money for his family.

On the TWCC-52 for the first quarter, claimant listed wages of $40.00. Claimant said that that money was actually expense money his wife gave him. Attached to the TWCC-52 is a list of companies that claimant said were his customer contacts during the filing period. There are approximately 78 customer contact entries, 14 of which are

highlighted to show hauling jobs that were secured. Also attached to the TWCC-52 for the first quarter are several "truck settlement" documents. On the TWCC-52 for the second quarter, claimant listed wages of $66.62. He said that was the amount he was paid by PT. Claimant attached to his TWCC-52 for the second quarter a list of customer contacts. There are approximately 137 customer contact entries, 13 of which are highlighted to show hauling jobs that were secured. Also attached to the TWCC-52 for the second quarter is information regarding waybills.

Claimant's wife stated in a notarized statement that from January 25, 1999, to April 12, 1999, claimant was her employee and the driver of a half-ton truck, that claimant's job was to drive and maintain the truck and to contact customers, that claimant did not do the loading or unloading, that claimant was paid 10% of the gross profits made by the truck, and that during claimant's employment the truck did not earn any profit. In evidence is an 11-page document in which claimant recorded deposits and expenses purportedly relating to the truck. From this document, the hearing officer determined that claimant earned $1,342.85 in the filing period for the first quarter and $1,202.04 in the qualifying period for the second quarter. Claimant states that this money was put back into the business and was not income. There are various entries for meals among the expense items.

Claimant does not appeal the hearing officer's finding that during the filing period for the first quarter and the qualifying period for the second quarter, claimant had the ability to work light duty and was self-employed. With regard to the good faith criterion for SIBS, the claimant appeals the hearing officer's finding that during the filing period for the first quarter and the qualifying period for the second quarter, claimant did not attempt in good faith to obtain employment commensurate with his ability to work and the hearing officer's conclusion that claimant is not entitled to SIBS for the first and second quarters. Claimant states that in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.101(1)(D) (Rule 130.101(1)(D)) (effective January 31, 1999, and applicable to qualifying periods beginning on or after January 31, 1999 (Rule 130.100(a)), he submitted contacts and information. Rule 130.101(1)(D) pertains to TWCC-52 information for self-employed individuals.

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 Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995, the Appeals Panel 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 Panel stated that in determining whether a claimant has attempted in good faith to obtain employment commensurate with the claimant's ability to work, the hearing officer must sometimes assess whether contacts with prospective employers constitute a true search for employment or are done instead in a spirit of

meeting, on paper, eligibility requirements for SIBS. A hearing officer may assess whether efforts at self-employment are tantamount to a good faith effort to restore oneself to gainful employment. Texas Workers' Compensation Commission Appeal No. 960188, decided March 13, 1996.

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. 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, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision that claimant is not entitled to SIBS for the first and second quarters is supported by sufficient evidence and 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

_____
Elaine M. Chaney
Appeals Judge