

APPEAL NO. 991937

Following a contested case hearing held on August 9, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by concluding that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fifth and sixth compensable quarters. Claimant has requested our review of these conclusions and certain underlying factual findings, asserting his views as to how they are erroneous. The respondent (carrier) filed a response urging the sufficiency of the evidence to support the challenged findings and conclusions.

DECISION

Affirmed as reformed.

The parties stipulated that, among other things, claimant lived within 75 miles of (City 1), on _____. The parties also stipulated that claimant has received SIBS for the prior quarters; that he earned wages of \$1,846.15 during the filing period for the fifth compensable quarter and \$2,500.00 during the filing period for the sixth compensable quarter; that he drew unemployment (compensation) during the period from December 25, 1998, to February 28, 1999, at the rate of \$124.00 "a fortnight"; and that the filing period for the fifth compensable quarter began on November 4, 1998, and ended on February 2, 1999. The qualifying period for the sixth compensable quarter was not stipulated to or otherwise stated during the hearing. However, claimant's Statement of Employment Status (TWCC-52) for the sixth quarter has written on its face that the qualifying period is "2/3/99 - 5/4/99."

Claimant testified that, following his compensable injury of _____, while employed by (Employer 1), he underwent spinal surgery at the L4, L5, and L6 levels on June 7, 1995. According to the March 4, 1997, report of Dr. F, who assigned claimant an impairment rating of 18%, claimant was status post-discectomies at L3-4 and L4-5 with hemilaminectomies at L3, L4, and L5. Claimant testified that following the spinal surgery, he underwent physical therapy (PT) for nearly two years and that he has been permanently restricted to very light duty with lifting restrictions. The January 29, 1999, record of Dr. B, claimant's current treating doctor, states the diagnosis as "Failed Back Syndrome" and returns claimant to limited duty with the remarks, "office work - consecutively able to lift 17 lbs & on occasion 50 lbs." Claimant indicated that following the surgery and PT he was employed by (Employer 2). (Employer 2) for about one year but was laid off on December 4, 1998, due to a business slowdown. Claimant's TWCC-52 for the fifth compensable quarter reflects that for the weeks ending "11/21/98," "12/5/98," and "12/12/98," claimant earned \$738.46, \$738.46, and \$369.23, respectively. Claimant said he then registered with the Texas Workforce Commission but was not provided with any job leads even though he checked back with that agency, and that in the mid-December 1998 to mid-January 1999

period, he made four unsuccessful efforts to obtain employment. He indicated that he mistakenly referenced these contacts on his sixth quarter TWCC-52 instead of his fifth.

Claimant further testified that at some subsequent time, apparently in late January 1999, he learned through a friend of an employment opportunity selling residential time shares in (City 2); that in the second week of February 1999, he "lined up the job"; and that in late February he went to City 2 and arranged to lease a house so he could start the new job on March 1, 1999. He stated that he did not thereafter continue to look for employment during the sixth quarter qualifying period because he had already obtained the new job and did not feel as though he needed to continue looking for a job for just a three-week period before moving to City 2. However, claimant further testified that he was delayed a month in moving to City 2 and starting his new employment because the tenant of the house he leased held over an additional month. He said he left Texas on March 31, 1999, moved into the house in City 2 on April 1, 1999, and started his new employment on April 5, 1999. Claimant further testified to the manner in which he is compensated in his new employment, namely, a weekly draw of \$250.00 and a percentage of his time shares sales, less the draws advanced. Claimant's TWCC-52 for the sixth quarter reflects that for the weeks ending "4/11/99," "4/11/99," "4/18/99," and "4/25/99," he earned \$250.00, \$500.00, \$750.00, and \$1,000.00, respectively. The parties stipulated that claimant's average weekly wage (AWW) was \$568.38. There was no contention that during the two filing periods in issue, claimant earned 80% or more of his AWW.

The hearing officer's Finding of Fact No. 1a incorrectly reflects the parties' stipulation of venue in that, as the parties stipulated, claimant lived within 75 miles of City 1 on _____, the date of injury, and not May 10, 1999. We reform that finding accordingly. Claimant also challenges Finding of Fact No. 2 to the extent that it states that he has since moved to City 1 when, in fact, he moved to City 2. We reform that finding accordingly.

The hearing officer found that claimant did not make a good faith effort to seek employment during the filing period for the fifth compensable quarter and that during the majority of that filing period, his unemployment was not due to any permanent impairment but rather to his having been laid off. In Findings of Fact Nos. 6 and 7, the hearing officer found that although claimant became employed, he did not work and did not seek other work during the interim weeks after being hired and before reporting for duty and that he did not make a good faith attempt to obtain employment. Both of these findings refer to the filing period for the fifth compensable quarter. Since it is apparent that these findings refer to the sixth quarter and not the fifth, we reform them accordingly. The hearing officer further found that claimant's unemployment during the sixth quarter filing period was not a result of the impairment from his compensable injury but was caused by his inability to report for work with his new employer. Claimant has challenged these adverse findings.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's

AWW as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed as reformed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge