

APPEAL NO. 991995

On August 16, 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 fourth quarter. Claimant requests that the hearing officer's decision that she is not entitled to SIBS for the fourth quarter be reversed and that a decision be rendered in her favor or, in the alternative, that we remand to the hearing officer. 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 her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that the fourth quarter was from May 19, 1999, to August 17, 1999, and that the qualifying period for the fourth quarter was from February 4, 1999, to May 5, 1999 (the qualifying period). The parties further stipulated that claimant sustained a compensable injury on _____; that she reached maximum medical improvement on August 27, 1997, with a 17% IR; that she did not commute IIBS; and that during the qualifying period claimant did not work or earn any wages, earned less than 80% of her AWW, and had some ability to work. There is no appeal of the hearing officer's finding that claimant unemployment during the qualifying period was a direct result of her impairment.

Because the qualifying period began on or after January 31, 1999, the new SIBS rules effective January 31, 1999, apply to claimant's fourth quarter for SIBS. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100(a) (Rule 130.100(a)).

According to claimant's answers to written interrogatories, she injured her back at work on _____, while working as a packer for (employer). She underwent a laminectomy in February 1996, an L5-S1 fusion in February 1997, and had hardware removed from her back in April 1998. (Dr. S), claimant's treating doctor, reported in October 1998 that claimant may return to restricted work on October 15, 1998, with restrictions of no lifting over 15 pounds and no bending, stooping, or twisting. According to a functional capacity evaluation (FCE) report dated October 21, 1998, claimant's job with employer is in the medium-work category and she does not meet the physical demands of that job. The FCE report also notes that if considering employment, it should be a part-

time, light-duty position with no repetitive tasks and the ability to sit and stand when needed. On January 24, 1999, Dr. S wrote that claimant is not able to work, but noted restrictions of no lifting over 10 pounds and no bending, stooping, twisting, climbing, or working at unprotected heights. The parties stipulated that during the qualifying period claimant had some ability to work.

Claimant testified that she is a high school graduate; that she originally contacted the Texas Rehabilitation Commission (TRC) in 1997; that after Dr. S released her to return to work, she contacted the TRC on March 11, 1999, and after several more contacts with TRC she obtained its assistance for her to begin classes at a junior college beginning September 7, 1999; that she will also be attending a tax preparation course beginning September 9, 1999; that she made a resume and started to look for work in February 1999; that she kept a log of her job search efforts; and that during the qualifying period she was able to do light-duty work, looked for an entry-level position in office work or light assembly work where she could be trained, searched for jobs on a computer at the Texas Workforce Commission (TWC) on several occasions, attended a job fair where she left her resume with three employers, looked for jobs in the newspaper, called job lines, looked at city job postings, made some job applications, sent her resume to prospective employers, applied for jobs within her restrictions, and had three job interviews. She said that some places where she looked for work had no jobs available that she could perform.

The cover letter to claimant's application for SIBS for the fourth quarter notes the correct qualifying period and contains documentation of her job search. According to claimant's job-search log, she began looking for employment on February 17, 1999, and continued to look for employment through the end of the qualifying period. The log documents approximately 49 contacts with potential employers, including contacts by telephone and by sending a resume or application; three job interviews; five contacts with TRC from March 22 to April 19, 1999; an orientation meeting with TWC on March 23, 1999; two visits to TWC in April 1999 for job searches on a computer; a discussion with the junior college in March 1999, checking of a city job bulletin board on February 17, 1999; and attendance at a job fair on April 28, 1999, where she said she gave her resume to three employers. Also in evidence are letters from TRC, beginning with a letter to claimant dated March 11, 1999, in which vocational services are mentioned. A TRC letter of April 1999 notes that on May 6, 1999, a plan would be written up for claimant to attend school. Information regarding the job fair held on April 28, 1999, is in evidence as is the junior college's notice of a test date of May 14, 1999, and claimant's resume and cover letter for her resume.

Rule 130.102(e) (effective January 31, 1999) provides:

- (e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsections (d)(1), (2), and (3) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period

and document his or her job search efforts. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(4) of this section, the reviewing authority shall consider the information from the injured employee, which may include but is not limited to information regarding:

- (1) number of jobs applied for throughout the qualifying period;
- (2) type of jobs sought by the injured employee;
- (3) applications or resumes which document the job search efforts;
- (4) cooperation with the [TRC];
- (5) education and work experience of the injured employee;
- (6) amount of time spent in attempting to find employment;
- (7) any job search plan by the injured employee;
- (8) potential barriers to successful employment searches;
- (9) registration with the [TWC]; or
- (10) any other relevant factor.

In the Statement of the Evidence portion of her decision, the hearing officer noted that claimant gave credible testimony about the types of jobs she sought during the qualifying period but also noted the provision of Rule 130.102(e) that an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period. The hearing officer then noted that claimant failed to establish that she looked for employment during every week of the qualifying period, because the qualifying period began on February 4, 1999, and claimant "failed to document nor explain any job search during the week beginning 02-07-99 and ending on 02-14-99." The hearing officer considered the provision to look for employment every week of the qualifying period to be mandatory. As previously noted, the qualifying period began on February 4th and claimant's log reflects that she began looking for employment on February 17th. The hearing officer found that claimant failed to make a good faith effort to obtain employment commensurate with her ability to work during the qualifying period. Claimant contends that, given her job search efforts and cooperation with TWC and TRC, she should not be denied SIBS based on having failed to look for employment during the period found by the hearing officer, and that we should render a decision in her favor or, in the alternative, remand the case to the hearing officer for a determination of whether a good faith effort was made in her job search "without the 'shall look' requirement."

Failure to look for employment in every week of a qualifying period under the new SIBS rules has been considered in the affirmance of a denial of SIBS in previous decisions. See Texas Workers' Compensation Commission Appeal No. 991859, decided September 30, 1999; Texas Workers' Compensation Commission Appeal No. 991793, decided September 29, 1999 (Unpublished). Furthermore, in adopting new Rule 130.102(e), the Texas Workers' Compensation Commission stated in the Texas Register (24 Tex. Reg. 401 (1999)) that:

New Sec. 130.102(e) provides guidance to reviewing authorities by listing facts which shall be considered when presented in reviewing job search efforts. Further, this subsection places an affirmative responsibility on the injured employee to look for work every week of a qualifying period during which the employee is able to perform any type of work.

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 410.169(a). 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. 1985).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge