APPEAL NO. 992605

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 15, 1999, in (city 1), Texas. She (hearing officer) determined that the appellant/cross-respondent (claimant) was not entitled to supplemental income benefits (SIBS) for the 12th, 13th, 14th, and 15th quarters; that the claimant permanently lost his entitlement to SIBS; that the respondent/cross-appellant (carrier) was relieved of liability for 12th, 14th, and 15th quarter SIBS because the claimant failed to timely file an application for SIBS (TWCC-52) for these quarters; and that the carrier is not relieved of liability for 12th and 15th quarter SIBS because the TWCC-52 for these quarters was not so inadequate as to amount to no filing at all. The claimant in his appeal refers to what appear to be typographical errors in the decision and order and expresses his disagreement with the adverse determinations. The carrier replies that, with the exception of typographical or clerical errors, the portions of the decision and order appealed by the claimant are correct, supported by sufficient evidence and should be affirmed. Although the carrier ultimately prevailed on the merits, it appeals the determinations that the TWCC-52s for the 12th and 15th quarters were not inadequate. It also refers to what appears to be a typographical or clerical error in the decision and order. The appeals file contains no response from the claimant to the cross-appeal.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

We consider the following to be typographical or clerical errors and reform the decision and order as follows:

1. The stipulation in Finding of Fact No. 1.E. that the 12th quarter ended on February 14, 199**8**, is reformed to read 199**9**.

2. In her discussion of the evidence, the hearing officer stated that she "will accept . . . the adjuster's rendition of the facts" regarding the circumstances of the filing of the TWCC-52s for the 12th, 14th, and 15th quarters. That evidence was in the form of an affidavit from the adjuster, which stated that the TWCC-52 was received for the 12th quarter on December 3, 1998; for the 14th quarter on June 2, 1999; and for the 15th quarter on August 24, 1999. In her discussion of the evidence and Finding of Fact No. 4, the hearing officer lists these dates of receipt as November 11, 1998; May 16, 1999; and August 15, 1999, and makes conclusions of law that the filings were untimely. The filings would not have been untimely according to the dates contained in Finding of Fact No. 4 and if these were the intended dates,

Conclusions of Law Nos. 5, 6, and 7 would not have made sense. Clearly, the hearing officer intended to find the filings untimely. For this reason, we reform Finding of Fact No. 4 and the relevant portions of the statement of evidence to reflect that the TWCC-52s were received for these quarters on December 3, 1998 (12th quarter); June 2, 1999 (14th quarter); and August 24, 1999 (15th quarter).

3. Finding of Fact No. 1.B. reflects venue in (city 1). Conclusion of Law No. 2 reflects venue in (city 2). We reform Conclusion of Law No. 2 to reflect venue in (city 1).

The claimant sustained a compensable injury to his low back and knee on _____, in a motor vehicle accident. He underwent knee surgery on August 21, 1997, and was assigned a 15% impairment rating. A functional capacity evaluation (FCE) on June 4, 1998, concluded that the claimant could perform work in the medium category, which included lifting up to 50 pounds occasionally and 25 pounds frequently. Repeated kneeling, crouching, squatting, and climbing were to be avoided. On July 3, 1998, Dr. S, his treating doctor, released him to "full-time modified duty," consistent with the FCE.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. The 12th SIBS quarter began on November 16, 1998; the 13th on February 15, 1999; the 14th on May 16, 1999; and the 15th on August 15, 1999. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), in effect for the 12th and 13th quarters, the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The 12th quarter filing period was from August 17 to November 15, 1998, and the 13th quarter filing period was from November 16, 1998, to February 14, 1999. Pursuant to Rule 130.102(b), in effect for the 14th and 15th quarters, the entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "qualifying period." Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBS quarter and consists of the 13 previous consecutive weeks. The qualifying period for the 14th quarter was from February 1 to May 2, 1999, and from May 3, 1999, to August 1, 1999, for the 15th quarter.

The claimant testified that during all the filing and qualifying quarters in issue in this case he was working as an automotive mechanic at a garage owned by his uncle. He said he did oil changes, air-conditioning service, brake work, and other jobs. He was not paid an hourly wage rate, but was paid on a commission basis, which, he said, was 50% of the charge for the work he did. Some days when work was slow, he made as little as $8.00 . In

the 12th quarter filing period, he said, he worked about 20 hours per week and increased this from 20 to 40 hours per week in the remaining quarters. He offered no evidence on how many hours he worked on any given day or week of any filing period, but in no case did his weekly wage exceed what would have been minimum wage for a 40-hour week. He said he went once to the Texas Workforce Commission but could not remember when. He also said he went to the Texas Rehabilitation Commission at one undisclosed time, but no one could help him. On the TWCC-52 for the 12th quarter he listed 12 employment contacts, which were retail establishments where he was a customer. None were hiring. He did not list any job search activities on the TWCC-52 for the remaining filing or qualifying periods because he said he was already working at the garage and felt "very comfortable" working there. He said he wanted to know as much as his uncle did about automotive repair with the hopes of some day owning his own business. He admitted that he was aware of Dr. S's duty release and that the terms had not changed since Dr. S originally issued it.

To be entitled to SIBS, a claimant must make a good faith job search effort commensurate with the ability to work. When a claimant is not restricted to less than full-time work, but for reasons of his or her own self-limits to less than full-time work, the requirement to seek work commensurate with the ability to work is not met. *See* Texas Workers' Compensation Commission Appeal No. 990572, decided May 3, 1999. Similarly, if one purports to actually work a number of hours, but the pay for these hours turns out to be substantially less than minimum wage, a hearing officer can conclude that the claimant has not made the required good faith job search commensurate with the ability to work. *See* Texas Workers' Compensation Commission Appeal No. 981429, decided July 29, 1998; Texas Workers' Compensation Commission Appeal No. 980153, decided March 11, 1998; and Texas Workers' Compensation Commission Appeal No. 972352, decided December 31, 1997. In this case, the hearing officer concluded from the claimant's testimony that he declined to seek more work or work at higher wages in the filing and qualifying periods, not because his injury made him unable to do such work but because he preferred to work for his uncle. Thus, she found that he did not make the required good faith job search commensurate with his ability to work.

With regard to the direct result element of SIBS entitlement, the hearing officer commented that the evidence established that the claimant could work up to full time and would have if more work at the garage presented itself. Because his uncle's garage did not generate enough business, the claimant did not work full time. For these reasons, she found that the claimant's underemployment was not a direct result of his impairment.

Whether a claimant has made the required good faith job search and established that underemployment is a direct result of the impairment are questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950307, decided April 12, 1995, and Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and

preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the good faith and direct result determinations of the hearing officer and decline to reverse them on appeal.

Section 408.146(c) provides that an employee who is not entitled to SIBS for 12 consecutive months ceases to be entitled to any additional income benefits for the compensable injury. Having affirmed findings of non-entitlement to four quarters of SIBS, we find no error in the hearing officer's further determination that the claimant has permanently lost entitlement to SIBS.

In cases of continuing entitlement to SIBS, a carrier is required to provide the claimant with a TWCC-52. Rule 130.104. Benefits for a subsequent SIBS quarter begin to accrue on the day after the end of the preceding quarter or the date the statement is filed with the carrier, whichever is later. Rule 130.104(g). The claimant testified that he was late filing for 12th, 13th, and 15th quarter SIBS because the carrier failed to timely send him TWCC-52 forms for these quarters and he had to pick them up at the local office of the Texas Workers' Compensation Commission. The carrier countered this testimony with an affidavit from the adjuster that the forms were timely sent but not received until the dates stated in reformed Finding of Fact No. 4. Assuming that the carrier was obligated to send these forms to the claimant (compare the old and new Rule 130.104(b)), we observe that whether the carrier did so, whether the claimant received them, and when the claimant filed the forms with the carrier were all questions of fact for the hearing officer to decide. She did not find the claimant's testimony credible or persuasive, but instead "accepted the adjuster's rendition of the facts." Under our standard of review, we decline to reverse her determination of when the TWCC-52s were filed. We do note, however, that none of the TWCC-52s for the 12th, 14th, and 15th quarters were filed with the carrier after the quarter ended. Thus, if the carrier were liable for SIBS for these quarters, it would have been relieved of liability only up to the time the TWCC-52s were received, not for the entire quarters. For this reason, we reverse Conclusions of Law Nos. 5, 6, and 7, and render a decision that the carrier is relieved of liability for SIBS only up to the time the carrier received the TWCC-52s for these quarters. Because the claimant was found not entitled to SIBS for these quarters, the claimant obtains no practical benefit from this action.

Although the carrier does not appear to be aggrieved in this case, it appeals the finding of the hearing officer that the claimant's TWCC-52 forms for the 12th and 15th quarters or TWCC 52s were "not so inadequate as to amount to no filing at all." Conclusion of Law No. 8. The alleged fatal inadequacy in the 12th quarter TWCC-52 was the lack of a signature. The claimant admitted he simply forgot to sign the form. The form itself states above the signature block: "The information I have provided on this [TWCC-52] is true and correct. I understand that if I intentionally provide false information in order to obtain benefits, I can be subject to an administrative or criminal penalty." The carrier argues that without the signature "the party offering the form is not certifying to the matters contained

therein." It relies on our decision in Texas Workers' Compensation Commission Appeal No. 972512, decided January 20, 1998, for the proposition that a certification must be in writing and signed. In that case, the Appeals Panel affirmed the determination of a hearing officer that a Request for Benefit Review Conference (TWCC-45) was ineffective because it was not signed by the carrier's agent. There, we noted that the form itself stated that "by my signature" certain information was certified and we relied on the definition of "certification" to require a signed writing. In the case of the TWCC-52, there is no statement that indicates that certification by means of a signature is required on the form. Rather, the statement on the form is more in the nature of an advisement to the claimant. The mere listing of the data on the form and its submission constitutes, we believe, an assertion of its accuracy. In this case, the claimant did not deny the truth and correctness of the statement or that it was his statement for purposes of obtaining 12th quarter SIBS. Absent any real issue as to the identity of the person submitting the statement or the purpose for its submission, we cannot conclude that the case cited by the carrier provides authority for the proposition that lack of a signature on a TWCC-52 renders it invalid and, in effect, a nonfiling.

The carrier argues that the TWCC-52 for the 15th quarter was fatally defective because the claimant "did not provide payroll documentation with his application for the 15th quarter as required by Rule 130.101(1)(A)." The TWCC-52 listed only the wages earned in the 13 weeks of the qualifying period. The carrier reads the cited rule as requiring, by way of attachment to the form, independent evidence of the wages listed, but does not identify what such documentation might consist of. Absent an indication or allegation of some attempt to conceal pertinent information from the carrier or to procure a favorable determination of SIBS entitlement through such concealment, we cannot conclude that a straightforward listing of wages on the form itself cannot meet the requirements of the rule. If the carrier has questions about the completeness of adequacy of the information supplied by the claimant, it can, in the 10 days allowed for seeking a benefit review conference, make further inquiries of the claimant. To require more would raise form over substance and not address what would seem to be the real question, that is, the concealment of additional wages by both not listing them on the form and not including extrinsic documentation of these additional wages.

For the foregoing reasons, we affirm the determinations that the claimant is not entitled to 12th, 13th, 14th, or 15th quarter SIBS; that he has permanently lost entitlement to future income benefits; and that his TWCC-52s for the 12th and 15th quarters were not fatally defective. We reverse the determinations that the carrier was completely relieved of liability for the 12th, 14th, and 15th quarters for the independent reason of the claimant's late filing of the TWCC-52s and render a decision that the relief of liability, had there been liability, would only have been for the period up to the time the TWCC-52s were received by the carrier.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge