APPEAL NO. 000089

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 10, 1999. The issues at the CCH were whether the appellant/cross-respondent (claimant) was entitled to supplemental income benefits (SIBS) for the first and second compensable quarters and whether the respondent/cross-appellant (carrier) has timely contested the claimant's entitlement to SIBS for the second compensable quarter. The hearing officer concluded that the claimant was entitled to SIBS for the first compensable quarter, but not for the second compensable quarter. The hearing officer also concluded that the carrier timely requested a benefit review Conference (BRC) to contest the claimant's entitlement to SIBS for the second compensable quarter. The claimant appeals, contending that the claimant was entitled to SIBS for the second compensable quarter. The claimant challenges findings by the hearing officer that he had some ability to work during the qualifying period for the second compensable quarter, that he failed to seek employment in good faith during the qualifying period for the second compensable quarter, that he failed to establish that he cooperated with the Texas Rehabilitation Commission (TRC), and that the carrier timely requested a BRC to contest the claimant's entitlement to SIBS for the second compensable quarter. The carrier responds that the question of whether the claimant looked for work commensurate with his ability to work was a factual determination and that there was sufficient evidence to support the determination of the hearing officer that the claimant failed to do so during the qualifying period for the second compensable quarter. The carrier also stated that the evidence established that it timely contested the claimant's entitlement to SIBS for the second compensable quarter. The carrier filed a request for review, asserting that the hearing officer erred in finding that the claimant was entitled to SIBS for the first compensable quarter. The carrier argued that the claimant failed to establish that he sought work in good faith commensurate with his ability to work during the filing period for the first compensable quarter. The claimant responds, requesting we affirm the hearing officer's determination that he was entitled to SIBS for the first compensable quarter.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____; that the Texas Workers' Compensation Commission (Commission) determined that the claimant reached maximum medical improvement (MMI) on May 5, 1998, with an impairment rating (IR) of 17%[1] and that the claimant did not commute any

[1]Although the parties also stipulated that the carrier continues to dispute this date of MMI and this IR.

portion of his impairment income benefits (IIBS). The parties also stipulated, based upon the Commission's determination of MMI and IR, that the first quarter of SIBS was from April 28 through July 27, 1999; that the filing period for the first quarter of SIBS was from January 26 through April 27, 1999; that the second quarter of SIBS was from July 28 through October 26, 1999; and the qualifying period for the second quarter of SIBS was from April 15 through July 14, 1999.

The hearing officer summarized the evidence as follows in the section of her decision entitled "Statement of the Evidence":

> Claimant sustained a compensable back injury on _____ while moving pipe. Claimant has had conservative treatment including physical therapy, massages and adjustments. Claimant has also completed a pain management program and a series of epidural injections. Claimant continues to receive medications for his back pain. The Commission determined that [MMI] was reached on May 5, 1998 with an [IR] of 17%. Claimant has applied for his 1st and 2nd quarters of [SIBS] based on a restricted release to return to work.
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> Claimant testified that he was released with lifting restrictions of 20 pounds and limitations on stooping, bending, and standing and sitting. During the 1st quarter Claimant wanted to work so he was given these restrictions. Claimant changed doctors in July, 1999 and was given the same restrictions regarding work ability. Medical records showed that [Dr. B] examined Claimant in February, 1998 and stated that Claimant had reached [MMI] and that he could return to work without restrictions. Claimant has continued treatment with [Dr. K] and [Dr. S], both who state that Claimant cannot work in any capacity. Two functional capacity evaluations were performed which indicate no ability to work - however both note significant symptom magnification throughout the examination. On the other hand, in spite of the medical reports, Claimant repeatedly stated that he has been released to return to work with limitations of lifting no more than 20 pounds, and no extended sitting, standing or walking. Claimant was advised not to work with heavy machinery and that he could look for work within his restrictions. Claimant had an ability to work, with restrictions during the filing period for the 1st quarter and the qualifying period for the 2nd quarter.
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> Claimant stated that he looked for work during the 1st quarter from newspapers, friends' [sic] recommendations and signs posted in the community. Approximately 69-70 jobs were sought during the 1st quarter. Many potential employers stated that they would call him back but have not done so to date. All employers listed on the 1st TWCC 52 [Statement of Employment Status, revised 4/93] were hiring. Others were contacted but not listed as they were not hiring. The TWCC 52 job search log indicated

that Claimant sought work 2-3 times per week. Some of the jobs sought were outside Claimant's abilities (such as drilling, warehouse, forklift driver) but the majority showed thought and reflected a willingness to return to the work force. The job search for the 1st qualifying period spanned the filing period. During the same time period, Claimant had been in contact with TRC. Claimant's job search was based on jobs listed in the paper or places that he noted were hiring. Claimant made a good faith job search during the filing period for the 1st quarter of [SIBS].

The medical for the 2nd quarter also reflected a total inability to work as stated by the treating doctors. Again Claimant testified that he was released to work with the same restrictions noted above. The inconsistency is also on the first page of the TWCC 52 which indicated that Claimant had been released to return to work with restrictions and a second mark that he has not been released to return to work. However, based on Claimant's continuing assertions that he had been released as noted above, Claimant was able to work, with restrictions during the qualifying period for the 2nd quarter.

There were several concerns regarding Claimant's testimony for the search made for the 2nd quarter. Of note, Claimant testified that he could have done more job searches in a day or week, but he did not need to - as he only had to search once a week. Claimant repeatedly stated that he was ordered to look for work by the Commission and that he was doing same therefore, why work with the TRC. Claimant also mentioned that he would be willing to be retrained by an employer but that he could not be retrained by the TRC. Claimant would contact TRC each quarter but would tell them he was not yet released by the doctor or that he could not sit through re-training. Claimant's testimony indicated an awareness of the rules and smacked of a mere attempt to qualify for [SIBS] rather than an honest attempt to find employment. Claimant [sic] search was inconsistent and did not span each week of the qualifying period. Claimant did not establish that he made a good faith effort to seek employment during the qualifying period for the 2nd quarter.

Claimant has not been released to return to the heavy duty work he was able to perform before his compensable injury. Claimant's medical treatment is still quite active and Claimant continues to suffer the effects of the compensable injury. Claimant established that his unemployment during the filing period for the 1st quarter, or qualifying period for the 2nd quarter, of [SIBS] was a direct result of the compensable impairment.

Claimant signed the TWCC 52 [Application for [SIBS], revised 4/99] for the 2nd quarter on July 13, 1999. Though a letter from Claimant's attorney indicated that it was mailed to Carrier on July 12, 1999, this is not possible

based on Claimant's date of signing. There was no green card indicating when the Carrier received the TWCC 52. The green card to the Commission is not conclusive as to receipt by the Carrier. Carrier date stamped the TWCC 52 for the 2nd quarter as having been received by them on July 19, 1999. The Carrier filed a dispute of the Claimant's entitlement to the 2nd quarter with the Commission on July 29, 1999 - which would be within 10 days of the receipt.

Section 408.142(a) outlines the requirements for SIBS eligibility as follows:

An employee is entitled to [SIBS] if on the expiration of the [IIBS] period computed under Section 408.121(a)(1) the employee:

(1) has an [IR] of 15 percent or more as determined by this subtitle from the compensable injury;

(2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;

(3) has not elected to commute a portion of the [IIBS] under Section 408.128; and

(4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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." 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] for any quarter claimed." On January 31, 1999, Rule 130.102 was changed with the passage of the "new" SIBS rules. Pursuant to Rule 130.100(a), entitlement or nonentitlement to SIBS shall be determined in accordance with the rules in effect on the date a qualifying period begins. We addressed the question of how to calculate a quarter subject to the old as opposed to the new SIBS rules in Texas Workers' Compensation Commission Appeal No. 992126, decided November 12, 1999. Applying the precepts set out in that case, the "old" SIBS rules apply to the first compensable quarter and the "new" SIBS rules apply to the second compensable quarter.

Under the "new" SIBS rules, Rule 130.102 provides that an injured employee who has an IR of 15% or greater and who has not commuted any IIBS is entitled to SIBS if, during the qualifying period, the claimant has earned less than 80% of the employee's preinjury wage as a direct result of the impairment from the compensable injury and has

made a good faith effort to obtain employment commensurate with the employee's ability to work. "Qualifying period" is defined in Rule 130.101 as the 13-week period ending on the 14th day before the beginning of a compensable quarter.

The fact that the claimant met the first and third of the requirements of Section 408.142(a) was established by stipulation. The hearing officer found that the claimant met the second requirement and neither party has appealed this determination. The hearing officer found that the claimant made a good faith effort to seek employment during the filing period for the first compensable quarter but failed to do so during the qualifying period for the second compensable quarter. The claimant appeals the hearing officer's determination concerning the filing period for the first compensable quarter and the carrier appeals the determination concerning the qualifying period for the second compensable quarter. We have previously held that the question of whether the claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own 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, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant," and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." We have likewise noted that medical evidence affirmatively showing an inability to work is required, if a claimant is relying on such inability to work to replace the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation

Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination of the hearing officer which is subject to reversal on appeal only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 951204, decided September 6, 1995; Pool, *supra*; Cain, *supra*. Also, under the "new" SIBS rules, Rule 130.102(d)(3) states that the "good faith" criterion will be met if the employee:

> has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

Applying the standards under both the "new" and the "old" SIBS rules, we find no ground to reverse the decision of the hearing officer. The hearing officer found that the claimant had some ability to work during the filing period for the first compensable quarter and during the qualifying period for the second compensable quarter, and there is medical evidence to support these findings. While Dr. B and Dr. S express a contrary opinion, it was up to the hearing officer to resolve conflicts in the evidence.

Section 408.147 provides as follows in relevant part:

> (a) An insurance carrier may request a [BRC] to contest an employee's entitlement to [SIBS] or the amount of [SIBS].
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> (b) If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the [IIBS] period or within 10 days after receipt of the employee's statement, the insurance carrier waives the right to contest entitlement to [SIBS] and the amount of [SIBS] for that period of [SIBS].

The claimant argues on appeal that the hearing officer erred in finding that the carrier did not waive its right to contest the claimant's entitlement to SIBS because it failed to request a BRC within 10 days of the receipt of the claimant's TWCC-52, revised 4/99, for the second compensable quarter. The date of when the carrier received the claimant's TWCC-52, revised 4/99, was in dispute and was a factual determination. Applying the standard of review outlined above, we find sufficient evidence to support the finding of the hearing officer that the carrier received the claimant's TWCC-52, revised 4/99, on July 19, 1999, and requested a BRC within 10 days.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge