

APPEAL NOS. 000327
AND 000437

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 convened on October 27, 1999, with hearing officer to determine whether the appellant (claimant) is entitled to supplemental income benefits (SIBS) for the fourth quarter. The claimant did not appear because of problems he had with his automobile. On January 10, 2000, the hearing officer held a consolidated CCH at which the issues were whether the claimant is entitled to SIBS for the fourth and fifth quarters. She rendered a separate Decision and Order for each quarter. The claimant and the respondent (carrier) stipulated that the claimant sustained compensable injuries to his neck, left shoulder and arm; that his impairment rating is 27%; that the fourth quarter ran from July 23, 1999, through October 21, 1999; and that the fifth quarter ran from October 22, 1999, through January 20, 2000. It is undisputed that the qualifying period for the fourth quarter began on April 9, 1999, and ended on July 8, 1999, and the qualifying period for the fifth quarter began on July 9, 1999, and ended on October 7, 1999. The hearing officer determined that during the qualifying periods for the fourth and fifth quarters, the claimant's unemployment was the direct result of his impairment from the compensable injury. Those determinations have not been appealed and have become final under the provisions of Section 410.169. The hearing officer also determined that during the qualifying periods, the claimant had some limited ability to work, that during those qualifying periods he did not make a good faith effort to find work in line with his ability to work, and that he is not entitled to SIBS for the fourth and fifth quarters. The claimant appealed, urged that the determinations that he did not in good faith seek employment commensurate with his ability to work during the qualifying periods and that he is not entitled to SIBS for the fourth and fifth quarters are against the preponderance of the evidence, and requested that the Appeals Panel reverse the decisions of the hearing officer and render decisions in his favor. The carrier responded; urged that the evidence is sufficient to support the decisions of the hearing officer; and requested that they be affirmed.

In his appeal, the claimant stated:

A TWCC-45 (Request for Benefit Review Conference) [should have been Application for SIBS (TWCC-52)], with a copy of Claimant's business card and flier, were exhibits that were admitted into evidence at the BCCH (benefit CCH). Therefore they should be considered when reaching a decision. These exhibits clearly indicate that the Claimant was actively pursuing employment. The Claimant testified that he was actively looking for work in the painting industry.

In its response, the carrier stated "[i]nitially I would like to deal with what is implied in the claimant's Request for Review; namely, a wish for consideration of documentation

regarding fliers and business cards that were excluded”; stated that a copy of the flier and business card were admitted; contended that the hearing officer “did not abuse her discretion in not allowing this documentation or testimony on this documentation”; and urged that even if it was error to exclude the offered evidence, the error was not reversible error.

DECISION

We affirm.

The SIBS rules effective January 31, 1999, apply to the disputed issues of whether the claimant is entitled to SIBS for the fourth and fifth quarters. Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 130.101 (Rule 130.101) contains definitions and subsection (1) states:

Application for [SIBS] — The Commission [Texas Workers' Compensation Commission] form TWCC-52 containing the following information:

- (A) a statement, with supporting payroll documentation, that the employee has earned less than 80% of the employee’s average weekly wage as a direct result of the impairment from the compensable injury;
- (B) the amount of the employee’s wages during the qualifying period;
- (C) a statement, with supporting information such as that outlined in §130.102(e) of this title (relating to Eligibility for [SIBS]; Amount), that the employee has in good faith sought employment commensurate with the employee’s ability to work; and
- (D) for self-employed individuals, copies of all supporting documentation such as, business plans, contacts, sales tax registration, and any other pertinent documentation to document all efforts to establish or maintain a self-employed enterprise during the qualifying period.

Rule 130.102 is entitled "Eligibility for [SIBS]; Amount." Subsection (d) provides in part:

Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee’s ability to work if the employee:

- (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
- (2) [Pertains to a full-time vocational rehabilitation program.]
- (3) [Pertains to being unable to perform any type of work in any capacity.]
- (4) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

Subsection (e) provides:

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 Texas Rehabilitation Commission;
- (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 Texas Workforce Commission [TWC]; or
- (10) any other relevant factor.

We first address the decision that the claimant is not entitled to SIBS for the fourth quarter. The claimant testified that he had been a professional painter for about 15 years; that in December 1995 painting business was slow because of the time of the year; that he obtained a temporary job as an electrician's helper; that he was electrocuted and knocked to the floor on _____; that he takes Soma, Vicodin, and Xanax; that he has not been released to return to work, needed money, and decided on his own to go back to work; that his left arm gives out on him; and that he is not claiming that he has no ability to work. The TWCC-52 for the fourth quarter has entries for 52 potential employers. The claimant stated that he knew of some of the employers because of his previous work experience; that he learned of the names of some of the employers from friends, relatives, TWC, newspaper, and telephone book; that he either went to the employers or called them on the telephone; that he may not have spoken with each employer; that his daughter and a friend wrote the information on the TWCC-52; and that some of the names listed are persons that were spoken to and some are owners of the companies. He said that he had problems using his left arm; that he could work using his right arm; that he could paint with a brush; that in the past he used his right hand to use a spray painter; that if he was offered a job, he would try to do it; that he did not have experience doing industrial painting; that if he was offered a job doing industrial painting, he would try to learn how to do it and would try to do it; and that many of the places were not hiring painters. A video of the claimant showing some of his activities on March 25, 1999, indicates that he has a problem with his left arm, that he uses his right arm to do most things that require the use of an arm, and that he does use his left arm to perform some limited functions.

The hearing officer made one finding of fact concerning the effort of the claimant to obtain employment commensurate with his ability to work during the qualifying period for the fourth quarter. That finding is that the claimant did not make a good faith effort to find work in line with his ability to work. In the statement of the evidence in her Decision and Order, the hearing officer stated that the claimant's testimony showed that he did not contact all of the 52 employers listed on the TWCC-52, that he was not capable of performing all of the jobs listed on the form, and that he did not seek employment during every week of the qualifying period as required by Rule 130.102(e). It would have been preferable for the hearing officer to have included those statements as findings of facts. The parties stipulated that the qualifying period for the fourth quarter began on April 9, 1999, and ended on July 8, 1999. The TWCC-52 indicates that the earliest date that a job was sought during the qualifying period for the fourth quarter was April 26, 1999. The TWCC-52 indicates that five of the employers listed on it were contacted after the last day of the qualifying period. The claimant did not testify about specific dates that he sought employment during the qualifying period for the fourth quarter. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The finder of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation

Commission Appeal No. 93426, decided July 5, 1993. The claimant's testimony about contacting each of the potential employers listed on the TWCC-52 for the fourth quarter is confusing. The hearing officer's determinations that during the qualifying period for the fourth quarter the claimant did not make a good faith effort to find work in line with his ability to work and that he is not entitled to SIBS are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We affirm the decision that the claimant is not entitled to SIBS for the fourth quarter.

We next address the decision that the claimant is not entitled to SIBS for the fifth quarter. The claimant testified that he gave up on trying to find a job; that he had been in the painting business before he was injured; that he decided to go into business for himself; that he used the same methods of trying to get work as he used when he was in business for himself before; that if he was hired by a company, he would be pushed to work fast; that if he was in business for himself, he could work at his own pace; that he painted a house for Mr. C, the only person listed on the TWCC-52 for the fifth quarter; that in September 1999 Mr. C gave his daughter a car in return for his painting the outside of a house for Mr. C; and that he did a good job painting the house, but it took him five days when it should have taken about a day and one-half. The claimant said that he got a silent business partner, that the partner paid for fliers and business cards to be used in obtaining business, that it took a while to get the fliers and business cards, that he started trying to get work in August 1999, that he distributed about 3,500 fliers in two areas where he had performed work before, and that he got three jobs from the fliers. The carrier objected to any testimony about those three jobs or any other jobs that are not listed on the TWCC-52 for the fifth quarter. The hearing officer sustained the objection and did not permit the claimant to provide names of the three or testimony about any jobs other than the work done for Mr. C. The claimant was not specific about when things occurred and did not state when he got the three jobs.

We do not read the claimant's appeal to contend that the hearing officer erred in not permitting him to provide further testimony about his job efforts, but rather to contend that the copies of the flier and the business card and his testimony about distributing them are sufficient to meet his burden that he "made a good faith effort to obtain employment commensurate with [his] ability to work" for the fifth quarter as required in Rule 130.102(d)(1) through his self-employment. We note that Rule 130.101(d)(1) in defining Application for [SIBS] states what a self-employed individual should include in a TWCC-52; that Rule 130.102(d)(1) addresses an employee who has returned to work; that Rule 130.102(d)(4) and 130.102(e) address an employee who has not returned to work and is able to return to work in any capacity and contain documentation requirements; and that Rule 130.102(e) provides that it does not apply to subsections (d)(1), (2), and (3) of Rule 130.102. This decision does not specifically address what documentation is required to be on a TWCC-52 filed by a self-employed person. Some of the claimant's testimony was not clear and was not related to specific dates. If the hearing officer's not permitting the claimant to name persons who contacted him about doing work would have been

determined to have been error, such error would not necessarily have been reversible error.

The hearing officer made one finding of fact concerning the claimant's effort to seek employment commensurate with his ability to work during the qualifying period for the fifth quarter. That finding of fact is that he did not make a good faith effort to find work in line with his ability to work. In the statement of the evidence in her Decision and Order, the hearing officer said that the claimant listed only one contact for the qualifying period on his TWCC-52; that she sustained the carrier's objection to evidence of other contacts; that passing out fliers and business cards certainly can be helpful to promote business, but without more that does not necessarily amount to specific contacts for employment; that evidence not show the claimant sought employment every week of the qualifying period as required by Rule 130.102(e); and that the claimant did not show that he made a good faith effort to seek employment or increase his business. The hearing officer did not specifically make a finding of fact that the claimant had not returned to work in a position which is relatively equal to the injured employee's ability to work as set forth in Rule 130.102. However, such a finding of fact may be implied from the finding of fact and the statements of the hearing officer. The evidence is sufficient to support such a finding of fact, the finding of fact that the claimant did not make a good faith effort to find work in line with his ability to work, and the conclusion of law that he is not entitled to SIBS for the fifth quarter. We affirm the decision that the claimant is not entitled to SIBS for the fifth quarter.

We have previously stated that hearing officers should make specific findings of fact to resolve questions concerning the SIBS rules that are raised by the evidence. In addition, in making findings of fact and conclusions of law that resolve questions and issues that are before a hearing officer, hearing officers should use words in Texas Workers' Compensation Commission rules and in the 1989 Act to avoid unnecessary questions and disputes.

We affirm the decisions and orders for the fourth and fifth quarters for SIBS.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge