APPEAL NO. 000381

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 February 1, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first and second quarters; that the claimant is not entitled to SIBS for the third, fourth, fifth, sixth, seventh, and eighth quarters; that the claimant timely filed her Statement of Employment Status (TWCC-52) forms for the first through the eighth quarters; and that the claimant permanently lost entitlement to SIBS because she was not entitled to them for 12 consecutive months beginning April 6, 1998. The claimant appeals, challenging a number of the findings of the hearing officer as being contrary to the evidence and contending that the hearing officer applied an incorrect legal standard in deciding the case. The claimant argues that the evidence established that she was eligible for SIBS for the third through the eighth compensable quarters and had not permanently lost entitlement to SIBS. The respondent/cross-appellant (carrier) replies that the findings of the hearing officer challenged by the claimant were sufficiently supported by the evidence and that the hearing officer applied the proper legal standard to the facts of the case. The carrier appeals, contending the hearing officer erred in finding that the claimant sought employment commensurate with her ability to work during the filing periods for the first and second quarters; erred in concluding that the claimant timely filed her TWCC-52s for the first through the eighth compensable quarters because she failed to show good cause for a delay in filing; and erred in finding that the claimant showed that her unemployment during the filing and qualifying periods for the first through eighth quarters was a direct result of her impairment. The claimant responds that medical evidence, including the recommendation that she undergo additional surgery, showed that she was unable to work during the filing periods for the first and second compensable quarters, and that the claimant showed that her delay in filing was caused by the fact that she was not informed of her eligibility for these benefits and was in fact told by the carrier she was not entitled to further income benefits.

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 essential facts of this case are not in serious dispute and are set out in the hearing officer's decision. We adopt the hearing officer's rendition of the facts and will only briefly touch on the facts germane to the appeal. These include the fact that the parties stipulated that the claimant sustained a compensable injury resulting in an impairment rating (IR) of 15% or more; that the claimant did not elect to commute any portion of the impairment income benefits (IIBS); that the first SIBS quarter was from October 6, 1997, through January 4, 1998; that the second SIBS quarter was from January 5 through April 5, 1998; that the third SIBS quarter was from April 6 through July 5, 1998; that the fourth SIBS

quarter was from July 6 through October 4, 1998; that fifth SIBS quarter was from October 5, 1998, through January 3, 1999; that the sixth SIBS quarter was from January 4 through April 4, 1999; that the seventh SIBS quarter was from April 5 through July 4, 1999; that the eighth SIBS quarter was from July 5 through October 3, 1999; and the claimant did not earn wages for the qualifying periods for the first through the eighth quarters.

The claimant described her injury as taking place when she injured her lower back while bending over to obtain material when operating a sewing machine. The claimant testified that as a result of her injury she had undergone two major back surgeries but had rejected a third surgery out of fear of paralysis. The claimant testified that she is in pain and is unable to work. The claimant testified that during the periods in question she was under the treatment of Dr. B, who told her not to work. There is conflicting medical evidence in the record concerning the claimant's ability to work.

The claimant testified that after the expiration of her IIBS she was unaware that she might be entitled to SIBS. The claimant testified that she received no information from the Texas Workers' Compensation Commission (Commission) or the carrier regarding SIBS entitlement. The claimant testified that when Dr. B eventually informed her that she might be entitled to further benefits, she contacted the carrier and was told that she was owed no further income benefits. On June 8, 1999, the claimant contacted the Commission and it was discovered that an initial determination of entitlement to SIBS had never been made and that the claimant had never been provided with a TWCC-52. The claimant was furnished the forms and filed TWCC-52s for the first seven quarters on June 16, 1999, and for the eighth quarter on July 3, 1999.

We will first address the issue of whether the hearing officer erred in not relieving the carrier of liability because of the failure of the claimant to timely file her TWCC-52s. Failure to timely file a TWCC-52 can result in relieving a carrier of liability for SIBS. We have previously held in Texas Workers' Compensation Commission Appeal No. 941263, decided November 3, 1994, that where the Commission failed to notify the claimant of eligibility for SIBS and failed to timely determine eligibility for SIBS that untimely filing of a TWCC-52 by the claimant will not preclude entitlement to SIBS. In that case we stated as follows:

> We do not find merit in the carrier's position on appeal that since the Commission failed to give timely notice (prior to the end of the IIBS period) to the parties and since the claimant thereby failed to timely file a TWCC-52, the Commission lacked authority to determine entitlement to SIBS for the first quarter and claimant waived her rights to SIBS. While there appears to be a failure to comply with the procedural provisions of the 1989 Act and implementing rules regarding the initial determination of SIBS, that is not a basis to conclude that the claimant's entitlement to SIBS was thereby extinguished.

While we do not give retroactive application to the current Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.105(a)(2) (Rule 130.105(a)(2)), we do note that this doctrine was

essentially codified by the commissioners in this rule. Applying Appeal No. 941263, *supra*, to the present case, we find no error in the hearing officer's not relieving the carrier of liability for SIBS due to the late filing of the claimant's TWCC-52s.

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 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 seven compensable quarters and the "new" SIBS rules apply to the eighth compensable quarter, as was explicitly recognized by the hearing officer in his decision.

Pursuant to the "old" SIBS rules, Rule 130.102(b), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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]." 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 failed to make a good faith effort to seek employment during the filing periods for the first and second compensable quarters. We have previously held in regard to cases considered under pre-1999 rules, 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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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*. Applying this standard, we do not find that the hearing officer erred in finding that the claimant made a good faith job search during the filing periods for the first and second compensable quarters or that the hearing officer erred in finding that the claimant did not make a good faith job search during the filing period for the third through the seventh compensable quarters. With regard to the eighth compensable quarter, under the "new" SIBS rules, Rule 130.102(d)(3) states that the "good faith" criterion will be met if the employee:

> (3) 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 this rule, we find no error in the hearing officer determining that the claimant failed to prove a good faith job search during the qualifying period for the eighth compensable quarter.

The carrier has appealed the finding of the hearing officer that the claimant's unemployment during the filing periods for the first seven compensable quarters and the qualifying period for the eighth compensable quarter was a direct result of her impairment. We have previously held that whether a claimant's unemployment was a direct result of her impairment is a question of fact. Appeal No. 94533, *supra*. We have stated that a finding of "direct result" is sufficiently supported by evidence that an injured employee sustained an injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. There is certainly such evidence in the record in the present case.

We do not find merit in the claimant's contention that the hearing officer applied the wrong legal standard in the present case because he indicated in his decision that qualifying for SIBS by establishing a total inability to work was a rare occurrence. In stating this, the hearing officer was merely citing language found in a number of Appeals Panel decisions. The claimant is critical of many of these decisions in his appeal. While the claimant certainly has the right to criticize prior Appeals Panel decisions and argue that they were incorrectly decided, we will not reverse the hearing officer in the present case for referencing our prior decisions. Whether or not total inability to work is rare, we do not find that the hearing officer applied an incorrect legal standard in the present case.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge