APPEAL NO. 000662

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 January 20, 2000, and reopened on March 1, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the first, second, third, sixth, seventh, and 10th quarters; that the claimant is not entitled to SIBs for the fourth, fifth, eighth, ninth, 11th, or 12th quarters; and that the appellant/cross-respondent (carrier) is not relieved from liability for SIBs because of the claimant=s failure to timely file an Application for [SIBs] (TWCC-52) for the second through 12th quarters. The carrier appeals, urging that the great weight of the evidence is contrary to the hearing officer=s decision regarding the first, second, third, sixth, seventh and 10th quarters; and that hearing officer abused his discretion in reopening the record of the CCH. The carrier also argues that the hearing officer erred in admitting claimant=s exhibits at both sessions of the CCH, erred in holding that the claimant=s impairment rating (IR) is 26%, and erred in finding that the claimant timely filed his TWCC-52 for the second through 12th quarters. The claimant appeals, urging that he is entitled to SIBs for the eighth, ninth, 11th and 12th quarters. The carrier replies that the evidence is sufficient to support the hearing officer=s determination on such quarters and that the decision should be affirmed. The hearing officer=s determination that the claimant is not entitled to SIBs for the fourth and fifth SIBs quarters has not been appealed and has become final. Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained a compensable injury to his low back and did not commute any portion of his impairment income benefits (IIBs). The hearing officer made a finding that the claimant has an IR of 26%. The carrier appeals, asserting that the claimant=s correct IR is 11%. The claimant=s IR was determined to be 26% at a prior CCH and this was affirmed by the Appeals Panel. The fact that the decision has been appealed to the district court does not affect the validity of the IR determination made by the Texas Workers' Compensation Commission (Commission) unless and until there is a contrary judgment by the district court. Section 410.205(b) provides that a decision of the Appeals Panel is binding during the pendency of an appeal for judicial review. We therefore find no error in the hearing officer=s finding that the claimant's IR is 26%.

The carrier asserts that the hearing officer erred in admitting Claimant=s Exhibits Nos. 1 through 12. The carrier objected to the admission of Claimant=s Exhibits Nos. 1 through 12 at the CCH on the basis that they were Aamended@ TWCC-52s that were not complete and not dated, and that the original TWCC-52s filed were contained in Carrier=s Exhibits Nos. A through K. On appeal, the carrier asserts that Claimant=s Exhibits Nos. 1 through 12 were not timely exchanged with the carrier, and were not accurate copies of the TWCC-52 applications

submitted for the respective quarters. The claimant testified that he filed amended TWCC-52s at the request of the benefit review officer because the original TWCC-52s sent to him by the Commission identified the wrong dates for the quarters and thus the information contained in the TWCC-52s did not accurately reflect his employment status and earnings during the filing periods.

Evidentiary rulings by a hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary and will be reversed only if there is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. In determining whether there is an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Appeal No. 941414. The carrier, by only contesting the admission of Claimant=s Exhibits Nos. 1 through 12 did not properly preserve any objection that such exhibits were not timely exchanged. Regarding the relevancy of the documents, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). The hearing officer did not abuse his discretion in admitting Claimant=s Exhibits Nos. 1 through 12.

The hearing officer closed the record at the end of the CCH held on January 20, 2000, and then issued an Order to Reopen Hearing Record on January 27, 2000, requesting evidence concerning the claimant=s physical restrictions during the filing periods for the first through seventh quarters; school hours and classes the claimant attended during the filing periods for the third through sixth quarters; and chronological information concerning when the Commission determined the claimant=s date of maximum medical improvement and IR. The hearing officer overruled the carrier=s objection to the reopening of the hearing record. At the reconvened hearing on March 1, 2000, the hearing officer admitted Claimant=s Exhibits Nos. 19 through 23, over the carrier=s objection that such documents were not timely exchanged within 15 days of the benefit review conference or prior to the first session of the CCH. The carrier asserts that the hearing officer abused his discretion in reopening the record and violated the due process rights of the carrier by allowing the claimant a second opportunity to prove his case.

Pursuant to Section 410.163(b), the hearing officer has a duty to ensure "the full development of facts required for the determinations to be made." To carry out this duty, a hearing officer must on occasion ask questions, inform the parties of the elements of the case, and, in some instances, reopen the evidence. We have noted in the past that a hearing officer is not to become an advocate for either party. Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. Rather, it is the parties themselves who are primarily responsible for presenting their case and protecting their own interests. In this case, there was an obvious gap in the medical records as offered by the claimant into evidence. While we do not agree that reopening of the record was necessary in this case, all of the documents admitted were cumulative of the claimant=s testimony that he had been released to

return to light duty in 1995, that the Commission had determined a 26% IR, and that he was enrolled in classes. The hearing officer's actions do not constitute reversible error.

The claimant has resided in (city) since 1995 and testified by telephone. According to the claimant, he was contacted by the Commission about SIBs in May 1999 and was told to file a TWCC-52 for the first quarter. The claimant said that he completed a TWCC-52 for the first quarter and faxed it to the Commission on May 15, 1999; that he received a letter dated May 21, 1999, approving his first quarter of SIBs; and that at the end of May 1999, he received TWCC-52s from the Commission which he completed and sent to the carrier. The claimant did not testify as to the specific number of TWCC-52s sent to the carrier. On May 21, 1999, the Commission issued an initial determination of entitlement to the first quarter of SIBs. The Commission=s records reflect that the claimant was sent 10 TWCC-52s on May 20, 1999. Evidence was presented indicating that the carrier received the claimant=s TWCC-52s on July 8, 1999; that TWCC-52s for the second through 10th quarters were date-stamped received by the carrier on July 13, 1999; that the carrier denied the claimant=s entitlement to second through 10th quarter SIBs on July 19, 1999; that the carrier received a TWCC-52 for the 11th quarter on October 4, 1999; that the carrier denied the claimant=s entitlement to 11th quarter SIBs on October 8, 1999; that the carrier received a TWCC-52 for the 12th quarter signed by the claimant on November 10, 1999, and date-stamped received by the carrier on November 16, 1999; and that the carrier denied the claimant=s entitlement to 12th quarter SIBs on November 24, 1999.

Section 408.143 requires that after the Commission's initial determination of SIBs, the employee must file a statement (a TWCC-52) with the carrier and failure to do so relieves the carrier of liability for SIBs for the period during which the statement is not filed. The Appeals Panel has determined that, where the Commission fails to make an initial determination regarding SIBs due to no fault of the claimant, so that the claimant delays in applying for SIBs, the late filing of the application may result in a delay in payment of SIBs, but it does not thereby extinguish the entitlement altogether. Texas Workers' Compensation Commission Appeal No. 941753, decided February 10, 1995. Such an application for SIBs may be considered timely if filed within a calendar quarter (three months) of the initial determination of SIBs eligibility. Appeal No. 941753. The carrier argues that the claimant was aware of the SIBs procedure because he had an IR of over 15% no later than March 1, 1999, and he had 90 days from that date to submit TWCC-52s.

The hearing officer determined that the carrier is not relieved from liability for SIBs because of any failure by the claimant to timely file a TWCC-52 for the second through 12th quarters and in so determining, made the following Finding of Fact:

FINDING OF FACT

13. The Claimant did not receive any blank TWCC-52 application forms for [SIBs] until May 25, 1999. The claimant used due diligence to fill out the forms for eleven quarters of [SIBs], listing out the necessary information, and filing them with the Carrier on July 8, 1999.

We do not find merit in the carrier's assertion that SIBs should not be awarded for the second through 10th quarters for the reason that the claimant's application was not timely. However, the claimant filed TWCC-52s for the 11th and 12th quarters more than 90 days after the initial determination and after the respective quarters had elapsed. We reverse the hearing officer=s decision that the carrier is not relieved from liability for the 11th and 12th quarters, and render a decision that the carrier is relieved from liability for the 11th and 12th quarters because of the claimant=s failure to timely file a TWCC-52.

The claimant testified that he had a lumbar laminectomy at L5-S1 in September 1993; that he was released to return to light-duty work in 1995 with restrictions on bending, lifting, twisting, and sitting; that he worked at a bar during the filing period for the first through third quarters, six to eight hours per day for three or four days per week, working the number of hours that he was needed; that during the sixth and seventh quarter filing periods he attended school four days per week sponsored by the Vocational Rehabilitation Division in Florida, and also worked three days per week; that during the eighth quarter filing period he worked for seven weeks and on June 24, 1998, went to the hospital for a severe exacerbation of low back pain; and that from June 24, 1998, until the end of the qualifying period for the 12th quarter, he had no ability to work and did not seek employment. On July 20, 1998, the claimant was diagnosed with a recurrent L5-S1 disc herniation with extruded fragment and was taken off work by Dr. Z. The claimant had a lumbar laminectomy and microscopic discectomy at L5-S1 performed by Dr. R on October 19, 1998. On December 7, 1998, Dr. R released the claimant to sedentary activities with no bending, lifting or long-distance walking. On June 7, 1999, Dr. R states the claimant "is clear to return to work in a limited duty capacity. He should avoid repetitive bending or lifting activities and should be able to sit down intermittently to rest."

We note that the "old" SIBs rules apply to determine the claimant's entitlement to SIBs for the first through 11th quarters and the "new" SIBs rules apply to determine the claimant's entitlement to the 12th quarter. Pursuant to Section 408.142, an employee is entitled to SIBs if, on the expiration of the IIBs period, the employee: has an 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 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. The claimant has the burden to prove entitlement to SIBs. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. There is no absolute requirement that a claimant who is working full time commensurate with his ability to work must also be actively engaged in a job-seeking effort for higher pay before a hearing officer may find that he or she acted in good faith. Texas Workers' Compensation Commission Appeal No. 961875, decided November 1, 1996; Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993; Texas Workers' Compensation Commission Appeal No. 961181, decided August 2, 1996; Texas Workers' Compensation Commission Appeal No. 951045, decided August 8, 1995. The job search generally need not be at a certain wage scale or level in order to constitute good faith. However, a hearing officer may consider this as a factor in making his or her determination as to whether the effort made was commensurate with the ability to work. Texas Workers' Compensation Commission Appeal No. 951624, decided November 15, 1995.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The

claimant was employed during the filing periods for the first through third, sixth, and seventh quarters, earning approximately $100.00 per week. During the filing periods for the sixth and seventh quarters, the claimant worked and also attended vocational rehabilitation classes. The hearing officer believed the claimant=s testimony that this work was commensurate with his ability to work, although the claimant=s job did not require him to work 40 hours per week. We find the evidence sufficient to support the hearing officer=s determination that during the filing periods for the first through third, sixth and seventh quarters, the claimant attempted in good faith to obtain employment commensurate with his ability to work.

The Appeals Panel has held that if an employee established that he or she has no ability to work at all, then he or she may be able to show that seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." The burden to establish this is "firmly on the claimant." Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994. Generally, a finding of no ability to work must be based on medical evidence. Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. The claimant has the burden to prove he has no ability to work because of the compensable injury. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995.

The claimant asserts he was unable to work during the eighth through 12th quarter filing/qualifying periods. The hearing officer notes that the medical evidence during this period was silent on the claimant=s ability to work until surgery on October 19, 1998, and there are no medical records indicating the claimant=s ability to work between December 7, 1998 and June 7, 1999. The hearing officer found that the claimant had some ability to work during the filing periods for the eighth, ninth, 11th and 12th quarters, and had no ability to

work during the 10th quarter. Based on our review of the record, we find the evidence sufficient to support the hearing officer=s determination that during the filing periods for the eighth, ninth, 11th and 12th quarters, the claimant did not attempt in good faith to obtain employment commensurate with his ability to work.

The claimant was released to return to sedentary work on December 7, 1998, less than one month into the filing period for the10th quarter, did not seek employment during the remainder of the filing period, and there are no records indicating that the claimant was unable to work after December 7, 1998. Given that during a majority of the filing period the claimant was released to restricted duty and did not seek employment, the hearing officer=s determination that the claimant was excused from attempting to find work because he had no ability to perform any work during the filing period for the 10th quarter is against the great weight and preponderance of the evidence. We reverse the hearing officer=s decision that the claimant is entitled to SIBs for the 10th quarter and render a decision that the claimant did not make a good faith effort to seek employment commensurate with his ability to work and is not entitled to SIBs for the 10th quarter.

The carrier appeals the hearing officer=s findings that the claimant=s underemployment and unemployment during the filing/qualifying periods in dispute was a direct result of his impairment. The hearing officer found that the claimant sustained a serious injury with lasting effects that precluded him from returning to the type of work he did when he was injured. The claimant testified that he could no longer perform his previous job. The hearing officer's direct result determination is sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing period, he could not reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996.

We affirm the hearing officer=s decision that the claimant is entitled to SIBs for the first, second, third, sixth and seventh quarters. We affirm the hearing officer=s decision that the

claimant is not entitled to SIBs for the eighth, ninth, 11th and 12th quarters. We reverse the hearing officer=s determinations that the claimant was excused from attempting to find work because he had no ability to perform any work during the filing period for the 10th quarter and that the claimant is entitled to SIBs for the 10th quarter, and render a decision that the claimant did not make a good faith effort to seek employment commensurate with his ability to work and is not entitled to SIBs for the 10th quarter. We affirm the hearing officer=s decision that the carrier is not relieved from liability for SIBs because of any failure by the claimant to timely file a TWCC-52 for the second through

10th quarters. We reverse the hearing officer=s decision that the carrier is not relieved from liability for SIBs because of any failure by the claimant to timely file a TWCC-52 for the 11th and 12th quarters and render a decision that the carrier is relieved from liability for the 11th and 12th quarters because of the claimant=s failure to timely file a TWCC-52.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge