

APPEAL NO. 031761
FILED AUGUST 14, 2003

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 June 9, 2003. With respect to the issues before him, the hearing officer determined that the respondent/cross-appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second and third quarters but is entitled to SIBs for the fourth quarter. In its appeal, the appellant/cross-respondent (carrier) argues that the hearing officer's determinations that the claimant's unemployment was a direct result of his impairment in the qualifying periods for all three quarters; that the claimant made a good faith effort to look for work in the qualifying period for the fourth quarter; and that the claimant is entitled to SIBs for the fourth quarter are against the great weight of the evidence. The carrier also argues that the hearing officer erred in excluding Carrier's Exhibit Nos. 18, 22, and 23. The claimant filed a pleading that was both a response to the carrier's appeal and a cross-appeal of the hearing officer's determinations that he did not make a good faith effort to look for work in the qualifying period for the third quarter and that he is not entitled to those benefits. The claimant urged affirmance of the determination that he is entitled to SIBs for the fourth quarter and asks that we reverse the determination that he is not entitled to SIBs for the third quarter. The claimant did not appeal the determination that he is not entitled to SIBs for the second quarter and that determination has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

Initially, we consider the carrier's assertion that the hearing officer erred in excluding Carrier's Exhibit Nos. 18, 22, and 23, which were responses to requests for verification whether three prospective employers had received a resume from the claimant. The carrier acknowledged that the documents were not timely exchanged; however, it argued that it had used due diligence in obtaining the exhibits and had exchanged them as soon as possible after they were obtained. The hearing officer determined that the carrier did not establish good cause for its late exchange. Specifically, the hearing officer noted that the information as to the identity of the employers was disclosed in the application for the third quarter of SIBs which was filed in November 2002 and that the request for verification was dated May 16, 2003. We cannot agree that the hearing officer abused his discretion in determining that the delay in seeking the verification of the applications did not demonstrate a sufficient level of diligence to demonstrate good cause such that the exhibits could be admitted despite not having been timely exchanged.

We find no merit in the carrier's challenge to the hearing officer's determination that the claimant's unemployment in the qualifying periods for the second, third, and fourth quarters is a direct result of his impairment from the compensable injury. We

have long stated that a direct result determination is sufficiently supported by the evidence if the injured employee sustained a serious injury with lasting effects and can no longer reasonably perform the type of work being done at the time of the injury. Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996. In this instance, there is evidence from which the hearing officer could determine that the claimant's injury resulted in permanent impairment and that, as a result thereof, the claimant can no longer reasonably work in the same position he had at the time of his injury. Consequently, there is sufficient evidence to affirm the hearing officer's determination that the claimant's unemployment in the qualifying periods for the second, third and fourth quarters was a direct result of his impairment.

Next, we consider the carrier's contention that the hearing officer's determination that the claimant did not make a good faith effort to look for work in the qualifying period for the fourth quarter of SIBs is against the great weight of the evidence. The hearing officer determined that the claimant made a good faith effort to look for work in the relevant qualifying period in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)). That issue presented a question of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The claimant's Application for [SIBs] (TWCC-52) for the fourth quarter showed that he looked for work during each week of the qualifying period, which ran from November 14, 2002, to February 12, 2003. In challenging the hearing officer's good faith determination, the carrier emphasizes the same factors it emphasized at the hearing in arguing that the claimant's search for employment was not undertaken in good faith in a genuine effort to return to work. The significance of those factors was a matter for the hearing officer, as the finder of fact, to determine. The hearing officer was acting within his province as the fact finder in rejecting the carrier's arguments and in determining that the claimant made a good faith effort to look for work in the qualifying period for the fourth quarter. Nothing in our review of the record demonstrates that the hearing officer's good faith determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to disturb that determination, or the determination that the claimant is entitled to SIBs for the fourth quarter, on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Finally, we consider the claimant's appeal of the hearing officer's determination that he did not make a good faith effort to look for work in the qualifying period for the third quarter. In Finding of Fact No. 8, the hearing officer stated:

The qualifying period for third quarter is from August 15, 2002 through November 13, 2002. Claimant did not look for work in each week of the qualifying period as he did not document looking for work for the week of August 22, 2002 through August 29, 2002. Claimant did not make good faith efforts to seek employment commensurate with his ability to work during the qualifying period for the third quarter.

The first week of the qualifying period for the third quarter of SIBs ran from Thursday, August 15, 2002, to Wednesday, August 21, 2002. The second week of the qualifying period ran from Thursday, August 22, 2002, to Wednesday, August 28, 2002, and the third week of the qualifying period ran from Thursday, August 29, 2002, to Wednesday, September 4, 2002. The dates listed as the dates of his job search activities on the claimant's TWCC-52 were not legible. However, the claimant submitted facsimile confirmation forms that show the dates that he faxed resumes to the various employers. Those records reflect that the claimant sent four resumes to employers in the week of August 22 to August 28, 2002, three on August 26, 2002, and one on August 28, 2002. In addition, the records show that the claimant sent out 10 resumes in the week of August 29 to September 4, 2002, six on August 29, 2002, and four on September 4, 2002. As such, the evidence does not support the hearing officer's determination that the claimant failed to document any job search activities from August 22 to August 29, 2002. Since it appears from the hearing officer's decision that the only reason he found that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work was because the claimant did not document a job search during the second week of the qualifying period, and since it appears from the record that there are documented job searches during the that week, we believe that it is appropriate to remand the case to the hearing officer for further consideration of the evidence and for the hearing officer to make findings of fact, conclusions of law, and a decision on the disputed issue of entitlement to SIBs for the third quarter after further consideration of the evidence.

The hearing officer's determination that the claimant is entitled to SIBs for the fourth quarter is affirmed. The hearing officer's determination that the claimant is not entitled to SIBs for the third quarter is reversed and that issue is remanded for further consideration consistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN PROTECTION INSURANCE** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica Lopez-Ruberto
Appeals Judge