

## APPEAL NO. 950197

On October 21, 1994, a contested case hearing was held in (city), Texas, with the hearing record being closed on January 19, 1995. (hearing officer) presided as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the hearing was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the sixth compensable quarter. The appellant (carrier) disagrees with the hearing officer's decision that the claimant is entitled to SIBS for the sixth compensable quarter. No response was received from the claimant.

### DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on (date of injury); that she reached maximum medical improvement (MMI) on May 1, 1992; that she has a 17% impairment rating (IR); and that she did not commute any portion of her impairment income benefits (IIBS).

Pursuant to Section 408.142(a), an employee is entitled to SIBS if on the expiration of the IIBS period the employee has an IR of 15% or more from the compensable injury; 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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. § 130.104(a) (Rule 130.104(a)), an injured employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent compensable quarters if the employee, during each filing period has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury, and has made good faith efforts to obtain employment commensurate with the employee's ability to work. Rule 130.102(b) provides that entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior filing period. Rule 130.101 defines "filing period" 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]."

Neither party disputes the hearing officer's determinations that the sixth compensable quarter began on July 22, 1994, and that the filing period for the sixth compensable quarter was from April 22, 1994, through July 21, 1994 (hereafter "filing period"). The claimant, who is 26 years of age and has an eleventh grade education, testified that on (date of injury), she injured her back and left knee when she fell on icy steps at work and that she has not worked since her injury. As stipulated by the parties, she reached MMI on May 1, 1992, with a 17% IR. The claimant testified that during the

filing period she was under her treating doctor's written work restrictions which restricted her from stooping, bending, lifting over 25 pounds, and standing for more than two hours. Her testimony regarding work restrictions was uncontradicted. She said that during the filing period her knee hurt every day, locked up, and was numb.

The claimant testified that during the filing period she sought work with six to eight employers, three of which she listed on her Statement of Employment Status, and five of which she mentioned by name at the hearing. She said she filled out an application for a waitress/cashier job at (employer), showed the owner of the cafe her doctor's written work restrictions, and the owner said he did not want to get involved with her having to sit down every so often and having lifting restrictions. She said the cafe was hiring when she applied. She testified that she talked to the owner of (B's) Cleaning Services about getting a job helping to clean houses, showed the owner her doctor's written work restrictions, and the owner told her there was a lot of lifting done on the job and did not hire her. She said that the cleaning service was hiring when she talked to the owner. The claimant further testified that she talked to the owner of (L) Painting about obtaining an inside house painting job, showed the employer her doctor's written work restrictions, and was not hired. She said the painting company was hiring when she talked to the owner about employment. She also testified that she applied for a job as a nurse's aid at the (city) Rehabilitation Hospital, the personnel person she interviewed with made a copy of her doctor's work restrictions, and she was told that there may be some nurse's aid openings coming up and she would be called back but wasn't. She said the hospital trains people to become nurse's aids while they work for the hospital. The claimant said she also applied for a job as a waitress/cashier at the Corner Restaurant, showed the owner her doctor's written work restrictions, and was told she would be contacted but wasn't. She said the restaurant had a help wanted sign up when she applied.

The claimant testified that she would have gone to work if she had been hired at the places at which she sought employment. She said she filled out the applications for employment and that if the employer wanted to talk to her about the job, she would show them her doctor's work restrictions. She also testified that during the filing period she was registered with the Texas Employment Commission but that agency did not refer her to any jobs, and that she also talked to the Texas Rehabilitation Commission. She said she feels that she would have been hired at the places she applied if she had not had work restrictions.

The carrier contends that the great weight of the evidence is contrary to the hearing officer's findings that the claimant made a good faith effort to obtain employment during the filing period, and that her unemployment during the filing period is a direct result of the impairment from her compensable injury. The carrier also disputes the conclusion that the claimant is entitled to SIBS for the sixth compensable quarter. The carrier contends that the claimant sabotaged her own efforts to find work, that she did not spend enough time looking for work, and that four of the five places she applied for work were not hiring. In

regard to this last point, we note that the claimant's uncontradicted testimony was that four of the five places she applied at were hiring and that the fifth place, the hospital, said it would get back to her if positions became available.

The claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. The questions of good faith efforts and unemployment as a direct result of the impairment from the injury were fact questions to be decided by the hearing officer from the evidence presented at the hearing. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer can believe all, part, or none of any witness's testimony, and he or she resolves conflicts in the evidence and determines what facts have been established from the evidence. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate 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. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's findings, conclusions, and decision are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge