APPEAL NO. 950243

On January 30, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding 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 appellant (claimant) disagrees with the hearing officer's decision that he is not entitled to supplemental income benefits (SIBS) for the first compensable quarter. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Pursuant to Section 408.142 an employee is entitled to SIBS if on the expiration of the impairment income benefit (IIBS) period the employee has an impairment rating (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. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the claimant 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]." According to the benefit review conference (BRC) report, the first quarter for SIBS was from December 13, 1994, to March 13, 1995.

The claimant injured his back at work on (date of injury), and on August 26, 1992, he underwent back surgery performed by (Dr. M). According to the BRC report, (Dr. K), the designated doctor, reported that the claimant reached maximum medical improvement on September 7, 1993, with a 22% IR. On January 7, 1994, (Dr. Z), who is the claimant's current treating doctor, filed a recommendation for spinal surgery. The carrier requested a second opinion from (Dr. LA) and he reported that he saw no indication for further surgical treatment. The Medical Review Division appointed (Dr. LE) to give a third opinion and in July 1994 he reported that the claimant is not a surgical candidate and he stated "I doubt seriously he will ever be able to return to heavy type activities, but he should be able to return to light to moderate activities." On November 3, 1994, the Texas Workers' Compensation Commission (Commission) issued a Decision and Order on spinal surgery in which the Commission determined that "[c]ircumstances extenuating the non-concurring second and third opinions do exist, namely, that the proposed surgery is medically necessary for Petitioner." The claimant testified that the carrier has appealed the Commission's decision on spinal surgery to the district court.

In a report dated September 1, 1994, Dr. Z wrote "N/A" in response to the questions as to when it was anticipated that the claimant could return to limited work and when he

could return to full time work. He noted that the claimant continued to have back pain which radiates to his legs. The claimant testified that he did not work during the filing period for the first quarter. He also testified that he did not look for work during that filing period because Dr. Z told him he could not work and because he has pain and his legs go numb and he does not think he can physically work. He said he went to the Texas Rehabilitation Commission, but they were waiting "to see what the outcome of the surgery is." He also said he went to the Texas Employment Commission, but was told he needed a doctor's release. When the claimant was asked whether he had been released to return to work for a period of time, he testified that "[a]ll the doctors - - he is able to return to work, but none of them signed the little piece of paper saying I can, you can go back to work." He said he can walk a mile or two each day and can drive a car, but not for a long period of time.

The hearing officer found that during the filing period for the first quarter for SIBS the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work, and concluded that the claimant is not entitled to SIBS for the first quarter. The claimant appeals this decision contending that he had no ability to work during the filing period for the first quarter. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, we noted that the employee's treating doctor's notes indicated she was unable to work at all, and we commented as follows: "If this is true, the claimant had an inability or no ability to work. Seeking employment commensurate with this inability to work would be not to seek work at all." However, in Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994, we stated:

> It is important to emphasize, however, that Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, did not do away with the requirement in Section 408.142(a)(4) that a claimant for SIBS must demonstrate that he or she attempted "in good faith" to obtain employment commensurate with an employee's ability to work. That case stands for the proposition that where it is demonstrated that a claimant's "ability" is "no ability," compliance with this requirement is effectively met by no search. However, we believe the burden is firmly on the claimant to prove that he indeed has "no ability" due directly to the physical injury.

Here, there is conflicting evidence on the claimant's ability to work. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. 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 judgment for that of the trier of fact, even if the evidence would support a different result. 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 decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge