

APPEAL NO. 950288

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 31, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issue presented for consideration was whether the respondent, (claimant), who is the claimant, was entitled to supplemental income benefits (SIBS) for the third quarter of eligibility. Claimant had been injured on (date of injury), and received a 15% impairment rating (IR) for his injury, which had not been commuted to a lump sum.

The hearing officer found that claimant's unemployment was directly related to his impairment, and that he had made a good faith search for employment commensurate with his ability during the period under consideration (August 13 through November 11, 1994).

The carrier has appealed, arguing that this decision is against the great weight and preponderance of the evidence in the case. There is no response from the claimant.

DECISION

We affirm.

Claimant had been employed by (employer) for two years at the time of his injury, which was a back injury. He stated that his job had involved heavy physical labor in jacking up railway cars, pulling out trucks from underneath, reworking them, and putting the car back together.

In connection with applying for some other disability insurance, claimant obtained a statement on June 30, 1994, from (Dr. E) as to his working abilities and restrictions. Dr. E stated that claimant was capable of sedentary or light work, with a 20 pound lifting limit, that he could stand or walk one to four hours a day, sit for three to five hours a day, that he needed a back brace, and claimant was disabled from performing any occupation.

Claimant testified about his job search efforts in the (city) area, which consisted of reading the want ads on a daily basis, and driving around periodically looking for help wanted signs. Claimant detailed specifically several companies from whom he sought employment, with no job offer. Claimant did not place formal application with every employer with whom he spoke. Claimant said that when the subject of his back injury would come up, prospective employers were no longer interested. The hearing officer questioned claimant at length about his efforts, expressing concern that claimant's efforts amounted to one contact with a prospective employer every 10 working days. By way of partial explanation, claimant stated that some of his SIBS checks had been late and that diminished income hampered his abilities. There was some testimony that basically the available jobs were minimum wage jobs. Contrary to what the carrier argues in appeal, it was the hearing officer, and not the claimant, that ruminated as to whether it would be human nature to obtain such a job when the SIBS benefit might work out to be more money. Claimant said he had

not been to an employment agency to seek work. Claimant said that a consultant hired by the insurance company to assist him in finding a job had contacted him only once to get information for an application.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

There are four eligibility criteria that must be met to qualify for SIBS, set out in Section 408.142(a):

- (1)has an impairment rating of 15 percent or more . . . ;
- (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 impairment income benefit . . . and
- (4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Section 408.143 makes clear that after initial eligibility is found, the job search requirement and "direct result" criteria must be met on a quarterly basis.

First of all, we believe that the doctor's statement in evidence, coupled with the restrictions outlined therein, is evidence supportive of a finding that claimant's unemployment is a "direct result" of his impairment. It is clear from the statement that claimant cannot return to his former employment. Further, claimant testified that prospective employers appeared to lose interest when the subject of a back injury came up. This is sufficient evidence to support the hearing officer's finding on the "direct result" aspect.

Concerning whether claimant made a good faith job search, although the carrier questions claimant's motivation, this was a question of fact for the hearing officer to assess and determine, given his observation of claimant's demeanor. We note that the hearing officer expressed to claimant what we have stated in previous decisions: that each quarter of SIBS is evaluated on its own facts, and that the efforts to find employment should be more than token. Indeed, the gist of the hearing officer's statements was not inconsistent with an expectation that claimant's future efforts should be expanded to include contacting an employment agency, and that his efforts to find employment should be more frequent and formal than driving around town looking for help wanted signs, if SIBS is to continue in the

future. However, under the facts developed in this record, for this quarter, we cannot agree that the decision of the hearing officer is against the great weight and preponderance of the evidence. We therefore affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge