APPEAL NO. 950348

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 26, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue to be decided was:

Is the Claimant entitled to supplemental income benefits [SIBS] for the second compensable quarter?

The hearing officer determined that appellant (claimant) had failed to establish that he was entitled to SIBS for the second compensable quarter because his inability to obtain employment was not the direct result of the impairment from his compensable injury. Claimant disagreed with the hearing officer's decision, cited that he had a compensable injury which he contends "is the sole reason" for his not being able to return to work. By inference, claimant asks us to reverse the hearing officer's decision. Respondent (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision, citing testimony from another legal proceeding.

DECISION

The decision and order of the hearing officer are 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 injured employee 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]."

Claimant in this case sustained a compensable neck injury on (date of injury). Claimant testified that he had neck surgery in November (the medical records indicate the 14th), (year), and that he began walking therapy on December 3 or 4, 1991. On December 8, 1991, claimant was involved in apparently a "slip and fall" non-compensable accident while at a (Store). This accident apparently necessitated additional surgery and claimant filed suit against the Store in July 1993. That lawsuit went to a jury trial in 1994 where claimant testified that he had completely recovered from the compensable (month year) injury, that he "felt great," "didn't have any pain [as a result of the compensable injury]," and that he had no problems "whatsoever" due to the compensable injury before he fell at the Store on December 8th. One of claimant's treating doctors, (Dr. K), in a deposition, stated that "all of his current symptoms are directly the cause or have been directly caused by the

[Store] fall." Claimant's father, a chiropractor, testified claimant prior to the Store fall ". . . was basically pain free; he was doing the exercises that had been prescribed for him; he was in a very good mood, looking forward to going back to work." Claimant testified that he was aware that the doctors that testified on his behalf in the lawsuit stated that the majority of claimant's physical problems and inability to obtain employment were directly caused by or due to the Store injury. The jury in that case, in 1994, found against the claimant in his suit against the Store.

The parties stipulated that claimant reached maximum medical improvement (MMI) on June 17, 1993; that he had an IR of 18%; and that claimant had not elected to commute any portion of his IIBS. The parties agreed that the compensable quarter at issue was October 1 (or perhaps 2) 1994, to January 2, 1995, and that the filing period was approximately June 2 to September 30, 1994.

Claimant testified that during the filing period he had not sought any employment because he was "incapable and unable to perform any work." On cross-examination claimant stated he had enrolled in college during the filing period (apparently not under the auspices of the Texas Rehabilitation Commission) and was carrying 14 credit hours. Claimant further testified that he would sometimes drive 50 miles to the town where he was attending school and stay overnight and other times would drive round trip to school and back the same day.

The medical evidence includes a note dated September 16, 1994, from (Dr. R), claimant's father, stating claimant is "incapable and unable to perform any work at this time." A report dated March 18, 1993, (not during the filing period) from (Dr. F) listed claimant's occupation as a student and indicated "it is impossible" to determine the claimant's IR if he had not had the second accident. Claimant relies on and references a report dated February 23, 1994, (also not rendered during the filing period) by (Dr. D) who states both that he is not ". . . smart enough to answer . . . or brave enough to try" to apportion impairment to the first and second accidents but then renders an opinion that "half of his present symptoms are secondary to his original injury . . . and approximately half are secondary" to the Store fall. A statement dated June 30, 1994, from Dr. K, whose deposition was used in the Store lawsuit, states "I do believe his symptoms stem from his injury of (date of injury)." This statement is directly contrary to his testimony in the deposition for the Store lawsuit. Another report from Dr. K dated August 11, 1994, states that the Store fall ". . . may have aggravated what was an underlying fragile state in his neck and may have led to further problems. However, the fundamental issue is that his continued pain stems principally from the work-related injury."

We would note that claimant filed for SIBS for the first compensable quarter based on the theory that he was totally unable to perform any work. The hearing officer in that case found that claimant's inability to work was not the direct result of the compensable injury. In that decision the hearing officer quoted from the Store lawsuit transcript and noted certain discrepancies in claimant's testimony and the medical evidence between the lawsuit

and the CCH. That decision was appealed to the Appeals Panel which determined in Texas Workers' Compensation Commission Appeal No. 941506, decided December 16, 1994, that the hearing officer's decision had become final in that claimant had not timely filed his appeal. With essentially the same evidence on the merits, plus some additional medical evidence, the case was presented to the same hearing officer for the second compensable quarter. The hearing officer in his statement of evidence comments:

> A review of the entire record indicates that the Claimant's inability to obtain employment during the filing period is not a direct result of the impairment from his compensable injury. Prior statements made by the Claimant (see Carrier's Exs. E and H) and the medical evidence presented by the Claimant are inconsistent with the position he now takes. The inconsistency raises a significant question concerning the relationship, if any, between the Claimant's impairment and the Claimant's inability to obtain employment during the filing period.

The hearing officer made the following determinations:

FINDINGS OF FACT

> 5.The Claimant did not seek employment during the filing period. The Claimant had no ability to work and therefore his failure to seek employment is commensurate with his ability. (*See* Appeal No. 931147 and 94398).
>
> 6.The Claimant's inability to obtain employment during the filing period is not a direct result of the impairment from his compensable injury.

First we would note that the hearing officer's determination that the claimant had no ability to work and therefore was not required in good faith to seek employment commensurate with his ability to work, has not been appealed and consequently has become final. However, our affirmance of the hearing officer on the remaining issue should not be interpreted, or cited, as our affirmance of the proposition that claimant, in these circumstances had "no ability to work." However, since the issue was not appealed it hence became final. Section 410.169.

On the remaining issue of whether the claimant's inability to obtain employment was the direct result of his compensable injury we point out, as did the hearing officer, that the burden of proof on that issue rests with the claimant. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is

equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Claimant's testimony and emphasis that the doctors now are unable to determine how much of claimant's current inability to work is due to each injury did not satisfy the hearing officer that claimant had met his burden of proof that he show that his inability to return to work was the direct result of the impairment he sustained in the compensable accident. The fact that this may be difficult to prove does not relieve a claimant of his or her burden. *See* Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). There was, in this case, sufficient proof based on claimant's own inconsistent testimony and the medical evidence in the Store lawsuit to support the hearing officer's determinations.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge