APPEAL NO. 980231
FILED MARCH 20, 1998

On December 11, 1997, a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding as the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were the respondent's (claimant) entitlement to supplemental income benefits (SIBS) for the 8th, 9th, 10th, 11th, and 12th quarters, and whether the claimant has permanently lost entitlement to SIBS. The appellant (carrier) requests review and reversal of the hearing officer's decision that the claimant is entitled to SIBS for the 9th, 10th, and 11th quarters. There is no appeal of the hearing officer's decision that the claimant is not entitled to SIBS for the 8th and 12th quarters. No response was received from the claimant.

DECISION

Affirmed as reformed herein.

Section 408.142(a) provides that an employee is entitled to SIBS if, on the expiration of the impairment income benefits (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 (AWW) 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. Rule 130.104(a) provides that an 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: (1) has been unemployed, or underemployed as defined by Rule 130.101, as a direct result of the impairment from the compensable injury; and (2) has made good faith efforts to obtain employment commensurate with the employee's ability to work. Rule 130.101 provides that "underemployment" occurs when the injured employee's average weekly earnings during a filing period are less than 80 % of the employee's AWW as a direct result of the impairment from the compensable injury. The claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

This case concerns a question of underemployment. In Texas Workers' Compensation Commission Appeal No. 951770, decided December 4, 1995, we noted that in determining good faith in an underemployment case, the hearing officer may consider the kind of work being done and the number of hours worked. In Texas Workers' Compensation Commission Appeal No. 960107, decided February 23, 1996,

we noted that, in common usage, good faith is a term ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intent to defraud, and, generally speaking, means being faithful to one's duty or obligation. With respect to the direct result criterion for SIBS, in Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996, we noted that a finding that a claimant's unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that a claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury." Also, in Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996, we noted that a claimant's unemployment or underemployment must be a direct result of the impairment, but that the impairment need not be the sole cause of the unemployment or underemployment.

The parties stipulated that the claimant is not entitled to SIBS for the 8th and 12th quarters because he earned more than 80% of his preinjury AWW during the filing periods for those two quarters.

The claimant, who is 43 years of age, testified that he injured his back on _____, while working as a laundry mechanic for the employer's hotel. We reform the hearing officer's decision to reflect that the parties stipulated that the claimant sustained a compensable injury on _____, and not on December 1, 1991, as stated in the hearing officer's decision. According to a document in evidence, in September 1992 the claimant had a lumbar fusion from L3 to S1. In August 1993, Dr. M, the claimant's treating doctor, wrote that the claimant has a "permanent disability of not being able to do awkward, heavy bending and lifting or anything of that sort in the future." The claimant testified that Dr. M told him that his permanent restrictions are not to do any heavy lifting, prolonged standing or sitting, or excessive stooping and bending. The claimant said that his laundry mechanic job required him to do an excessive amount of heavy lifting and that it required him to extract 500-pound motors from machines. He said that he is unable to perform the laundry mechanic job he had at the time of his compensable injury because of the injury.

The parties stipulated that the claimant has an 18% IR; that he did not commute IIBS; that the 9th quarter was from December 25, 1996, to March 25, 1997, with a filing period of September 25 to December 24, 1996; that the 10th quarter was from March 26 to June 24, 1997, with a filing period of December 25, 1996, to March 25, 1997; that the 11th quarter was from June 25 to September 23, 1997, with a filing period of March 26 to June 24, 1997; and that the claimant's preinjury AWW was $346.40. The claimant testified that he made $8.61 an hour working as a laundry mechanic for the employer.

The claimant testified, and his Statement of Employment Status (TWCC-52) and attachments thereto for the ninth quarter reflect, that during the filing period for the ninth quarter he worked for (Temp 1) and (Temp 2). The TWCC-52 and attachments thereto for the ninth quarter reflect that the claimant worked during 12 weeks of the filing period

for that quarter, four weeks for 40 hours a week and eight weeks for less than 40 hours a week; that his hourly wage rate at Temp 1 varied from $4.75 to $5.75 an hour; and that he made $7.00 an hour at Temp 2. The claimant said that during the filing period for the ninth quarter he worked for Temp 1 on an assembly line putting lids on jars and that he then worked for a client of Temp 2 making window frames, installing rubber in window frames, and moving glass. He said that he had help building frames and moving glass. It is undisputed that the claimant earned $1,779.60 during the filing period for the ninth quarter and that his earnings during that filing period were less than 80% of his AWW.

The claimant testified, and his TWCC-52 and attachments thereto for the 10th quarter reflect, that during the filing period for the 10th quarter he worked for (IG) and (BB). The TWCC-52 and attachments thereto for the 10th quarter reflect that the claimant worked during nine weeks of the filing period for that quarter, six weeks for 40 hours a week and three weeks for less than 40 hours a week, and that he made $9.00 an hour at IG and $10.00 an hour at BB. The claimant said that at IG and BB he built window frames, installed rubber in the frames, and installed glass. He said that he had help building the frames and installing glass. He said that after working for IG he went to BB for more money and that the BB job ran out. He also said that he had back problems during the time he was employed by BB. It is undisputed that the claimant earned $3,341.50 during the filing period for the 10th quarter and that his earnings during that filing period were less than 80% of his AWW.

The claimant testified, and his TWCC-52 and attachments thereto for the 11th quarter reflect, that during the filing period for the 11th quarter he worked for Temp 1, Temp 2, BB, and (ME). The TWCC-52 and attachments thereto for the 11th quarter reflect that the claimant worked during 12 weeks of the filing period for that quarter, seven weeks for 40 or more hours a week and five weeks for less than 40 hours a week, and that he made $5.50 an hour at Temp 1, between $6.00 and $7.00 an hour at Temp 2, $10.00 an hour at BB, and $7.62 an hour at ME. The claimant said that at Temp 1 he worked on an assembly line putting lids on jars; that at Temp 2 and BB he did glass work, as he had previously described; and that at ME he drove a large lawn tractor. He said that his work at ME was seasonal. It is undisputed that during the filing period for the 11th quarter the claimant earned $2,790.88 and that his earnings during that filing period were less than 80% of his AWW. The claimant testified, and his TWCC-52 and attachments thereto for the 11th quarter reflect, that he applied for work at six other employers during the filing period for that quarter. The claimant said that those employers were not hiring.

The claimant further testified that during the filing periods for the quarters in issue he was either always working or looking for work and that he looked for other work even when working. The claimant agreed that the reason he moved from job to job during the filing periods was because the jobs ended or were seasonal and did not have to do with his physical ability to do the jobs.

The hearing officer found that during the filing periods for the 9th, 10th, and 11th quarters the claimant made a good faith effort to obtain employment commensurate with his ability to work. The carrier appeals that determination. Whether the claimant made a good faith effort to obtain employment commensurate with his ability to work was a fact question for the hearing officer to determine from the evidence presented. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that the hearing officer's finding on the good faith criterion for SIBS for the 9th, 10th, and 11th quarters is supported by sufficient evidence and that it is 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 also found that during the filing periods for the 9th, 10th, and 11th quarters the claimant's earnings were less than 80% of his AWW as a direct result of his impairment. The carrier appeals the direct result finding. The carrier argues that the evidence shows that the claimant was able to make at least 80% of his preinjury hourly wage and that he was able to work full time and thus his underemployment cannot be a direct result of his impairment. It is undisputed that the claimant earned less than 80% of his preinjury AWW during the filing periods for the 9th, 10th, and 11th quarters. For the purpose of defining "underemployment," Rule 130.101 compares average weekly earnings during a filing period to the AWW, it does not compare hourly rates of pay. There is evidence that the claimant suffered a serious injury requiring a multiple-level spinal fusion, that he has permanent restrictions, and that due to his compensable injury he is unable to do the type of job he was doing when injured. We conclude that the hearing officer's findings on the direct result criterion for SIBS are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The carrier has not shown that the claimant was not entitled to SIBS for 12 consecutive months and thus we find no merit in the carrier's contention that the hearing officer erred in determining that the claimant has not permanently lost entitlement to SIBS. Section 408.146(c). The hearing officer's findings of fact support his conclusion of law that the claimant is entitled to SIBS for the 9th, 10th, and 11th quarters.

We reform the hearing officer's decision to reflect that the parties stipulated that the claimant sustained a compensable injury on _____, and as reformed the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge