APPEAL NO. 93636

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). On June 10, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole disputed issue presented and agreed upon was: "Whether the Claimant is entitled to Supplemental Income Benefits?" The hearing officer determined that claimant was entitled to Supplemental Income Benefits (SIBS) for three quarters beginning November 20, 1992, and ending August 19, 1993.

Appellant, carrier herein, contends that the hearing officer did not have jurisdiction to address any issue other than whether the claimant is entitled to SIBS from March 5, 1993, to June 3, 1993, that the hearing officer erred in finding the claimant had made a good faith attempt to obtain employment commensurate with his ability to work, and that the hearing officer erred in refusing to admit or consider Carrier's Exhibit No. 3, a video tape of claimant. Respondent, claimant herein, filed a response rebutting carrier's contentions of error and requests we affirm the decision. The carrier filed a response to claimant's response.

DECISION

Finding the evidence insufficient to support one of the hearing officer's determinations we reverse and render a new decision that claimant was not entitled to SIBS for the period in question.

Carrier's response to claimant's response was not timely filed within the period allowed for responses and consequently will not be considered.

The parties agreed and verbally stipulated that claimant sustained an injury in the course and scope of employment on (date of injury). It is undisputed that claimant was an insurance agent for Allstate Insurance Company, which is both the employer and the carrier, but will be referred to as carrier herein except when they are acting in the capacity of the employer. Claimant apparently had, prior to the date in question, some back problems. On (date of injury), while standing on a chair with casters, reaching to get some files on a self in the closet, the chair moved and claimant fell. Claimant called his wife and went home to lie down. Later that night the pain got so severe that he went to the local hospital emergency room (ER) where he saw (Dr. S). It was determined that claimant needed back surgery and he was referred to (Dr. L), who became the primary treating physician. While claimant was still in the hospital he was seen by (Dr. CPD). Claimant was released from the hospital on November 1, 1991. Claimant was also seen by (Dr. CLN) apparently as a consultant. After Dr. L assigned a maximum medical improvement (MMI) date and impairment rating (discussed later), (Dr. B) was appointed by the Texas Workers' Compensation Commission (Commission) as the Commission designated doctor. It was stipulated that claimant reached MMI on January 9, 1992, with a 15% whole body impairment rating. (Dr. W) a "vocational consultant" conducted an interview and rendered a vocational analysis report dated May 26, 1993, regarding claimant's condition.

Claimant contends he is entitled to SIBS as he meets all the requirements of Subchapter H. Sections 408.142-150 and Tex. W.C. Comm'n 28 TEX. ADMIN. CODE §§ 130.101-110 (Rules 130.101-110). Claimant filed an Employee's Statement of Employment Status (TWCC-48) with the Commission on February 2, 1993. The Commission ordered SIBS for the quarter beginning March 5, 1993. Claimant contends that he is entitled to SIBS because he has a whole body impairment rating of 15% due to his compensable injury of (date of injury), and that he is unable to work because of constant pain in his back and other physical limitations. It is undisputed that claimant did not elect to commute any portion of the impairment income benefits. Claimant acknowledges he had been released to work on light duty since November 17, 1992, and that carrier has made an offer of employment of his old position with "reasonable accommodation." Claimant testified that he could not perform the requirements and duties of his old job because of his injuries and contends the employer did not make the offer of employment in good faith.

It is clear from the record that there is a good deal of acrimony and rancor on both sides. Carrier apparently refused to answer claimant's interrogatories and made less than full disclosure of all the evidence they intended to use, which resulted in several of carrier's exhibits being excluded on the grounds of failure to exchange. Claimant also sought to have admitted a Notice of Favorable Decision from the United States Department of Health & Human Services but which was not admitted by the hearing officer on the ground that the Social Security Administration (SSA) determination of disability is not applicable to a Texas Workers' Compensation proceeding. Claimant nonetheless testified that the SSA's determination of disability was the reason he was unable to work and had not been seeking employment.

The carrier's position is that claimant is not entitled to SIBS because there is no (or very little) evidence to support his claim that he cannot work and that claimant has made no effort to secure employment, although obligated to do so in order to qualify for SIBS. Carrier alleges that claimant was offered employment of his previous position with reasonable accommodation. Carrier has disputed the payment of SIBS.

The medical evidence consists of a report including history and physical from Dr. S, apparently dated (date). The history indicates some back problems prior to (date), but diagnosis of a ruptured disc due to the fall on (date of injury). A comprehensive report from Dr. L dated 3-31-92, gives an MMI date of 1-9-92. Dr. L states claimant is "doing all right, although he still has some pains down the left lower extremity whenever he walks for a while or whenever he stands. If he sits his back and left leg bother him, and tingle and throb . . . . This may be sequelae of what he had and may be permanent." In a Subsequent Report of Medical Evaluation (TWCC-69) Dr. L certifies MMI on 1-9-92 with 21% impairment. Dr. CLN, a consultant, in a report dated July 21, 1992, records "continued pain and discomfort preventing normal daily activities." Dr. CLN, in summary states that claimant's

". . . postoperative pain . . . are constant . . . and are causing him extreme agitation." Dr. CLN theorizes that claimant's spondylolisthesis "may or may not be contributing to the pain syndrome." Dr. B was subsequently appointed as the Commission's designated doctor and by report and TWCC-69 of September 29, 1992, certified MMI on 1-9-92 with 15% impairment. Dr. B released claimant to light duty work on November 17, 1992. Dr. W's vocational analysis report dated May 26, 1993, requested by carrier, indicates claimant ". . . is mentally and experimentally capable of performing a major portion of the usual tasks of a working person to the extent that he is able to perform work similar to that which he was performing prior to the claimed injury." Dr. L in a Specific and Subsequent Medical Report (TWCC-64) dated 3-23-92 suggests that claimant might be able to work ". . . if he gets the kneeling type chair that has already been suggested to him." This kneeling type chair is also referred to in the benefit review conference (BRC) report which states, referring to Dr. L's report, (the actual report was not admitted at the CCH for failure to exchange) that ". . . if claimant could not sit to perform his duties, he could obtain a 'kneeling chair', or could raise his desk and work standing up." The benefit review officer (BRO) comments that "[t]he only medical report dealing with a return to work issue was the onerous (Dr. L) report wherein he prescribed the multilevel desk" (emphasis added).

The Commission found claimant was entitled to SIBS for the quarter beginning 3/5/93. The carrier disputed that determination and the BRO noted in the BRC, "an Interlocutory Order is being issued ordering payment for the quarter beginning 3/5/93. The question of continuing payment may be resolved by the [CCH]." The Interlocutory Order was signed on April 2, 1993, for the quarter beginning 3/5/93.

The hearing officer found that claimant had made a good faith attempt to obtain employment commensurate with his ability to work and that claimant had met the other requirements of Sec. 408.142 and Rule 130.103. The hearing officer concluded claimant was entitled to SIBS ". . . with the first compensable quarter beginning November 20, 1992, and ending February 18, 1993." The hearing officer further concluded claimant was entitled to SIBS for the second compensable quarter beginning February 19, 1993, and ending May 20, 1993, and the third compensable quarter from May 21, 1993, ending August 19, 1993.

Although carrier cites seven points of error, the appeal can be reduced to three principal contentions. Carrier alleges 1) the hearing officer did not have jurisdiction to address any issue other than whether the claimant was entitled to SIBS from March 5, 1993 to June 3, 1993; 2) Claimant has not made a good faith attempt to obtain employment commensurate with his ability to work; and 3) the hearing officer erred in not admitting carrier's exhibit No. 3, and not considering this evidence (a video purporting to show claimant engaged in several activities).

I

The Contested Case Hearing Officer did not have jurisdiction to address any issue other than whether the claimant was entitled to supplemental income benefits from March 5, 1993 to June 3, 1993.

The carrier argues that the only issue submitted to the hearing officer and over which the officer had jurisdiction was whether the claimant was entitled to SIBS from March 5, 1993, to June 3, 1993, and that this issue was not addressed. Carrier goes on to argue that the hearing officer does not have discretion to add issues "*sua sponte*." While we may agree with the carrier's argument that the hearing officer cannot add issues on his own motion, we note that on page 15 of the transcript the hearing officer announces the issue as "[w]hether the claimant is entitled to [SIBS]?" To this announcement of the issue, carrier's counsel states, on page 16, then he agrees that the announced issue is the one the hearing officer is to resolve. No dates are mentioned, just whether claimant is entitled to SIBS. The issue as announced is mentioned at several other places in the transcript with no attempt by carrier to limit the issue of SIBS to a particular time frame or quarter. Carrier raises this issue for the first time on appeal. We note that carrier has misstated the announced issue to which it agreed, and further note we have early held that the Appeals Panel does not consider issues first raised on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1002, and Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991.

Section 408.142(a) of the 1989 Act states "[a]n employee is entitled to supplemental income benefits if on the expiration of the impairment income benefit period computed under Section 408.121(a)(1) the employee:

(1)has an impairment rating of 15 percent or more as determined by this subtitle from the compensable injury;

(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 under Section 408.128; and

(4)has attempted in good faith to obtain employment commensurate with the employee's ability to work.

This portion of the statute is implemented by Rule 130.102. The hearing officer consequently had broad authority to make a determination on the award of SIBS and by terms of the issue announced and agreed upon by the parties at the beginning of the CCH was not limited in time to a particular quarter or time frame, contrary to the contentions of

carrier. We might also note in passing that pursuant to Rule 130.10 the Commission is required to send to the employee a copy of the Statement of Employment Status with filing instructions and a description of the consequences of late filing and failing to file. The record is silent regarding whether this requirement was actually accomplished. Carrier's contention on this point is not meritorious.

II

Claimant has not made a good faith attempt to obtain employment commensurate with his ability to work.

Carrier cites the four elements listed in Section 408.142(a), argues that by scratching out that portion of form TWCC-48 inquiring whether he had in good faith sought employment claimant "[i]mpliedly . . . admitted that he had not . . . ." In fact, as carrier points out, claimant specifically testified that he had not looked for employment and that he had not applied for any employment. Carrier points out that Dr. B had released claimant to return to light duty work on November 17, 1992. Carrier further alleges that the employer made a *bona fide* offer of employment taking into account and making accommodation for claimant's physical condition.

Claimant, both at the CCH and on appeal, unequivocally states he is "disabled." Claimant explained the scratched out portion of the TWCC-48 was based on the SSA determination that he is disabled from the date of the accident to the present and that therefore he has ". . . been unable to work or look for work . . . ." Claimant contends that Dr. B's release to light duty was from "a torn muscle" and was not in connection with his work related back injury. The decision to order SIBS by the Commission "Customer Service Officer" was based on claimant's explanation that he was "disabled" per the Social Security criteria and "[i]f this is the case, then he was unable to work so therefore, he did not seek work." Dr. L, in a note dated 1-9-92, believes claimant's "pain down the left lower extremity whenever he walks for a while or whenever he stands . . . ." to be permanent. Dr. L confirms the pain and "mild degree of numbness and minimal weakness in the left lower extremity" and states that claimant ". .. can work if he gets the kneeling type of chair . . . so he can work at his desk" in a report of 3-23-92.

The hearing officer makes a Finding of Fact that "[c]laimant has made a good faith attempt to obtain employment commensurate with claimant's ability to work" (using the terminology of the 1989 Act and implementing rules). The hearing officer made no other findings on this point and had no discussion how he arrived at that determination. Contrary to the hearing officer's statement that claimant has made a good faith attempt to obtain employment commensurate with his ability to work, it is clear from claimant's own testimony he has made no attempt to seek employment, relying instead on the SSA determination that he is "disabled" and that therefore seeking employment would be futile. We believe such

reliance to be misplaced. In Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993, we defined good faith and indicated that the provisions of Section 408-1.42(a) are explicit and that the claimant must have made some good faith efforts to obtain employment commensurate with his ability. Claimant here has shown no such efforts, relying strictly on the SSA determination.

Carrier points out that it has made claimant a "bona fide offer of employment." Employer's letter dated March 29, 1993, meets the technical conditions of a *bona fide* offer, however the BRO raises the question, that given the acrimony and the employer/carrier's perceived "antagonistic attitude" toward claimant, "whether the tardy job offer relieves the carrier of payment of [SIBS]." Regarding use of the kneeling chair, the BRO points out the "absurdity" and impracticability of having ". . . to continually shift from a kneeling position to a sitting position to a standing position." We clearly understand that claimant perceives that the employer/carrier have been less than forthright with him, as evidenced by carrier's refusal to answer claimant's interrogatories, exchange a medical report they received from Dr. L and refusal to exchange the video of claimant that carrier had in its possession. However, we do not believe these actions by the carrier/employer relieve the claimant from making a good faith effort to obtain some kind of employment commensurate with his somewhat restricted physical ability. In Texas Workers Compensation Commission Appeal No. 93559, decided August 20, 1993, on this point we stated:

> The question is one of whether the injured employee has made good faith efforts to obtain employment commensurate with his ability to work. (Unlike the provision governing entitlement to temporary income benefits where there is no specific requirement to actively seek out employment, Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, entitlement to SIBS hinges on making good faith efforts to obtain employment).

In the instant case, claimant admits he made no efforts to seek employment commensurate with his ability. This is not to say that in all cases the employee must seek employment, regardless of the employee's physical condition or how futile that effort might be. However, in this case, claimant had been released to light duty, Dr. L stated that by using a kneeling chair he could do some work at a desk and claimant admits he can do some light chores around the house. Under these circumstances we believe claimant is obligated to, at least, make some efforts to find some type of employment commensurate with his ability to work. Claimant did not do so and therefore we reverse and render a new decision based on this point.

III

The Contested Case Hearing Officer erred in not admitting Carrier's Exhibit

No. 3, and not considering this evidence.

Carrier had in its possession a video tape taken on or about March 27, 1993, purporting to show claimant walking bending, squatting and lifting. Carrier argues this video was offered for the sole purpose of impeaching the claimant's testimony. Carrier states that it did not exchange this tape because ". . . Carrier did not intend on using the videotape at the time of the [CCH]." We find that statement totally incredulous. Carrier was perfectly aware of claimant's position and expected testimony from the BRC. In fact, it appears carrier had the video in its possession at the BRC when there appeared to be significant discussion regarding claimant's abilities and where the carrier made its previously referenced "bona fide offer of employment." To state that carrier did not intend to use the video tape until claimant "lied about his physical activities" stretches credibility. Section 410.160 (formerly Article 8308-6.33(d)) clearly prescribes the information that the parties shall exchange. There is no provision to withhold certain information if it is to be used solely for impeachment. Section 410.161 (formerly Article 8308-6.33(e)) states:

> FAILURE TO DISCLOSE INFORMATION. A party who fails to disclose information known to the party or documents that are in the party's possession, custody, or control at the time disclosure is required by Sections 410.158-410.160 may not introduce the evidence at any subsequent proceeding before the commission or in court on the claim unless good cause is shown for not having disclosed the information or documents under those sections.

Use for impeachment purposes, under these circumstances where carrier fully knew the substance of claimant's testimony, does not constitute good cause. In Texas Worker's Compensation Commission Appeal No. 92204, decided July 6, 1992, where certain time sheets had not been exchanged and were offered as "impeachment/rebuttal" we upheld the hearing officer's ruling not to admit the documents. We noted that carrier, in that case, as in the instant case, "has cited no authority for its proposition that 'impeachment/rebuttal' evidence is excepted from exchange requirements . . . ." What may be permissible in hardball court room tactics is not acceptable in the less formal administrative setting of a workers' compensation dispute resolution process, where the claimant is frequently a pro se party. Carrier's contention is totally without merit.

Finding that the evidence is insufficient to support the finding of the hearing officer that claimant has made a good faith attempt to obtain employment commensurate with the claimant's ability to work, we reverse and render a new decision that claimant is not entitled to SIBS for the period in question because he had made no efforts to obtain employment commensurate with his physical abilities.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge