APPEAL NO. 93630

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). On May 25, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The record was closed on June 22, 1993. The issue presented and agreed upon was: "Whether Claimant has met her burden of proving that her unemployment is a result of her impairment, thereby entitling her to continued Supplemental Income Benefits." The hearing officer determined that claimant's failure to return to work was not a direct result of her impairment, and that therefore claimant was not entitled to continued Supplemental Income Benefits (SIBS). Appellant, claimant herein, contends that the hearing officer decision was in error, and that she has been diligently and in good faith seeking employment. Respondent, carrier herein, responds that the decision is supported by the evidence and that claimant's failure to return to work was not a direct result of her impairment. Carrier requests we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

At the outset we note that the evidence and testimony at the CCH dealt almost entirely with claimant's efforts to seek employment, prospective employers she had contacted and speculation on why claimant's employment applications had been rejected. There was no evidence or testimony how claimant's original injury had occurred, why she did not return or seek to return to her position with the preinjury employer, or any medical evidence. The benefit review conference (BRC) notes on page 2 that a Dr. W apparently certified MMI on 3/18/92, n/a restrictions with an "AMA Impairment Rating 17%." The BRC reports contained an Interlocutory Order signed by the benefit review officer (BRO) ordering payment of SIBS for the quarter beginning March 25, 1993. There was no evidence whether impairment income benefits (IIBS) had been commuted (although we presume not in view of the interlocutory order for SIBS). The indication was from carrier that those benefits had been paid and carrier was contesting payments of benefits for the second quarter based on the contention that claimant's unemployment was not a direct result of claimant's impairment. Claimant's contention, and testimony was that she had applied for many jobs, including placing her name with the Texas Employment Commission (TEC), and had received rejection letters from several of the employers (the rejection letters were offered and admitted in the record). Although claimant cannot be sure, she believes she was not hired because of her workers' compensation injury. Claimant testified the only thing she could not do is "long periods of standing or long periods of sitting." "Long periods" was defined as three or four hours, after which she gets a pain in her lower back. Claimant testified she has learned to live with the pain and can "handle any type of job" and she had no other limitations.

The hearing officer found claimant had not returned to work and that the claimant's failure to return to work is not a direct result of her impairment. The hearing officer concluded that claimant was not entitled to SIBS for the period in question. Claimant

reurges the arguments she made at the CCH, that she has "made numerous contacts and is registered with the (TEC)." Claimant states she has excellent job skills and "I couldn't imagine why I haven't been made a job offer." Claimant states she has proved she was ". . . looking for work and should continue to receive my benefits because I have in good faith sought employment commensurate with my ability to work, considering I would still he employed had not I'd (sic) been injured."

The 1989 Act, Subchapter H Section 408.142 states an employee is entitled to SIBS if on the expiration of the impairment income benefit 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 1989 Act has been implemented in Tex. W.C. Comm'n 28 TEX. ADMIN. CODE §§ 130.101-110 (Rules 130.10110). Rule 130.104 states an injured employee initially determined by the 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 in §130.101 of this title (relating to Definitions), 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.

The overview of SIBS payments in 1 Montford, Barber & Duncan, A Guide to Texas Workers' Comp Reform §4.28 at 4-119 states that the concept of SIBS compares the employment post-injury and pre-injury earnings. "To qualify for SIBS, the employee has the burden, before the Commission, to establish that the lesser ‘post v. pre’ earnings are a ‘direct result’ of the employee's impairment." Montford expressed some concern about SIBS at 4-121 when it stated the 15% impairment threshold ". . . for SIBS (which was

controversial during the legislative process) was adopted, among other reasons, to address a concern that these benefits might serve as a disincentive for less seriously injured worker to rehabilitate and return to gainful employment." Furthermore Montford at 4-122 goes on in discussing the provision regarding when the employee has not returned to work (or has returned to work earning less than 80% of this employees average weekly wage) as a direct result of the employee's impairment, to state:

> The employee has, before the Commission, the burden to prove that his lost or reduced earnings are "a *direct result*" of the employee's impairment, rather than, for example economic factors unrelated to the employee's physical limitation.

Impairment is defined in Section 401.011(23) as "any anatomic or function abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent."

In the instant case, there seems to be little doubt that claimant made good faith efforts to obtain employment commensurate with her ability to work. Claimant, both at the CCH and on appeal, stresses those efforts and the fact that she has not received a job offer. To some extent both the carrier and the hearing officer are also led down this path as evidenced by their discussion of good faith and the hearing officer's citation of Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993. However, we believe the key issue here is whether claimant's unemployment is as a direct result of her impairment. Section 408.142(a)(2). Montford, *supra* observes that claimant's inability to obtain employment must be "a *direct result*" of the impairment rather than other factors unrelated to the employee's physical limitation.

We understand and agree with claimant's argument, that it is unreasonable to expect a potential employer to say, much less write, that the reason they are not hiring an applicant is because the applicant has an impairment or a handicap. However, neither can we engage in speculation that an employer has somehow divined that an applicant has a workers' compensation claim and impairment which would preclude them from employment. Carrier points out, and we agree, that there is a distinction between an "injury" and impairment." Not all injuries, and workers' compensation claims, result in impairment, as defined above. Even if a potential employer were to say it was not hiring an applicant because the applicant had filed a workers' compensation claim (an act illegal under another statute) that would not be sufficient to qualify for the provision that her failure to obtain employment was a direct result of her impairment, rather the failure to obtain that employment would have been as the result of the discriminatory act.

Given that a potential employer may well not give a reason why an applicant was not selected for a position, a claimant may rely on other evidence. We note that the record is

completely devoid of any medical evidence, other than the BRC report which indicates claimant achieved MMI without restrictions. In this case, claimant also testified that she could handle any kind of job and that the only limitation she had was after three or four hours of standing or sitting she experiences some pain. Furthermore, claimant testified that if she could alternate standing and sitting (i.e. stretch breaks) she could "handle any type of job."

Although the hearing officer mentions "a good faith attempt to obtain employment" his finding that claimant's failure to return to work is not a direct result of her impairment addresses the issue and is supported by the evidence, principally claimant's own testimony. In summary, the conclusion that the claimant has not proven by a preponderance of the credible evidence that her unemployment is a direct result of her impairment is supported by sufficient evidence and is not 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); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge