APPEAL NUMBER 941275

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 12, 1994, a contested case hearing (CCH) was held. The issue was whether respondent, who is the claimant herein, was eligible for payment of supplemental income benefits (SIBS) for two quarters, specifically the quarter beginning January 1, 1994, and that beginning April 1, 1994. Claimant had sustained a compensable injury on _____, injuring his neck, back and left shoulder, while employed by (employer), and had been assessed a 17% impairment rating.

The hearing officer determined that claimant was eligible for SIBS. The hearing officer made no factual findings relating to whether claimant's unemployment was a direct result of his impairment. He found that claimant had been restricted from returning to heavy manual labor that required constant moving and lifting. He further found that claimant could not work at all.

The carrier has appealed on several grounds. The carrier notes that the hearing officer failed to address and consider the impact of claimant's subsequent injury to his other shoulder on his unemployment or underemployment, and that there is evidence that the second injury, not the first, has caused claimant's current unemployment. The carrier argues that the claimant failed to prove that he had no ability to work that would absolve him from a good faith search for employment. The carrier argues that the Texas Workers' Compensation Commission (Commission) erred in approving claimant's first application for SIBS because it did not assert facts meeting the four essential requirements to qualify for benefits. In conjunction with this, carrier argues that the Commission ought not to be able to retroactively determine qualification for SIBS, even through the dispute resolution process, and evidence should be limited to that presented on application. The claimant has not responded.

DECISION

We reverse and remand for development of further evidence and findings as indicated by this decision, determining that the hearing decision contains insufficient fact findings to support the conclusion that claimant was entitled to SIBS for the period of time in question.

Claimant said he fell on his left side on _____. Claimant's treating doctor was Dr. B. The record indicates that claimant developed an internal derangement of the left shoulder, and received arthroscopic surgery on November 18, 1991, from Dr. A. In a medical report filed prior to surgery, on November 13, 1991, Dr. B estimated that claimant could return to work within six months. A medical report dated May 6, 1992, stated that claimant had rehabilitated and returned back to work, but had to be taken off work in late March 1992. In this same report, Dr. B indicated that claimant was being taken off work for two weeks, with the objective of returning him to light duty status. A November 24, 1992,

medical report indicated that claimant would be undergoing therapy and his prognosis for recovery and return to work was good.

Claimant testified that he had gone back to work and sustained a second shoulder injury, this time to his right shoulder. This injury also resulted in arthroscopic surgery. The testimony from claimant was only that this happened sometime in 1992, and that the second surgery took place after claimant's surgery for the _____ injury. The carrier asked claimant if he "received benefits again" after his second injury and claimant stated that he did, but left somewhat unclear by the testimony was whether those benefits were paid because of the second injury or the first. A Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) put into evidence by the carrier indicated that no TIBS were paid by the carrier for the _____ injury for any periods of lost time after June 2, 1992.

An impairment rating examination report by the designated doctor, Dr. A, issued for the _____ injury, noted that claimant had sustained a right shoulder injury on (subsequent date of injury), and was operated on in September of that same year. Dr. A noted that as of his examination on April 14, 1993, claimant was not working as a result of the second injury. Claimant stated that this was Dr. A's impression. For the _____ injury, Dr. A certified that claimant had a 17% impairment rating due to his left shoulder and lumbar spine. (This rating was confirmed in a CCH decision in September 1993.)

The TWCC-21 filed by the carrier indicated that claimant did not commute his impairment income benefits and was paid through January 20, 1994.

When asked about his job duties for the employer, claimant stated he was a set-up tech, and did picking up and tightening, and moved his shoulders a lot. This was the extent of the description of his duties. Claimant said he had a high school diploma and his previous work experience was manual labor. He was 27 years old at the time of his injury. Left undeveloped in the record was a description of what he did when he returned to work in 1992 and thereafter injured his right shoulder. Claimant said his conversations with Dr. B about his current ability to work focused on whether he could return to the same type of work he performed. He stated that Dr. B has repeatedly told him that his shoulder is not "ready" and there remains inflammation. He stated that Dr. B told him he could not do lifting or any task involving extensive motion of the shoulder. Claimant testified that his shoulder gets sore and swollen, and he has lost strength. He stated that he has not sought employment at all because he has not been "released" and would be violating doctor's orders if he went back prior to a release. Claimant did say that if his doctor released him, he would look for work. Claimant said that he felt there were jobs with the employer he would have been able to do, but that his employer said that there was no light duty available.

Carrier submitted a labor market survey dated June 1994 which lists seven jobs, none of which list a need for lifting, except for one limited to a 5 lb. maximum.

Admitted into evidence was a subsequent medical report completed by Dr. B for the _____ injury. It is dated February 21, 1994, and states that claimant "has been returned" to work. Claimant testified that he was actually told by Dr. B at his examination that date that he could not return to work, and that he first saw this report at the benefit review conference.[1] He stated that Dr. B had not told him he couldn't do any type of work, but had not released him, even for light duty. A general letter written by Dr. B on January 24, 1994, indicating a date of injury of (incorrect date of injury, document was dated a day later of the actual date of injury), states briefly that claimant is under his care for "an injury" and had a disability rate of 100% and was unable to return to work due to his medical condition. An identical letter dated May 9, 1994, is also in the record. There was no testimony that claimant was examined on either of these dates (the last medical report in the record from Dr. B is the February 21, 1994, report).

Claimant indicated that he had no plans for re-employment. He stated that it was his belief that he would require retraining that he could not afford. He stated that he contacted Texas Rehabilitation Commission on a date he could not recall and was rejected because he was on probation apparently from a previous training.

Carrier presented claimant's applications for SIBS. The first was filed with the Commission field office on February 7, 1994. The second was filed May 9, 1994, apparently initially with the carrier (although records of the Commission indicated it was received by the agency May 13, 1994). While both are signed, they are essentially blank as to the criteria for SIBS qualification; pre-printed boxes indicating the elements of SIBS were not "checked off." The Commission field office nevertheless approved the claimant's first application for SIBS, but not until April 28, 1994.

In addition to an impairment rating over 15%, and receipt of impairment benefits without commutation to a lump sum, a claimant for SIBS must additionally prove that he is underemployed, or unemployed, as a direct result of his impairment. Section 408.142(a)(2). We believe that a finding on this criterion of eligibility for SIBS must be made before SIBS can be awarded. That has not been done in this case, and requires a reversal and remand back to the hearing officer.

As noted in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP REFORM, p. 4-122:

[1] We do not understand the tape of this hearing to include a statement by claimant that he was told by Dr. B that the report was submitted in error, as indicated by the hearing officer in the discussion of the evidence. Even if there were such evidence, we would note that a revocation or correction of a doctor's report required by the rules of the Commission should only be accomplished through the doctor, and not by lay testimony.

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.

We have also upheld a determination of a hearing officer that a subsequent injury broke the "chain" linking current unemployment to the work-related impairment. *See* Texas Workers' Compensation Commission Appeal No. 94907, decided August 16, 1994. In the case here, the evidence shows that claimant went back to work after being released from the effects of his _____ injury. A subsequent re-injury and surgery caused lost time. The only mention of the second injury in the decision is in the statement of the evidence, which notes also that claimant had not been released for his first injury. This is not to say that the second injury will necessarily preclude a finding that the claimant's compensable injury is a direct result of the claimant's impairment.

We do not believe the aspect of a "release" conclusively disposes either of the need of a claimant to prove the "direct result" link nor does it, standing alone, absolve a claimant of the statutory requirement to search for employment commensurate with the ability to work. An injured employee who did not return to his or her treating doctor might never have "a release" and yet have ability to work. The fact that there is no "release" is ambiguous at best and suggestive of many interpretations: it could be based solely upon a reluctance to give a full release to the employment previously worked, or it may be the particular practitioner's practice not to give a written release unless requested for some purpose. It is the reasons for the failure to give a release that should be developed in the record, primarily from the physician, before supportable conclusions may be drawn about the impact on SIBS.

Because the remand may develop new facts that could affect our review of the "job search" qualification, we will not rule on the hearing officer's findings at this point. It is important to emphasize, however, that Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, did not do away with the requirement in Section 408.142(a)(4) that a claimant for SIBS must demonstrate that he or she attempted "in good faith" to obtain employment commensurate with an employee's ability to work. That case stands for the proposition that where it is demonstrated that a claimant's "ability" is "no ability," compliance with this requirement is effectively met by no search. However, we believe the burden is firmly on the claimant to prove that he indeed has "no ability" due directly to the physical injury. As noted in the concurring opinion in Appeal No. 931147, findings relating to the educational background or a claimant's prior work experience are not necessarily relevant to whether or not a claimant must make the effort to search for employment. The ability to perform the previous job is of marginal relevance, because the SIBS statute arguably contemplates that the claimant will not be able to return to the prior employment and wage level, because it compensates for unemployment or underemployment. While we recognize the role of the hearing officer as the judge of the

evidence, we would note that the quality of evidence needed to absolve a claimant of the minimal job search requirement for the particular quarter under consideration should demonstrate that the doctor has examined the claimant and considered the specific injury and its impact on employment generally, not just the inability of the employee to perform his previous job. We are troubled here that the hearing officer notes only that the doctor has restricted claimant from returning to heavy manual labor requiring constant moving or lifting, and then makes a general finding that claimant "could not work at all." *See* Texas Workers' Compensation Commission Appeal No. 941263, decided Nov. 3, 1994. (However, this is not to say that medical evidence that a claimant could "not work at all" if found persuasive by the hearing officer is not sufficient to support a finding of inability to work at all.)

Regarding the procedural point raised by carrier, we agree that the Commission should not have approved an application that was devoid of even "check marked" assertions that the requirements for SIBS had been met. But the hearing process is in place precisely to allow a party to appeal the action of the Commission, and we find no authority (and carrier cites none) that would support a proposition that either side should be precluded from bringing forth additional evidence in a hearings process to challenge or defend the agency's action. Claimant's procedural challenge as an attack on the hearings decision itself is without merit.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993. These matters can be addressed, if the hearing officer deems necessary, by development of additional evidence on remand.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge