APPEAL NO. 941382

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 8, 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 the quarter beginning July 4, 1994. Claimant had sustained a compensable injury on (date of injury), injuring her right shoulder and right wrist. She took early retirement from (employer) on September 30, 1991.

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 her impairment, or whether she had made a good faith attempt to search for employment commensurate with her ability to work. He found only that claimant was currently under medical care and had not been released to return to any type of work. The hearing officer did find that claimant had been assessed with a 24% impairment rating, which she had not commuted.

The carrier has appealed, arguing that the hearing officer erred by failing to make any findings on whether claimant's unemployment was a direct result of her injury. The carrier urges that because of her voluntary retirement in 1991, her current unemployment could never be considered to be a "direct" result, regardless of subsequent medical opinions. Claimant responds by asking that the decision be upheld and asks the Appeals Panel to continue to order SIBS.

DECISION

We reverse and remand for further consideration of the 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 stated she was injured while working for employer (by whom she had been employed for 17 years) on (date of injury),, when she lifted an item over her head and felt her right shoulder pop. Claimant was off on a leave of absence until June 1991 when she was given an unrestricted release to work by her treating doctor. Claimant stated that she requested a non-restricted release. Claimant is in her mid-40s, and has a high school diploma and additional training and experience as a licensed vocational nurse (LVN).

Claimant said she was put back doing her original job and her shoulder began to bother her again. Claimant stated that she left the employer September 30, 1991. There was prolonged testimony about her reasons for leaving. Both claimant and (Ms. R), the human resources manager for the employer, testified, and the following account was developed. Claimant, upon her return, began having personality problems with her supervisor, and received a negative evaluation. Ms. R investigated and determined that

there were both good and bad things about claimant's performance, and characterized claimant as average to below average, with a need for improvement. However, Ms. R testified that claimant was not in jeopardy of losing her job.

The employer offered various retirement packages, one of which required fewer years of service and was typically offered only to persons who were not doing a good job. Ms. R stated that although claimant was not in the poor performance category, she asked management if she could have permission to offer the package to claimant because of the personality problems that claimant was having and the apparent inability due to a "freeze" at that time to transfer claimant to another department. Claimant was given 45 days to consider the early retirement. Ms. R stressed that she was not required to accept it. Claimant asked her several questions about the plan and eventually accepted it, and signed an affirmation that her action was voluntary. The statement she signed also gave her seven days to revoke her acceptance. Claimant signed the agreement on September 23, 1991, and her departure from the employer became effective September 30th. Ms. R testified that claimant did not indicate that her injury was causing her not to work as well, and further stated that if claimant had been released with restrictions, that the employer would have accommodated those restrictions with a light duty job. She said that when workers were fully released by their treating doctors, that they were typically returned to their previous jobs.

The gist of claimant's testimony was both that she felt if she did not accept the plan she would be subject to layoff, and that she left because her shoulder was bothering her.

Claimant had a shoulder operation in January 1992 and a right carpal tunnel release surgery in mid-1992. She said that no doctor has ever released her to work, and there was "no way" she could return to work. She testified that she now needed a left carpal tunnel release. Claimant was certified as having a 24% impairment rating, by Dr. R, referred to as a designated doctor at the hearing. The conditions he rated were claimant's right shoulder and both hands.

Medical evidence in the record is sparse. On April 1, 1993, Dr. S, on behalf of the carrier, examined claimant. He noted in his report that "claimant has not gone back to work, states that she has been retired." He noted that claimant told him she had left hand symptoms "for years." Dr. S concluded that claimant has "tremendous scarring on the psychic [sic]" and thus would not be a good candidate to return to the work force.

Claimant identified Dr. C as her treating doctor. He wrote a "To Whom It May Concern" letter on June 24, 1994, noting that he last saw claimant in December 1992, and that claimant currently still needed a left carpal tunnel release. He observed that "she has been unable to work." The letter is brief and does not include an assessment of claimant's present capabilities.

Dr. C's notes indicated that he resumed treatment of claimant in July 1994. Dr. C stated that he believed that claimant needs to lose weight and "there isn't any doubt in my

mind that this is causing a lot of trouble she is having in her upper extremities. It's causing her to have signs and symptoms of thoracic outlet syndrome." He indicated further (and claimant in her testimony verified) that she was referred for consultation about breast reduction.

On August 3, 1994, Dr. C wrote that claimant continued to have problems with her hands, unchanged because of her weight. He stated that the earlier carpal tunnel release was unsuccessful, and that her nerve impingement was "because of excessive breast tissue and excessive fatty tissue in the arms." None of Dr. C's notes (including that from December 1, 1992) commented, one way or the other, on claimant's ability to work. Claimant's application for SIBS stated she made no search for employment during the quarter preceding July 4, 1994.

There are four eligibility criteria that must be met to qualify for SIBS, set out in Section 408.142(a):

> (1) . . . has an impairment rating of 15 percent or more . . .;
>
> (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 . . . and
>
> (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

In addition, Section 408.143 provides that after initial eligibility is found, the job search requirement and "direct result" criteria must be met on a quarterly basis. We believe it is essential for a hearing officer who is considering eligibility for SIBS to make findings that support each of the criteria set out in the statute. The hearing officer in this case has erred because he has only made findings relating to the impairment rating and non-commutation, with no findings relating to "direct result" or "good faith" job search. We are unwilling to imply such findings from a boilerplate legal conclusion of eligibility when a record presents greatly conflicting evidence on "direct result," and minimal evidence on the matter of "good faith" job search.

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

> 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 this case, the evidence shows that claimant went back to work in June 1991 after being released with no restrictions. She voluntarily took early retirement from the employer on September 30, 1991. The evidence further indicates that after her surgery she has experienced problems attributed by her doctor to her weight. She apparently was not actively treated by her treating doctor for nearly a year and a half. The carrier's doctor indicated that emotional factors may affect her employability (although this was in 1993). In short, there are other factors which the evidence suggests should have been evaluated by the hearing officer as factors causing claimant's current unemployment.

In our opinion, lay testimony concerning the absence of a "release" does not conclusively dispose 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 make a "good faith" search for employment commensurate with the ability to work. For example, an injured employee who did not return to his or her treating doctor might never obtain a "release" and yet have ability to work. The fact that claimant testifies she has 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. In this case, for the period of time within the quarter on which eligibility was based, Dr. C noted only that claimant had in the past been unable to work. There was no affirmative statement from him regarding claimant's abilities to work during the second quarter of 1994. Claimant's application for SIBS indicated that she made no job search. In the record here, with no assessment as to what her capabilities were, and no affirmative statement that she had no capability, it was error to determine that claimant had eligibility for SIBS absent a finding that she made a good faith job search commensurate with her ability to work.

To forestall further overreading of a previous Appeals Panel decision, we feel it important to emphasize 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 proven 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 or she indeed had "no ability" due directly to the impairment that resulted from the injury. Restricting analysis only to the ability to perform the previous job is an incomplete analysis, 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 impairment and its impact on employment generally, not just the inability of the employee to perform the previous job. The record does not contain such evidence, perhaps because of the overemphasis of both parties on claimant's September 1991 separation from employment.

This case is distinguished from Texas Workers' Compensation Commission Appeal No. 94858, decided August 11, 1994, in that the hearing officer in this case has failed to make pertinent findings of fact as to all eligibility criteria, based upon the evidence for SIBS in this record. Although a hearing officer has the discretion in any case to take additional evidence on remand, that is not our primary recommendation here as it was for the majority of the panel in Appeal No. 94858. That appeal dealt primarily with the particular record of that case. In the appeal at hand, essential elements of eligibility for SIBS do not appear to have been applied to the existing record in this case. If the record in this case is scant in some areas, it was because of the tendency of both parties to focus on claimant's retirement far more than necessary for the issues at hand.

We wish to make clear that we do not accept carrier's argument that claimant's unemployment could not ever be found to directly result from the impairment because she was already voluntarily unemployed when she had surgery and received an impairment rating. The SIBS statute clearly requires an analysis of whether unemployment or underemployment subsequent to the exhaustion of IIBS is causally connected to the impairment. The interpretation urged by carrier would lead to a harsh result that is at odds with what the SIBS statute aims to do: provide income benefits to the most severely injured workers as they attempt to re-enter the job market. Voluntary retirement in 1991 that may have directly caused unemployment back then has little to do with claimant's current status; there is no prohibition against re-entering the job market. The relevance of her retirement, if any, would be whether claimant refrained from seeking work because she considered herself to be in a retired status and therefore had no intent to re-enter the job market. Claimant's retirement would not, standing alone, override her subsequent surgeries as a direct cause of unemployment in the quarter under consideration in this proceeding. More important in the "direct" result analysis are the indications in the medical records that physical factors other than those related to the injury are impacting on claimant's abilities.

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.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge