APPEAL NO. 950114
FILED MARCH 7, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 6, 1994, a contested case hearing was held. The issue unresolved was whether claimant was entitled to supplemental income benefits (SIBS) for his fourth quarter of eligibility. The filing period under consideration was stipulated to run from June 29, 1994 to September 27, 1994, with SIBS to be paid in the quarter following the filing period.

The hearing officer held that claimant was eligible for SIBS.

The carrier appeals the decision. One of carrier's contentions is that claimant's relationship with a realty company is not one of employment within the meaning of the SIBS statute, such that claimant could not be said to have searched for work commensurate with his ability to work. Second, the carrier argues that claimant did not demonstrate that his lower wage was a direct result of his impairment, but merely due to the fact that he had not made a sale and therefore derived no commission. The claimant rebuts several points made by the carrier in its appeal and asks that the decision be affirmed.

DECISION

We affirm the hearing officer's decision.

The claimant stated that he had been a carpenter before his injury, and injured his knee during a lifting incident on _____. It was stipulated that claimant had received a 16% impairment rating (IR) and had not commuted his impairment income benefits to a lump sum. Claimant stated that his doctor told him he would be precluded from performing physical labor again because of his knee. In cooperation with the Texas Rehabilitation Commission (TRC), and, said the claimant, with the approval of the adjuster for the carrier at the time, the claimant sought retraining leading to an associate degree in real estate at the local junior college. He began his course of study in August 1993.

In issue was his fourth quarter of eligibility for SIBS. Claimant stated that after one study year, he had received a license to act as a real estate agent (on March 31, 1994); another year of study, and the degree, would be required to become a broker (as opposed to an agent, who must work under supervision of a broker).

The claimant stated that after he got his agent's license, he began working for (Realty Estate Company). The Company did not pay any salary, nor provide benefits. Office space and supervision was provided. Claimant stated that throughout the summer months, until August 27, 1994, he worked full time attempting to acquire listings and make

sales of land. Claimant said that he had at the end of September, obtained his first listing, and had gotten a few more since the end of the eligibility period under consideration. Claimant said his hours during the summer could be up to 60 hours or more a week; the average hours he worked were 35 hours a week. Claimant said he had some sales fall through. The result was, except for payment for odd jobs (such as painting the front of the realty), he did not receive wages during the summer.

Claimant said he began his second year of school; although his tuition was no longer paid for by TRC because his wife's income put them above eligibility for such assistance, he stated he was still in touch with his counselor at TRC, and his second year of schooling was consistent with the original retraining plan. Claimant said that notwithstanding his status as a full-time student, he continued to work at the Realty Company about 20 hours a week.

When asked by the carrier if he had looked for work during the summer, he pointed out that he already had a job with Realty Company so did not. Claimant indicated that he spent several hours during his employment as an agent trying to build up business and soliciting listings.

Claimant put a letter from a doctor into evidence dated June 24, 1993, to the effect that he was under treatment at that time by the doctor's pain management clinic and could not return to a job in the construction industry. Claimant did not recall he had seen a doctor in 1994.

Section 408.142 describes the eligibility requirements for SIBS as follows:

(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.

The hearing officer is somewhat off the mark in a finding of fact that it was claimant's "injury" that directly resulted in his inability to continue to pursue employment requiring physical labor. Although inartfully phrased, we are persuaded from reviewing the findings of fact and decision as a whole that the hearing officer agreed that it was claimant's impairment that caused him to be returning to work where, for the period under

consideration, he earned less than 80% of his average weekly wage. Absolute unemployment is not required for a claimant to be entitled to SIBS, because the statute expressly provides that a benefit may be paid for "underemployment."

The hearing officer found that claimant made a good faith job search, but the necessity to search is somewhat qualified in that during the applicable filing period, the claimant had a job commensurate with his ability. A month before the end of the filing period, the job went from full time to part time, due to increased time spent at school. Because he had employment commensurate with his ability to work (and we do not agree with carrier that performing real estate agent services is not "employment" within the meaning of the SIBS statute), the hearing officer could have believed there was no requirement to search for another. Although claimant actually earned no commission during the period under consideration, this does not render his employment a sham, or any less commensurate with his ability to work. The hearing officer could well chose to believe that because claimant was precluded from doing more physical labor, and cooperated with TRC in formulating retraining to something less physical, that it was his impairment that directly resulted in the fact that he earned, for the period under question, less than 80% of his average weekly wage. To the extent that carrier argues that other economic factors rather than the impairment caused the lack of remuneration, the hearing officer could believe that these economic factors were part and parcel of the career for which TRC trained him, and that such training directly resulted from the impaired knee. We would therefore agree with the hearing officer's conclusion that claimant had eligibility for SIBS during the period under consideration.

Contrary to the carrier's assertion, unsupported by citation, that claimant's situation is not what the Legislature envisioned in enacting SIBS, it would seem to fall squarely within the purpose of SIBS. We have indicated before that a claimant is not required to seek employment only from third parties, versus self-employment, in order to qualify for SIBS, so long as good faith efforts to drum up business are demonstrated. *See* Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994. The evidence in this case supports the decision and further demonstrates a clear trajectory toward full re-employment. Claimant demonstrated that his impairment to his knee precludes him from performing certain types of jobs, and he sought an alternative. He cooperated with TRC and undertook a retraining program. He embarked upon a career path toward which such retraining was directed. During the eligibility period, claimant worked apparently long hours, actively sought business, but received no remuneration, a situation connected to his employment under a commission-only based scheme of remuneration for personal services. There is every indication that his efforts will bear fruit in the coming quarter, according to his testimony about his listings and the three percent commission to be derived therefrom (independent of any sales he might make, which would increase the percentage). Claimant appears to be in transition from unemployment to full employment and cooperative with TRC, as the statute also directs; the purpose of SIBS appears to us clearly devised for the purpose of providing benefits for such period of

transition. There is no evidence to support the expressed fear in the dissenting opinion that SIBS is being used as "an insurance policy to soften the economic hazards inherent in a business start-up."

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The determinations underlying the order in favor of claimant are fact determinations, considering the totality of facts, that were the responsibility of the hearing officer to make.

The hearing officer's decision and order are affirmed.

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the result reached by Judge Kelley; that is, the claimant is entitled to supplemental income benefits (SIBS) for the compensable quarter in question. Whether the claimant met the criteria for SIBS was a fact question to be resolved by the hearing officer who is the sole judge of the weight and credibility to be given to the evidence. I believe that the hearing officer's findings support his decision and that the findings and decision are 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, 176 (Tex. 1986).

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The critical dispute in this case over claimant's entitlement to supplemental income benefits (SIBS) for the fourth compensable quarter centers on his good faith efforts to obtain employment and whether his underemployment is the direct result of his impairment. Both are questions of fact. I am satisfied that there is sufficient evidence to support a finding that the claimant's schooling and actual entrance onto a career in real estate sales amounted to the necessary good faith effort to obtain employment. My reservation is over whether he met his burden of proving that his underemployment is the direct result of his impairment and whether the hearing officer made the necessary findings of fact to support his conclusion of law that the claimant was entitled to SIBS.

The Appeals Panel has in the past observed that a claimant seeking SIBS must show that his underemployment is the direct result of his impairment and not of economic factors. *See* Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993. The issue becomes especially focused when a claimant's return to the market place is in the capacity of an independent contractor or self-employed business person. In such cases, one would not expect to immediately replace pre-injury wages dollar for dollar or necessarily to make a profit at all from the beginning of the venture even though one seems able to put forth the necessary physical effort to perform the required work. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994. The choice, however, to elect self-employment is the claimant's and he or she should not expect SIBS to be an insurance policy to soften the economic hazards inherent in a business start-up. Frankly, I find no support in the 1989 Act for awarding SIBS when one embarks on a "clear trajectory toward full re-employment." While self-employment is not prohibited in attempting to meet the SIBS requirement, neither does the statute give it an advantage over traditional employment. What the lead opinion does in this case is give self-employment preferred status in qualifying for SIBS.

Leaving aside my disagreements over statutory interpretation, I also dissent because in my view the hearing officer did not make necessary findings of fact to support his conclusion that the claimant was entitled to SIBS. *See* Texas Workers' Compensation Commission Appeal No. 92258, decided August 7, 1992. His Finding of Fact No. 12 is that the claimant's "impaired left knee has kept him from being able to obtain or retain employment involving physical labor, which he had pursued prior to his injury" (Emphasis added). This finding has no bearing on the impact of the claimant's impairment on the pursuit of a career in real estate. On its face, it simply says the claimant could no longer continue his earlier career as a carpenter. The author of the lead opinion arguably concedes that the claimant's real estate career is not being hindered by his impairment. He attends school. He did some painting for his broker. He has signed listing agreements. We do not know if his impairment hinders his showing of properties or prevents him from doing other essential acts of a real estate agent. I would remand the

case back to the hearing officer to make specific findings of fact that the claimant's inability to earn wages as a real estate agent is or is not the direct result of his impairment.

Alan C. Ernst
Appeals Judge