

APPEAL NO. 950117
FILED MARCH 3, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A contested case hearing was held on December 15, 1994, to determine the claimant's entitlement to supplemental income benefits (SIBS) for the first compensable quarter. The hearing officer held that the claimant's unemployment was not a direct result of the impairment attributable to her compensable injury, and denied recovery. The claimant takes this appeal, contending that she followed the statutory requirements. The carrier basically asserts that the hearing officer's decision is correct, citing to evidence.

DECISION

We affirm.

The claimant had been employed for five years as a school bus driver for (employer). She sustained a compensable injury in the form of a repetitive trauma injury (bilateral carpal tunnel syndrome) on _____, and had two subsequent surgeries. She returned to her regular job on October 3, 1993, although she said that driving a bus with no power steering and automatic doors caused her arms to ache. She returned to her doctor, (Dr. J), who released her to restricted duty (including no repetitive use of hands). Thereafter, her employer assigned her to a bus with automatic doors which she said she was able to operate with no problems. She last worked for her employer on May 28, 1994, the last day of the school year, and fully anticipated that she would be returning to the same job in the fall.

Claimant said that it had been her usual practice to supplement her income with summer jobs, and she detailed at the hearing numerous jobs she had applied for during the period from July 1 through September 29, 1994, which was the qualifying period for the first quarter of SIBS. These included positions with restaurants, with nursing homes, with a bus terminal, and with retail establishments. She stated that she applied for most of these during September of 1994. According to her testimony and to the Statement of Employment Status (Form TWCC-52) she filed with the Texas Workers' Compensation Commission (Commission), she also applied for processing jobs with a poultry plant and a lumber company, and a cashier job with a service station. Some of the places where she applied did not have openings, but she was interviewed at some and told she did not get the position. She said that she frequently has to wear splints on her hands and that she wore them when she applied for these jobs because she would need to wear them when working; she surmised that this evidence of her physical condition impeded her job search. In addition, claimant's evidence included a note from a woman who had interviewed claimant for a job as housekeeper for an elderly woman; the note stated that claimant did not qualify due to the problem with her hands, since the job involved cooking, lifting, and

cleaning. A note from an individual at a bingo parlor stated that if claimant was physically able "I would love to hire her to help in the kitchen." Claimant also stated that, had she not failed the physical examination, she would have gone back to her prior job for employer when school started in the fall.

(Mr. H), the employer's general manager, testified that pursuant to state and federal requirements governing school buses, all drivers are required to pass a yearly physical examination. The evidence shows that a physician examined the claimant on August 8, 1994, and found she was not qualified, although no reason was stated on the form. Claimant said it was her understanding that she did not pass the physical examination because she was overweight (under the medical examination report form's "General Comments" it is noted "mildly overweight"). Mr. H and (Ms. A), employer's operations supervisor, testified that it was their understanding that claimant did not pass the physical due to a heart rate problem; both stated that her disqualification had nothing to do with her wrist injury, and Ms. H stated she had fully expected claimant would be returning to work that fall. Mr. H said that claimant was not initially terminated because the employer's policy was to put an individual who failed the physical on medical leave until the particular problem was corrected, although she apparently was terminated around October 1st.

Pursuant to a letter from the carrier, (Dr. K), the doctor who performed the physicals, wrote on December 2, 1994, that claimant's disqualification was not due to high blood pressure but to "marked tachycardia following a brief exercise," acknowledging that he had omitted the reason for disqualification from the form. Dr. K also wrote that for claimant's height her weight was twice what it should be and "[t]his could well account, or lend to, the etiology of her tachycardia." He noted his understanding that providing her with a bus with automatic doors had alleviated problems she had had with her wrists.

Section 408.142 provides in pertinent part that a claimant who has been given an impairment rating of 15% or more is entitled to SIBS upon the expiration of impairment income benefits, if his or her unemployment or underemployment is a direct result of the impairment, and if he or she has attempted in good faith to obtain employment commensurate with the ability to work. In her decision the hearing officer found that the claimant had made a good faith effort to obtain employment commensurate with her ability during the 90 days preceding the quarter at issue. As to the "direct result" factor, the hearing officer wrote:

Unfortunately, the record does not contain sufficient evidence of probative force to support a decision that claimant's current unemployment is a direct result of the impairment which is due to claimant's compensable injury. Although claimant understandably surmised that her unemployment was due to the condition of her wrists, speculation, even if coincidentally correct, does not constitute the preponderance of credible evidence which is necessary to support a decision in favor of claimant. Therefore, it is appropriate to decide

that claimant's current unemployment is not a direct result of her impairment, and a decision in favor of carrier is appropriate with regard to the issue made the basis of this case.

We have previously written of the dilemma inherent in establishing that a claimant's failure to obtain employment was the direct result of impairment from the compensable injury, stating 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." Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993. In that decision, however, we went on to state that ". . . 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." We noted the explicative language in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM (1991) § 4.28 at 4-119, which stresses the employee's burden to prove that lost or reduced earnings are a direct result of the impairment rather than, for example, economic factors unrelated to the employee's physical limitation.

The evidence in this case clearly showed that the claimant applied for numerous jobs during the qualifying period prior to the first quarter, both before and after the physical examination which disqualified her from her original job. While it is clear that claimant was not rehired as a bus driver for a reason not relating to her compensable injury, this fact alone would not be dispositive of why she was not hired at any other job. (*Compare* Texas Workers' Compensation Commission Appeal No. 94907, decided August 16, 1994, in which the evidence was held sufficient to support a decision that a separate, intervening injury was the cause of the claimant's unemployment.) However, while two individuals indicated in written statements that they did not hire claimant because of her hands, and the claimant surmised that her wearing splints on her hands caused her not to be hired, she also stated that some employers had no openings and that at other places she was interviewed but not hired; the hearing officer may also have inferred that the fact that claimant was not hired, in the period before she learned she would not be rehired by her employer, was because a job involving such a limited period of time was not available. In addition, the hearing officer may have reached her decision based upon the evidence that claimant was able to work, both before and after accommodation by her employer, during the seven month period from October 1993 through May 1994. Whether a claimant's unemployment is a direct result of a compensable injury is a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 941185, decided October 19, 1994. As an appellate body, we cannot overturn the hearing officer's decision unless it is not supported by any evidence or unless it is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We cannot make that determination in this case. While the record in this case contains evidence which could have supported a different

inference, that fact alone is not a sufficient basis to overturn the hearing officer's determination.

Based upon the foregoing, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge