APPEAL NO. 960165
FILED MARCH 7, 1996

On December 28, 1995, a contested case hearing (CCH) was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the CCH was whether the appellant/cross-respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fifth compensable quarter. The hearing officer held that the claimant is not entitled to SIBS for the fifth quarter. The claimant appeals the hearing officer's determination that his unemployment is not as a direct result of his impairment. The respondent (carrier) filed a response to the claimant's appeal requesting affirmance of the hearing officer's decision that the claimant is not entitled to SIBS for the fifth quarter. In the response, the carrier states that it contests the hearing officer's findings that the claimant made a good faith effort to obtain employment commensurate with his ability to work during the filing period for the fifth quarter. According to records of the Texas Workers' Compensation Commission (Commission) the carrier's Austin representative received the hearing officer's decision on January 16, 1996. Since the carrier did not file its response with the Commission until February 8, 1995, the response cannot be considered as a timely filed appeal since it was not filed within 15 days after the date of the receipt of the hearing officer's decision. *See* Section 410.202(a). Thus, we do not consider the carrier's appeal of the good faith findings. Responsive matters in the carrier's response, other than the appeal of the good faith findings, will be considered as the response was filed within 15 days of receipt of the claimant's appeal. *See* Section 410.202(b).

DECISION

Reversed and remanded.

The parties stipulated that the claimant suffered a compensable injury on _____; that he reached maximum medical improvement (MMI) with a 15% impairment rating on November 5, 1993; that he did not commute any of his impairment income benefits; that the filing period for the fifth quarter was from June 16, 1995, to September 14, 1995 (hereafter called the filing period); that the fifth quarter was from September 15, 1995, to December 14, 1995; that the carrier had paid SIBS for all previous quarters; that the claimant was released to return to light-duty work by his treating doctor, Dr. T, on December 20, 1994; and that the claimant was unemployed during the filing period.

The claimant is 30 years of age. He worked for (employer), as an auto mechanic for nine years. He testified that he injured his back on _____, when he lifted an engine cover from a motor home, that he was last employed by the employer in October 1992, and that he had back surgery in July 1993. On December 20, 1994, Dr. T wrote that the claimant could perform light-duty work, with no lifting over 20 pounds and avoidance of repetitive bending, pushing, or pulling. In addition, Dr. T wrote that the claimant could stand for a total of four to six hours per day with a maximum of four hours at one time, sit for a total of two to four hours per day with a maximum of two hours at one time, and walk

a total of four to six hours a day with a maximum of four hours at one time. The claimant testified that he continues to be under the work restrictions set out by Dr. T in December 1994 and that he goes to Dr. T once every three months. The claimant further testified that his work restrictions prevent him from performing his old job as an auto mechanic.

The claimant testified that in September 1995, and within the filing period, he applied for a cashier's job at a building supply store, a hardware store, and a convenience store (he gave the names of the stores); that the applications for those jobs inquired about disability; and that he wrote on the applications that he had had back surgery. He said he was told at the building supply store and at the hardware store that they were hiring, but later said he didn't know if they were hiring. He said that during the filing period he also looked for work as an orderly at two hospitals. He said he did not apply for work at the hospitals because they were not hiring and because he was told that orderly work required lifting. He said he asked about other types of jobs at the hospitals but no jobs were available. In addition, the claimant testified that he went to the employer during the filing period and asked about a cashier's job but the cashier's job was already filled. He said he told the employer about his work restrictions. The claimant said he was not hired at any of the places he applied. He testified that he doesn't know why he wasn't hired at the places that were hiring. He also testified that during the filing period he attended college for six hours per week during the first summer session and that he did not attend college the second summer session. He indicated that during the fall semester of 1995 he attended college for 12 hours per week.

In a recorded statement dated September 22, 1995, the manager of the convenience store said that it was possible that the claimant had applied for a job there but that the store had not been hiring recently. In another recorded statement dated November 13, 1995, a secretary at the hardware store stated that the store was hiring in September 1995, that the claimant had applied for a job at the store, and that she did not know why the claimant wasn't hired. A salesman at the building supply store stated in a recorded statement that the store was hiring in September 1995, that the store received a lot of applications, and that there wasn't any way to verify whether the claimant had applied for a job. A person the claimant identified as an accountant at the employer stated in a recorded statement dated November 13, 1995, that the claimant had asked about his auto mechanic job "sometime back," but not within "the last couple of months"; that the claimant only had a light-duty release; and that the employer did not have any light-duty work.

The criteria for SIBS entitlement are set out in Section 408.142(a). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 130.104(a) (Rule 130.104(a)) provides that 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 by Rule 130.101, 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 hearing officer found that the claimant "sought employment commensurate with

his abilities, with six employers during the qualifying period [filing period] for the fifth compensable quarter," and that the claimant "made a good faith effort to obtain employment during the qualifying period [filing period]." These findings were appealed by the carrier in its response but, as we have previously determined, the response was not timely filed as an appeal. Thus, the findings on the good faith criterion stand unappealed and are final. With respect to the direct result criterion, the hearing officer made one finding which was "claimant's unemployment during the qualifying period was not a direct result of his impairment from the compensable injury." On the basis of that finding, the hearing officer concluded that the claimant is not entitled to SIBS for the fifth compensable quarter.

The claimant has the burden to prove his or her entitlement to SIBS. *See* Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. In her discussion of the evidence the hearing officer cites Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, and states that the claimant did not adequately address his impairment and its effects on his ability to obtain employment. In Appeal No. 93630, *supra*, we affirmed a hearing officer's decision that the employee's unemployment was not as a direct result of her impairment from her compensable injury. However, the facts of that case are clearly distinguishable from the facts of the instant case. In Appeal No. 93630, *supra*, the claimant did not offer any medical evidence regarding the severity of her injury or any evidence concerning any work restrictions from a doctor. In addition, the employee testified that she was capable of doing any kind of job with the only limitation being that she would have pain after three or four hours of standing or sitting, but that with alternating standing and sitting positions she could handle any job. The only mention of work restrictions was in the benefit review conference report which indicated that the employee had achieved MMI without restrictions. Furthermore, there was no evidence as to why the employee "did not return or seek to return to her position with the preinjury employer. . . ."

In Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993, we reversed a hearing officer's determination on the good faith criterion and remanded; however, in upholding the hearing officer's determination that the employee's underemployment was as a direct result of his impairment we stated that:

> We agree with the implicit determination (not specifically set out as a finding but necessary for the result reached) of the hearing officer that the evidence established that the claimant's unemployment or underemployment was a direct result of the impairment from the compensable injury. All of the medical evidence tends to support the fact that the claimant suffered a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury. Indeed, there has never been a question of various limitations being imposed on the claimant. And, the claimant's testimony is consistent with this as is the report of Dr. W. There is sufficient evidence of a direct linkage between what the claimant was earning at the time of his injury and the subsequent reduced

wage level resulting from that injury.

In a recent case, Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996, we reversed a hearing officer's determination that the employee's unemployment was not as a direct result of the impairment from the compensable injury and remanded. The hearing officer's finding that the employee had made a good faith effort to obtain employment commensurate with his ability to work was not timely appealed by the carrier. In remanding on the direct result criterion, we cited Texas Workers' Compensation Commission Appeal No. 950849, decided July 7, 1995. In that case we stated:

> The requirement that a claimant make a good faith search for employment, commensurate with the ability to work, and that his unemployment or underemployment be a "direct result" of the impairment, are two different criteria of eligibility, set out in Sections 408.142(a)(4) and 408.142(a)(3). We have previously stated, however, that application of these criteria should not lead to incongruous results. *See* Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. We do not believe that the "direct result" criteria was merely an alternative way to evaluate the job search. Although the Appeals Panel has quoted Sen. John Montford's observation that economic conditions, rather than impairment, are an example of something other than the injury that could be the direct cause of unemployment, we believe this refers to situations where the general economic conditions in the area impact all workers, rather than the fact that some of the prospective employers contacted by one person had no current openings.

We also noted in Appeal No. 952082, *supra*, that "direct result" does not require a claimant to prove that his impairment is the sole cause of unemployment or underemployment.

In the instant case, the hearing officer states in her discussion of the evidence on the direct result criterion that "speculation about potential employers motives is not enough." It appears that the hearing officer may not have evaluated the evidence the claimant presented on the direct result criterion in light of applicable Appeals Panel decisions such as Appeal No. 93559, Appeal No. 952082, Appeal No. 950849, *supra*, and cases cited therein. We reverse the hearing officer's decision and remand the case to the hearing officer for further consideration and development of the evidence on the direct result criterion for SIBS and for further findings of fact and conclusions of law on the

direct result criterion. The findings regarding a good faith job search are binding as they were not timely appealed.

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 Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING OPINION:

I concur in all that is written in the majority decision and would add the following observation. SIBS also compensates for "underemployment." It appears to me that where an injured employee cannot, because of his injury, return to his previous type of employment, and the types of jobs he is physically restricted to search for would constitute "underemployment" if obtained (fewer hours, less pay), then the status of unemployment during the good faith job search process is no less a direct result of the impairment than his or her underemployment would be.

Susan M. Kelley
Appeals Judge