

## APPEAL NO. 961122

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 14, 1996, a contested case hearing (CCH) was held in \_\_\_\_\_, Texas with (hearing officer) presiding as hearing officer. The issue(s) were:

1. is the compensable injury a producing cause of the Claimant's depression resulting in psychiatric treatment;
2. is the Claimant entitled to supplemental income benefits [SIBS] for the fourth compensable quarter;

The hearing officer determined that the claimant's compensable injury was a producing cause of the claimant's depression and resultant psychiatric care and that claimant is entitled to SIBS for the fourth compensable quarter.

Appellant, carrier, appeals on the grounds that numerous other stressors are the cause of claimant's depression, that the claimant's inability to work is not "a direct result of his compensable injury," and in any event even if the depression is a result of the compensable injury the inability to work is not "a direct result of the employee's impairment." Respondent requests affirmance.

### DECISION

We affirm in part and reverse and render in part.

It is undisputed that claimant had been employed as a truck driver by the employer, a large construction company. On [Date of Injury], claimant sustained a compensable back injury which ultimately required a laminectomy at the L3-4 level and subsequently a spinal fusion at the same level on June 7, 1993. A designated doctor certified maximum medical improvement (MMI) on March 17, 1994, with a 19% impairment rating (IR) based on the back injury; claimant had returned to work with the employer in January 1994 (before he was assessed as having reached MMI) in a light-duty position assisting the dispatcher/locator. The work of the dispatcher/locator was to dispatch trucks to various sites and track the location of various pieces of heavy equipment, sending that equipment where and when needed. Several months after beginning his duties as the assistant, the regular dispatcher/locator quit and claimant was assigned all the duties of that position. Uncontroverted testimony from both the claimant and carrier witnesses established that claimant's duties required him to work 10 to 12 hours a day, 5 1/2 days a week and that the work, while not physically demanding, was very stressful. Claimant had a 20-pound lifting restriction and had been told to periodically stand up and walk around. Whether claimant was allowed to

walk around is in dispute. Apparently, sometime in the summer of 1993, employer's management changed.

Claimant testified that he received physical therapy and other treatment after he returned to work but continued to have severe back pain that limited his activities. In a June 13, 1995, progress note, Dr. S notes claimant has "some depression." A July 11, 1995, progress note has an impression "Rule out development of significant depression related to chronic pain." Dr. S recommended claimant get "back to a more normal 40 hour week work schedule. . . ." An August 8, 1995, progress note notes delay in getting carrier approval and "the main concern is progressive disability and increasing depression despite our best efforts at . . . use of antidepressant agents." The medical records, and claimant's testimony, indicate that claimant became evermore severely depressed, wrote a note to his wife (indicating severe depression) and on November 4, 1995, was admitted to the psychiatric unit of a regional medical center by Dr. R. Claimant was discharged November 9, 1995.

A report dated December 14, 1995, a report by Dr. P, a doctor at the medical center, states:

More recently [claimant] developed severe depression which required inpatient evaluation and treatment by [Dr. R], Senior Staff, [medical center] psychiatrist. His depression is thought to be associated with his chronic low back pain and although improved he is still considered disabled from depression and unable to return to work.

Dr. G, another psychiatrist at the medical center, in a report dated February 16, 1996, stated:

I also felt it was important to treat him as an inpatient to address his chronic left sacroiliitis aggressively together with his depression in order to maximize his improvement, *i.e.*, I did not feel one problem would improve significantly without paying attention to the other. His back pain, secondary to history of work related injury appeared a strong contributor to his depressive symptoms and had failed intensive outpatient treatment as well.

Dr. P in a March 7, 1996, report stated that it was his opinion that claimant's depression was as a result of "his chronic unrelenting low back pain." Dr. R in a comment dated March 20, 1996, states:

I felt his depression was brought on by his chronic low back pain and his inability to continue full-time work. In my opinion, his low back

pain and his chronic pain syndrome precipitated and aggravated his depression.

Regarding claimant's ability to work, Dr. P, in a report dated May 9, 1996, wrote:

[Claimant] is unable to return to work because of his chronic low back pain due to work-related injury of July, 1992. He continues to experience back pain and is being followed by [Dr. S] for his chronic low back pain. He is being followed by [Dr. E], psychologist, [medical center] for his ongoing depression. There is no date of anticipated release of return to work at this time.

Dr. E, in a report dated may 10, 1996, wrote:

[Claimant] was seen by myself on 8/25/95 for psychological evaluation regarding his history of chronic pain. That evaluation indicated psychological factors affecting physical condition. The patient was seen for follow-up on 10/25/95 for individual psychotherapy and pain management.

\* \* \* \*

I believe his psychiatric admission for depression on 11/4/95 was warranted. I base this upon my post-hospitalization evaluation and subsequent follow-up in which recurrent bouts of acute depression have been noted, such as on 3/1/96 and 3/4/96.

Carrier requested a record review by Dr. FP who in a report dated April 21, 1996 summarized:

It is my opinion that the patient demonstrates some stressors and a psychological adjustment reaction which in my judgement is related to difficulties he has encountered on his job recently. However, it is also my opinion that these difficulties are not likely related to difficulties adjusting to his job situation with the changes imposed after his accident of July 27, 1992. I do not believe that the admission to the psychiatric hospital was warranted or necessary.

\* \* \* \*

First addressing the issue of whether claimant's compensable back injury was a producing cause of his depression and attendant psychiatric treatment, carrier points to other stressors, such as financial problems, frustration in dealing with carrier, changes in management, and claimant's stressful job as factors which caused claimant's psychiatric problems. Carrier cites specific instances and excerpts of various reports to

support its contention. While everything carrier alleges is contained in the record, we note the medical evidence from Dr. S, Dr. R, Dr. P, Dr. G and Dr. E all established a causal connection that claimant's compensable back injury and chronic pain, at least in part, caused claimant's depression. Opposed to this medical evidence is Dr. FP's record review and carrier's argument that all of claimant's other stress factors caused claimant's depression rather than the work injury. At best, we find the evidence on this point in conflict. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is the hearing officer's duty to resolve inconsistencies and contradictions in the evidence. *Garza v. Commercial Insurance Co. of Newark, New Jersey*, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Consequently, we find that the hearing officer could well accept the opinions of five doctors (including a Ph.D psychologist) over the opinion of carrier's psychologist and argument. Accordingly, we affirm the hearing officer's determinations that claimant's compensable back injury was a producing cause of his depression as being supported by the medical evidence.

On the second issue of whether claimant is entitled to SIBS, Section 408.142 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the average weekly wage (AWW) as a direct result of the impairment, and (2) had made a good faith effort to obtain employment commensurate with his or her ability to work. See also Tex. W.C. Comm'n, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102.(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994. Documentary evidence indicates that the filing period for the fourth compensable quarter was from October 20, 1995, through January 18, 1996. It is undisputed that claimant worked through November 4, 1995. After November 4, claimant's treating doctors took claimant off work (and in fact he was hospitalized for a portion of that time) until after the end of the filing period. The hearing officer determined that "Claimant was not obligated to seek employment since he had no ability to work" and that the "Claimant's inability to work was due to his compensable injury." (The hearing officer also determined that carrier was entitled to a credit for the salary earned by claimant, during the "qualifying" period, but as this is not an appealed issue, we will not address it further).

As noted previously in this opinion, carrier first argues that claimant's depression is not related to the injury, and in the alternative argues that even assuming the depression is related to the injury, claimant's unemployability, during the filing period, was not "the direct result of claimant's impairment." Carrier cites the IR given to claimant and points out that the impairment is based solely on the compensable back injury. Carrier contends that the "depression is not a part of the impairment that the claimant has sustained as a result of this injury [and] it cannot be the basis upon which to entitle [claimant] to SIBS." Carrier cites *Texas Employers Insurance Association v. Wilson*, 522 S.W.2d, 192, 195 (Texas 1975) and Texas Workers' Compensation Commission Appeal No. 94591, decided June 22, 1994. We note that those cases involve extent of injury and do not deal with whether a subsequent mental condition arising from the compensable injury can be basis for SIBS, based on a total inability to work due to the mental condition, as opposed to the rated impairment from the original compensable injury.

Carrier, in its appeal, suggests that the hearing officer is linking claimant's inability to work with his injury "as opposed to his impairment." Both in his discussion and in Finding of Fact No. 10, the hearing officer states that claimant's "inability to work was due to his compensable injury." Section 408.142(a)(1) provides that to be entitled to SIBS, the employee must "(1) [have] an impairment rating of 15 percent . . . from the compensable injury; (2) has not returned to work or has returned to work earning less than 80 percent [of his preinjury wage] as a *direct result of the employee's impairment*." (Emphasis added). It is not the compensable injury that determines eligibility for SIBS, but the employee's 15% or more impairment. Consequently the inability to work must be from the impairment, not just the compensable injury, which may in some circumstances be broader than the impairment.

In Texas Workers' Compensation Commission Appeal No. 960451, decided April 8, 1996, this appeals judge stated that "Entitlement to SIBS is based on the rated impairment of the compensable injury" giving as a reason "that to hold otherwise would lead to endless litigation on each quarter of SIBS were a claimant allowed to allege new and different sequela from the original injury for each quarter." In Texas Workers' Compensation Appeal No. 960541, decided May 1, 1996, the chief appeals judge cited Appeal No. 960451, *supra*, stating:

In Appeal No. 960451, *supra*, we stated that the entitlement to SIBS is based on the rate of impairment of the compensable injury. In that case the compensable injury was a back injury and claimant argued that a psychiatric condition was related to his injury and consequently he could not work at all. We affirm the disallowance of SIBS. That case supports

our reversal here on the direct result requirement for qualifying for SIBS in the quarters in issue.

Those cases were both cited, and distinguished, in Texas Workers' Compensation Appeal No. 960810, decided June 10, 1996, which stated:

We are more troubled, however, by the finding that the claimant's unemployment "was a direct result of his impairment." Finding of Fact No. 9. As we observed in Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, this is the second and independent part of a two-part test to establish entitlement to SIBS. We have also pointed out that "direct result" may be established with medical documentation of the lasting effects of a serious injury and no ability to perform the type of work at the job where the injury occurred. See Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993. Our concern in this case is that Dr. W diagnosed and gave an IR only to a cervical injury and that the entire 20% IR was for abnormal cervical range of motion.

\* \* \* \*

Contrary to the suggestion in Judge Stephens' concurrence in this case, we find ample Appeals Panel precedent for the proposition that entitlement to SIBS must be based on the rated impairment from a compensable injury. See Texas Workers' Compensation Commission Appeal No. 960541, decided May 1, 1995; Texas Workers' Compensation Commission Appeal No. 960451, decided April 8, 1996. Under these circumstances, we conclude that hearing officer's finding of fact that the claimant's unemployment is the direct result of his impairment is against the great weight and preponderance on the evidence.

Judge Stephens in her concurring opinion stated:

However, I do not agree that a claimant may not obtain SIBS if he cannot work at all due to impairment that is not rated if the impairment is clearly from the compensable injury. . . . Section 408.142(a)(2) speaks of "impairment," not rated impairment.

\* \* \* \*

Judge Ernst cites two cases for the proposition that "impairment" means "rated impairment": Texas Workers' Compensation Commission Appeal No. 960541, decided May 1, 1995 and Texas Workers' Compensation Commission Appeal No. 960451, decided April 8, 1996. These cases are distinguishable. Neither cited cases involves

an unrated part of an injury that has been held to be part of the compensable injury. In fact, both cases emphasize that very distinguishing fact. The statement in Appeal No. 960451 that "entitlement to SIBS is based on the rated impairment," was made, of course, regarding the facts of that case. I believe that statement is too broad and I do not agree with it for the reasons stated above.

Section 408.142(a)(1) speaks in terms of eligibility for SIBS being based on "an [IR] of 15 percent or more . . . from the compensable injury." The following section, Section 408.142(a)(2) requires the unemployability/underemployability to be "a direct result of the employee's impairment." I believe that these sections must be read together rather than separately and completely independent from each other. Section 408.142(a)(1) requires an IR (*i.e.* a rated impairment) of more than 15% and while (a)(2) does not mention a "rated impairment," in my opinion, the impairment in that subsection refers to the IR (rated impairment) in (a)(1).

Consequently, based on the consensus of opinion in Appeal Nos. 960451, 960541, and 960810, we reverse the hearing officer's decision on the entitlement to SIBS in that, clearly, the rated impairment was the back injury and that claimant's unemployability/ underemployability eligibility for SIBS must be based on the rated back injury rather than the mental condition. In this case, clearly, the unemployability/underemployability was due to the depression. We render a new decision that claimant is not entitled to SIBS for the fourth compensable quarter. We do note that our affirmance that the subsequent depression and mental condition was based on the compensable injury establishes an entitlement for lifetime medical benefits due to the entire injury. Section 408.021.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

CONCUR IN THE RESULT:

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Robert W. Potts  
Appeals Judge