

APPEAL NO. 961689
FILED OCTOBER 10, 1996

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case returns on appeal from a remand ordered in Texas Workers' Compensation Commission Appeal No. 960684, decided May 20, 1996. The issue involved the eligibility of the appellant, (claimant), for the second compensable quarter of supplemental income benefits (SIBS). The hearing officer, who decided the case on existing evidence and did not hold an additional hearing. The same result was reached as in the first decision: that the claimant failed to prove that his unemployment was a direct result of his impairment, notwithstanding that he had proven that he made a good faith search for employment commensurate with his ability to work and that he had proven that he continues to have significant lasting effects of his injury. Claimant appeals this determination, arguing that the hearing officer has been consciously indifferent to the evidence and to previous Appeals Panel decisions on his claims for SIBS, including Texas Workers' Compensation Commission Appeal No. 960873, decided June 18, 1996. The employer and carrier is a self-ensured governmental entity (City) and has filed no response to the appeal.

DECISION

Reversed and rendered.

Claimant sustained a back injury during an automobile accident, on _____, while employed as risk manager for the (City). He applied for employment during the qualifying period in issue, which was August 16 through November 14, 1995. Although (City) asserts, in its brief submitted on remand to the hearing officer, that claimant only searched for risk management positions, essentially every one of the applications for this quarter indicates interest in positions not only in risk management but in planning, public works, management, streets, and insurance coordination. A willingness to work temporary or permanent jobs was indicated by claimant in the applications. The hearing officer found that claimant placed eight applications during the filing period.

Pertinent to the filing period in question, the claimant's treating doctor, Dr. S, stated that claimant had two herniated cervical discs, and a herniated lumbar disc, all of which caused chronic pain. He stated that claimant could not work more than four hours a day, 20 hours a week, and had limitations on the ability to stoop and bend, and a 10 pound lifting limit. A second-hand reference in a report from a vocational counsellor, Mr. F, indicated that a Dr. K opined in July 1995 that claimant could work eight hours a day by alternately standing and sitting, and that he had a 40-pound lifting limit.

The hearing officer has correctly pointed out that the provisions regarding good faith job search and direct result are two different provisions that must each be satisfied. This is what the Appeals Panel has emphasized. The hearing officer agreed that claimant's search for part-time employment was a good faith search, and she gave credence to Dr.

S's restrictions in her findings of fact rather than those of Dr. K that are alluded to by the vocational counsellor. What concerns us is that the hearing officer appears to still require express, direct evidence that claimant did not get a job because of his impairment. The closing paragraph of the discussion states:

The Appeals Panel has held that medical evidence of significant lasting effects of the claimant's injury and his inability to return to his former employment may provide evidence of direct result. Yet, a direction that such evidence will always prove direct result was not made. In this case, claimant was able to prove only part of the above stated holding: that he continues to have significant lasting effects of his compensable injury. Claimant testified he could return to the position of manager because such work would allow him the flexibility to work within his restrictions. Thus the circumstantial evidence was not sufficient to overcome the doubt that claimant's unemployment was a direct result of his impairment. Although there was insufficient evidence to establish precisely what caused claimant's unemployment if not his impairment, this void does not compel a finding that claimant's unemployment was the direct result of his impairment. The Act does not provide that claimant's unemployment or underemployment will be presumed to be a direct result of his impairment unless the carrier can prove that otherwise.

We agree that our holdings in the area of SIBS are not checklists that are to be strictly applied to the facts of each case, nor have we established a presumption or a two-pronged test for direct result. However, we are concerned that the hearing officer may have applied an erroneous burden of proof by indicating that claimant did not produce evidence "to overcome the doubt" of direct result. A claimant is not required to prove conclusively or beyond a reasonable doubt that his unemployment or underemployment results from his impairment. In the ordinary course of applying for positions, any job seeker will risk losing a job to someone else with more qualifications, or someone who interviews better. In that particular situation, those may be the reasons that the specific job was not attained. However, this does not in and of itself defeat the "direct result" link to the impairment of the overall status of unemployment or underemployment. See Texas Workers' Compensation Commission Appeal No. 951019, decided August 4, 1995. This is one reason why the Appeals Panel suggested that the direct result provision should be analyzed on the basis of circumstantial evidence showing that there is medical evidence of lasting effects of the injury, which the hearing officer agrees was present in this case, as well as the absence of any intervening injury or illness. The great weight and preponderance of the evidence for this quarter is against the hearing officer's determination that claimant's unemployment for the second quarter did not directly result from his impairment. That great weight includes the restrictions by Dr. D, the nature of the injuries, the lack of an intervening factor, and the claimant's inability to find a job for which he was qualified. There appears to be little that is substantially different from the prior quarter, which we reversed and rendered in Texas Workers' Compensation Commission Appeal No. 960873, *supra*.

We pointed out a possible anomaly in the hearing officer's reasoning on direct result that might cause more harsh consideration of claimant's SIBS eligibility in his present state of unemployment than if he went back to part-time work. The hearing officer has dismissed the concern by noting that it would be the burden of claimant to prove that he was underemployed (earning less than 80% of his preinjury wage) and that there was no evidence to support underemployment. Our concern about the apparent anomaly remains.

We emphasize that an injured employee who maintains the same job search pattern for several quarters after the end of the impairment period, with no increase in the number of contacts made or no broadening of the types of jobs sought and who utterly rebuffs the assistance of a vocational counsellor, may fail to satisfy a "good faith" job search standard that was met in earlier quarters. We reverse and render a decision that claimant was eligible for the second quarter of SIBS on the "direct result" criterion.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge