APPEAL NO. 961981
FILED NOVEMBER 18, 1996

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On September 6, 1996, a contested case hearing was held. With respect to the single issue before him, the hearing officer determined that claimant was entitled to supplemental income benefits (SIBS) for the eighth compensable quarter and ordered carrier to pay the appropriate income benefits and "to pay any fees approved for Claimant's attorney for services regarding such [SIBS] disputes."

Appellant, a self-insured governmental entity, referred to as employer or carrier, as appropriate, contends that claimant has failed to meet the good faith job search and direct result requirements of the 1989 Act (in essence arguing that the hearing officer's determination is against the great weight and preponderance of the evidence on these factual points) and that, as a matter of law since this CCH "did not concern the initial determination of SIBS by the Commission" the hearing officer incorrectly ordered carrier to pay the claimant's attorney's fee for the eighth compensable quarter. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds to the points raised by the carrier and requests affirmance.

DECISION

Affirmed.

Section 408.143 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 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* 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 "[f]iling period." Under Rule 130.101, "[f]iling 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.

Among the relevant stipulations are that claimant had a 17% IR and that claimant had not commuted any portion of his impairment income benefits (IIBS). The parties agreed that the filing period for the eighth compensable quarter ran from December 29, 1995, to March 28, 1996, and that the eighth compensable quarter began on March 29, 1996, and ended June 27, 1996.

Claimant is 59 years old, does not have a high school education and has worked as

a mechanic all of his life. Claimant sustained a right shoulder and left index finger injury and has been released to light duty. His job restrictions included "no lifting, pushing, pulling or carrying more than 20 pounds. No work above chest level."

Claimant testified, and the carrier does not disagree, that during the filing period in question claimant worked 22 hours a week, at $8.11 an hour, as a school district bus driver. In addition, claimant testified that he sought employment in a wide variety of fields, including dishwasher, in a tire shop, as a salesman, and as a security guard (where he apparently did not pass a psychological test). Claimant listed ten potential employers on his Statement of Employment Status (TWCC-52) and submitted "Job Search" forms with notations of multiple inquiries on 13 positions. In addition, claimant testified that he checked the newspaper want ads and made numerous other job inquiries not listed on the TWCC-52 or on job search forms. Claimant testified that he did not know why he was not hired, and conceded that some potential employers were not hiring and that some other factors such as age could have been a consideration in his failure to obtain additional employment. Claimant's attorney, in argument, undisputed by carrier, pointed out that carrier had disputed each quarter of SIBS on basically the same grounds. In any event the hearing officer, in his statement of evidence recited:

> In the filing period for the eighth compensable quarter, Claimant worked . . . as a bus driver, earning less than 80 percent of his [AWW]. Claimant introduced into evidence job search forms documenting that, during the filing period for the eighth compensable quarter, he made application at thirteen different businesses looking for additional employment within his restrictions.

The hearing officer determined that claimant had made a good faith effort to seek employment commensurate with his ability to work and that his underemployment was a direct result of his impairment.

Carrier, in its appeal brief, sets out the statutory requirements for SIBS, recites the facts from its perspective, and argues "there is no evidence [in the alternative insufficient evidence] that any employer refused to hire [claimant] as a 'direct result' of his impairment," reciting some nine reasons for its contention. The Appeals Panel has addressed this issue a number of times and has previously stated that the direct result criterion was not intended as another method to evaluate the job search requirement. Texas Workers' Compensation Commission Appeal No. 960165, decided March 7, 1996 (citing Texas Workers' Compensation Commission Appeal No. 950849, decided July 7, 1995). In addition, we have consistently stated that a claimant need not establish that his impairment is the only cause of his or her unemployment or underemployment in order to satisfy the direct result criterion; rather, a claimant need only establish that his or her impairment is a cause of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996; Texas Workers' Compensation Commission Appeal No. 960895, decided June 27, 1996; Texas Workers' Compensation Commission Appeal No. 960092, decided February 26, 1996; Texas Workers' Compensation Commission Appeal No. 941649, decided January 26, 1995. Finally, we have previously noted that a

finding that the claimant's unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of injury." Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996; Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995; Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995.

Regarding carrier's assertions that claimant has not proved the direct result "prong" because he does not know why he was not hired, the Appeals Panel has held that inability 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. We have before stated that an employer is highly unlikely, in this day of possible liability under the Americans With Disabilities Act, to state, much less put in writing, that he did not hire an injured worker because of his impairment. Texas Workers' Compensation Commission Appeal No. 950298, decided April 10, 1995. This is one reason why the Appeals Panel has advised that the direct result criterion be analyzed on the basis of circumstantial evidence, including medical evidence of lasting effects of the injury and the absence of any intervening injury or illness. Texas Workers' Compensation Commission Appeal No. 961776, decided October 23, 1996.

Carrier also asserts that claimant's job search efforts did not amount to good faith because he applied with employers that were "not hiring" or for positions for which he either was not qualified or that he could not physically do. However, whether claimant put forth a good faith effort to obtain employment commensurate with his ability to work is generally a fact question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evident. As such, it is for the hearing officer to resolve conflicts and inconsistences in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer determined that by applying with some 13 employers during the filing period for the eighth quarter, the claimant had demonstrated that he had made a good faith job search in the filing period. Our review of the record does not demonstrate that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for reversing it on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

It is carrier's argument that the hearing officer's decision on attorney's fees is wrong, as a matter of law, because the "hearing did not concern the initial determination of SIBS by the Commission, but involves the subsequent determination for the 8th quarter SIBS." Carrier states the first four quarters of SIBS, decided in claimant's favor, were appealed to the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 951891, decided December 21, 1995. A review of that case, however, reveals that carrier's appeal

was untimely, that the Appeals Panel did not have jurisdiction and that the hearing officer's decision had become final. The Appeals Panel did not address the merits of that case. Carrier does cite Texas Workers' Compensation Commission Appeal No. 950534, decided May 19, 1995. Section 408.147(c) provides that if a carrier disputes a Commission determination that an employee is entitled to SIBS and the employee prevails on any disputed issue, the carrier is liable for reasonable and necessary attorney's fees incurred by the employee. Attorney's fees under Section 408.147 are not subject to Sections 408.221(b), (e) and (h). The Appeals Panel had interpreted that section to not be limited to the initial determination of the entitlement to SIBS. The Appeals Panel had rejected a similar argument in Texas Workers' Compensation Commission Appeal No. 950534, decided May 19, 1995, when we upheld a hearing officer's order for a carrier to pay a claimant's attorney's fees under Section 408.147(c). The hearing officer had determined that the claimant in that case was entitled to SIBS for the fourth quarter. In Texas Workers' Compensation Commission Appeal No. 951045, decided August 8, 1995, we upheld a hearing officer's order for the carrier to pay a claimant's attorney's fees where the carrier disputed the claimant's entitlement to SIBS for the fourth quarter and we stated that "[u]nder Section 408.147(c), a carrier is liable for reasonable and necessary attorney's fees incurred by the claimant as a result of the carrier's dispute of his or her SIBS entitlement." *See also* Texas Workers' Compensation Commission Appeal No. 960228, decided March 20, 1996, in which we held that a claimant's attorney's fees were to be paid by the carrier where the claimant was found to be entitled to SIBS for the fourth quarter, and Texas Workers' Compensation Commission Appeal No. 960408, decided April 12, 1996, where we held that a claimant's attorney's fees were to be paid by the carrier where it was found that the claimant was entitled to SIBS for the sixth quarter. A more recent unpublished case, Texas Workers' Compensation Commission Appeal No. 961924, decided November 14, 1996, reaffirmed our holding in Appeal No. 950534, stating "we are disinclined to reconsider our decision in light of our belief that the 1989 Act envisions that a carrier 'will be liable for reasonable and necessary attorney's fees incurred by the claimant as a result of the carrier's dispute of his or her SIBS entitlement'." Appeal No. 960228, *supra.*; Appeal No. 951045, *supra*. We believe that Section 408.147(c) is applicable whenever a carrier disputes entitlement to SIBS and the Commission (the hearing officer) determines that the employee should prevail on the entitlement to SIBS; the carrier will be liable for reasonable and necessary attorney fees for any quarter where carrier had disputed that entitlement and claimant has prevailed. We believe that to hold otherwise would negate the purpose and intent of Section 408.147(c) and encourage carriers to dispute each and every quarter of SIBS after the first quarter. We do not believe the 1989 Act or Commission Rules require such a narrow reading to limit the potential payment of reasonable and necessary attorney's fees to one, and only one quarter, that being the first quarter.

Accordingly, we affirm the hearing officer's decision and order.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Judy L. Stephens
Appeals Judge