APPEAL NO. 980265
FILED MARCH 26, 1998

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 31, 1997, a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding as hearing officer. With respect to the only issue before her, the hearing officer determined that respondent (claimant) was entitled to supplemental income benefits (SIBS) for the first compensable quarter, having made a good faith effort to seek employment and that claimant's unemployment was a direct result of his impairment.

The appellant (self-insured) appealed, contending that claimant was "retired," that claimant had quit a full-time job "to return to school," that claimant was physically fit enough to win a golf tournament and that claimant was capable of 'work at a medium work-level" according to a functional capacity evaluation (FCE). The self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Reversed and we render a new decision that claimant is not entitled to SIBS for the first compensable quarter.

Pursuant to Section 408.142, an employee is entitled to SIBS if, on the expiration of the impairment income benefits (IIBS) period, the employee: has an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter based on criteria met by the injured employee during the prior 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 parties stipulated that claimant sustained a compensable (low back) injury on _____, reached maximum medical improvement (MMI) on August 20, 1996, with a 17% IR, did not commute IIBS and that the filing period for the first compensable quarter was from May 15 through August 12, 1997.

Claimant testified that he is 56 years old, that he is retired from the (employer), and that he was a bus driver for the self-insured when he was injured. Claimant testified that he has not had surgery for his injury, that surgery is not contemplated and that he currently (and apparently during the filing period) had constant pain in his lower

back and was unable to sit for more than 30-45 minutes at a time. An FCE was performed on May 12, 1997 (just before the applicable filing period), and an explanatory report dated May 13, 1997, released claimant to medium-duty work, eight hours a day, with restrictions of no lifting to exceed 40 pounds, constant seating limited to three hours and limited stooping and crouching. Claimant testified that his doctor returned him to medium duty in September 1996.

Claimant apparently returned to work for the self-insured even before reaching MMI because on April 1, 1996, he submitted a resignation, effective April 8th, "due to an offer of employment with another company." No mention is made that claimant was unable to pursue what was apparently his preinjury job. Claimant testified, at the CCH, that he left because the other bus company (referred to as bus company), had better career opportunities. Claimant began work for the bus company in May 1996. Claimant testified that the bus company assigned him a route that took about 10½ hours to drive (apparently one way) and that he was unable to continue driving for the bus company because of back pain. At some point, the bus company apparently placed claimant in an off-work status. Claimant testified that he began a work study program through the Veteran's Administration (VA) in January 1997. Initially, apparently, claimant was only going to school four hours a week, but apparently was still in an off-work status with the bus company. In February 1997 claimant, and a partner, entered, and won, a "best ball" golf tournament. Claimant explained that golf was good therapy for his back, that he used a golf cart and that he had a very good partner. Apparently, the bus company told claimant that they could no longer keep him in an off-work status while he was playing golf. Claimant subsequently resigned from the bus company in March 1997 and in subsequent employment applications stated that the reason for leaving the bus company was "To return to school." At sometime claimant became a "full time" student in the VA work study program, a water technology program, which claimant certified he could physically perform upon completion.

During the filing period at issue, claimant was going to school and submitted a list off 22 job contacts, including driving, office helper, parts runner, telephone helper, etc., for which he had applied. Claimant conceded that during the applicable time period he was only looking for part-time work as his schooling, to include driving to and from school, took up to six hours a day, and he was not able to go to school and hold a full-time job. The hearing officer, after summarizing some of the testimony, determined that claimant made "a good faith effort to find employment" and that claimant's "unemployment/ underemployment . . . was a direct result of the impairment . . . ."

First, we are unpersuaded by the self-insured's argument that claimant was, or considered himself, "retired," because it is clear that while claimant was retired from the National Park Service, claimant was still employed to supplement his retirement annuity. We distinguish this case from situations where an employee voluntarily retires from the work force. We also reject the self-insured's broadly stated notion that an employee in a retraining program is required to seek full-time outside employment. *See* Texas Workers' Compensation Commission Appeal No. 94119, decided March 14, 1994. In Texas Workers' Compensation Commission Appeal No. 960895, decided June 27, 1996, cited by the self-insured, the Appeals Panel cited Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993, and quoted:

> We in no way state a requirement that an injured employee who is cooperating with TRC [Texas Rehabilitation Commission] to assist him in

> alleviating or overcoming the effects of an on-the-job injury is required, nonetheless, to seek out full or any particular level of employment to be entitled to SIBS. Rather, all the factors affecting the qualifications for SIBS must be considered under the particular circumstances of the case. [Citations omitted.]

We are mindful that the cited cases can be distinguished from the instant case on the basis that the cited cases involved rehabilitation under TRC auspices and the present case involves vocational rehabilitation under VA sponsorship. We point out that this case is not a total inability to work case, but rather a case where claimant clearly, by his own admission and FCE reports, has an ability to do at least medium-level work.

The basis of our reversal in this case is that claimant apparently returned to work with the employer and, on April 1, 1996, submitted his resignation, not because he was unable to do the work or because of his injury, but because the other bus company offered better career opportunities. Only after claimant changed jobs did he decide that the longer routes of the bus company bothered his back. At that point, claimant took some sort of off-duty status (apparently drawing IIBS), enrolled in school and played in the February golf tournament, without apparently any reference to his back condition. Claimant then resigned from the bus company "to return to school" without any reference to his back injury or impairment. These circumstances appear to be similar to Appeal No. 960589, *supra*, a case where a teacher's aide resigned her position to accept a scholarship to return to college full time exclusive of the TRC retraining program. Claimant in Appeal No. 960895 made job searches during semester breaks, but the hearing officer determined that did not constitute a good faith effort to obtain employment and the Appeals Panel affirmed. Similarly, in Texas Workers' Compensation Commission Appeal No. 960999, decided July 10, 1996, the Appeals Panel reversed and rendered a decision against SIBS entitlement because the evidence compellingly showed that the underemployment was due to the employee's voluntary student status (he had voluntarily left light-duty employment) and was not a direct result of the impairment.

Under the circumstances of the instant case, where claimant resigned from not one, but two full-time jobs for stated reasons unassociated with his injury and impairment, we cannot agree, on the basis of the evidence presented here, that claimant has shown that his unemployment is a direct result of his impairment. We find the hearing officer's determination on that point to be so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Accordingly, we reverse the hearing officer's decision and render a new decision that claimant is not entitled to SIBS for the first compensable quarter, as his unemployment is not a direct result of his impairment, but rather the result of changing jobs for reasons unassociated with his impairment and that his unemployment was the result of his voluntary student status under a VA program, having voluntarily left prior full-time employment.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge