APPEAL NO. 990163

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 11, 1999. She determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fourth through eighth quarters and that respondent (carrier) is relieved of liability for SIBS for the fourth through sixth quarters and part of the seventh quarter because claimant was late in filing her Statements of Employment Status (TWCC-52s). Claimant appeals, contending that she proved that she is entitled to SIBS for the fourth through eighth quarters and that carrier is liable for part of the seventh quarter and all of the eighth quarter. Claimant did not appeal the determinations regarding the late filing of her TWCC-52s for the fourth through seventh quarters. The hearing officer apparently made a good faith determination in claimant's favor regarding all five quarters, determining that claimant was employed "commensurate with her ability to work." Neither party appealed the good faith determination in claimant's favor. Carrier noted that the Appeals Panel should not consider evidence submitted by claimant for the first time on appeal but responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and remand.

This decision concerns only the direct result criterion. We construe claimant's appeal as a challenge to the direct result finding in this case. Claimant contends that she established that she is entitled to SIBS for the fourth through eighth quarters and that carrier is liable for part of the seventh quarter and all of the eighth quarter.

The parties stipulated that: (1) claimant sustained a compensable injury on _____; (2) claimant's impairment rating (IR) is 19%; and (3) claimant did not elect to commute her impairment income benefits (IIBS). The filing periods for the fourth through sixth quarters ran from August 23, 1997, to May 22, 1998. The filing period for the seventh quarter ran from May 23 to August 21, 1998. The filing period for the eighth quarter was from August 22 to November 20, 1998. Claimant filed her TWCC-52s for the fourth through sixth quarters after the quarters had already ended. Claimant filed her TWCC-52 for the seventh quarter about 60 days after the quarter began, on October 20, 1998.

Claimant testified that she sustained a compensable back and hip injury in 1993 while working as a receptionist and that she choose not to have surgery for her injury. She said she has continuing problems with sitting and driving for long periods of time. Claimant testified that she thinks she is able to work as a receptionist as long as she does not have to do any prolonged sitting. Claimant said that since 1995 she and her husband have operated a pet shop that features birds and supplies for bird owners and breeders and that she began working there full time in October 1997, which was during the filing period for the fourth quarter. She testified that they have placed several ads promoting the business and

that the sales have increased over time. She said that she and her husband split the duties for the pet shop, that her husband does the cleaning, most of the feeding, the heavy work, and the bookkeeping, while she helps maintain the birds and works in the store doing sales. She said she spends over 40 hours per week working at the pet shop. Claimant testified that her half of the gross income from the store for each quarter was: (1) fourth quarter, $1,263.00; (2) fifth quarter, $788.45; (3) sixth quarter, $2,139.00; (4) seventh quarter, $1,187.50.00; and (5) eighth quarter, $2,169.74.

An operative report dated January 17, 1996, states that claimant underwent injections for "chronic recurrent lumbar spondylosis." A January 19, 1996, report from Dr. S, the designated doctor, states that: (1) driving increases claimant's pain after about 20 minutes; (2) claimant is able to do housework only "very carefully"; (3) claimant has constant lumbosacral pain, discogenic pain, and intermittent leg pain; (4) claimant is status "post Chymopapain discectomy"; (5) claimant has a probable right rotator cuff injury from doing prone push ups; (6) claimant's sensory testing shows very slight decrease "in the S1 on the left"; and (7) claimant's Waddell testing was unremarkable. The record contains a work release from Dr. N dated April 15, 1996, that states that claimant may work half days for one month, "then full days." Claimant testified that she underwent injections in January 1996 and that, in October 1996, she returned to work as a receptionist for her employer, but was terminated. A September 1996 medical record from Dr. N states:

> Apparently there was some misunderstanding on [claimant's employer's] part in regards to her restrictions. I think that she should be able to handle a job as a receptionist quite well as long as she is allowed to stand up for at least 10 to 15 minutes every hour. In other words, she should not do any continuous sitting for more than 45 minutes at a time. I think this will keep her going and keep things well under control. In regards to her therapy I have asked that she start again with her pool therapy which she stopped for a while.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the IIBS period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBS; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Self-employment has been recognized as a valid way to show an attempt in good faith to obtain employment. We have indicated before that a claimant is not required to seek employment only from third parties versus self-employment, in order to qualify for

SIBS, so long as good faith efforts to drum up business are demonstrated. *See* Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994; *see also* Texas Workers' Compensation Commission Appeal No. 961291, decided August 15, 1996.

In this case, the hearing officer determined that claimant did not meet her burden to prove the direct result criterion. The hearing officer noted that claimant was underemployed working within her restrictions, and said:

> The testimony and medical evidence do support claimant's position that she suffered a serious injury with lasting effects . . . . However, she has not shown, by a preponderance of the evidence, that she can no longer reasonably perform the duties of [her] previous job, e.g., secretarial/ receptionist duties. Claimant has not shown that she can no longer perform at the same capacity level as she performed prior to her injury. While her self-employment does accommodate her injury, it has not been shown that she would not be able to perform secretarial/receptionist duties within her doctor's restrictions . . . . Claimant has not met her burden of showing that she was underemployed during the filing period as a direct result of her impairment . . . . [Claimant's underemployment is] the result of claimant's decision to undertake a self-employment business venture; and is not the result of her impairment . . . . It is believed that claimant's self-employment venture is a sound one and is within her restrictions. She has made efforts to build up the business and has shown an increase in income over the periods.

In Appeal No. 982993, *supra*, we discussed a similar situation where the claimant was released to return to his former job doing sedentary work. We discussed whether a claimant who has been given a full-duty release to return to his or her former *sedentary* job, and yet who *also has continuing work restrictions*, may satisfy the direct result criterion for SIBS. In that case, we said:

> [D]uring the filing period for the third quarter, the claimant *was physically able* to return to his former employment: a sedentary job as an electronics technician. The Appeals Panel has stated that a hearing officer's direct result determination may be sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the filing period, *"he could not reasonably perform the type of work being done at the time of the injury."* Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993. However, while this is an accurate statement of the law, it is not necessarily true that if a claimant is physically able to do his former work, then, as a matter of law, he *cannot* establish that his unemployment is a direct result of his impairment. [Footnotes omitted.] [Emphasis added.]

We further said:

> When a claimant has work restrictions imposed after a compensable injury, this, in effect, will narrow the field regarding the number and types of jobs available to that claimant. A claimant who was injured at a sedentary job should not have a more difficult time proving direct result than a claimant who sustained an injury while doing a heavy job. Under the facts of this case, the focus should not be solely on what type of job the claimant had before or on whether the claimant is physically able to perform that old job. Instead, one must consider (1) why was the claimant unemployed during the filing period and (2) did the impairment affect or impact claimant's unemployment or underemployment situation.
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> The claimant in this case was working at the time of his 1995 compensable injury and did not have the restrictions he has now. He indicated that, had he not been injured, he would still be employed with his former employer. There is evidence that claimant had some work restrictions when he was working/making his good faith job search during the filing period in question. It must be considered whether work restrictions would generally change or limit the type and number of jobs that claimant looked for or was physically able to do. It can be assumed that a worker with restrictions has fewer options available to him than a worker with no restrictions. Therefore, if there are job restrictions due to impairment from a compensable injury, then a hearing officer should consider whether any unemployment could be at least a direct result of the impairment from the compensable injury. A claimant need only prove that the unemployment or underemployment is a direct result of the impairment, but need not prove that it is the *sole cause* of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996. [Emphasis in original.]

* * * *

In that case, the Appeals Panel noted that there was evidence that that claimant had continuing work restrictions but that there was no finding of fact regarding whether that claimant had any work restrictions during the filing period. The Appeals Panel reversed the hearing officer's direct result determination and remanded that case for reconsideration of the direct result determination.

In the case now before us, we must remand for reconsideration of the direct result determination for the same reason. We remand for the hearing officer to reconsider the SIBS/direct result determinations considering the work restrictions noted by the hearing officer in her decision and order and the cases and discussion set forth in this appeals decision.

Regarding the evidence that was attached to claimant's brief, we note that we do not normally consider new evidence for the first time on appeal. We may, however, in very

limited circumstances, remand a case when new evidence is presented if that evidence came to the party's knowledge after the CCH, is not cumulative of the evidence presented, it was not through lack of diligence that the evidence was not presented at the CCH for the hearing officer to consider, and if the evidence is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. In this case, the documents were dated before the date of the CCH, therefore claimant could have obtained them at an earlier time, and there is no indication that this evidence is so material that it would probably have produced a different result. We decline to consider the evidence submitted on behalf of the claimant for the first time on appeal.

We reverse the hearing officer's determinations regarding direct result and remand for further proceedings consistent with this decision. 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 Commission Appeal No. 92642, decided January 20, 1993.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

CONCUR IN RESULT:

_____
Robert W. Potts
Appeals Judge