

APPEAL NO. 990446

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 20, 1999. The appellant (claimant) and the respondent (carrier) stipulated that the claimant sustained a compensable injury on \_\_\_\_\_; that he reached maximum medical improvement on January 13, 1997, with a 19% impairment rating; and that the filing period for the fourth quarter for supplemental income benefits (SIBS) began on August 18, 1998, and ended on November 16, 1998. The hearing officer made the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

9. During the filing period the Claimant did not return to work, because he underwent a two-level back surgery on June 18, 1998 and did not recover from the surgery as originally scheduled.
10. On July 14, 1998, the Claimant contacted Texas Rehabilitation Commission (TRC) and was not offered assistance because he had not been released to go back to work.
11. The main reason for Claimant's limited ability to work during the filing period was severe pain and back problems associated with the condition leading to the surgery on June 18, 1998.
12. The Claimant sustained very serious injuries to his right shoulder, ulnar nerve at right elbow, right wrist and cervical spine with long lasting physical effects.
13. The Claimant has received extensive medical treatment from different medical providers, has undergone extensive diagnostic testing and surgical procedures including: a right carpal tunnel release (October, 1996) and spinal surgery (June, 1998).
14. The Claimant's compensable injury does not extend to his low back.
15. On July 17, 1995, the Claimant was released to return to work light duty with restrictions.
16. In August, 1995 the Claimant returned to work and the Employer accommodated his physical restrictions.
17. Following his return to work (August, 1995), Claimant exhibited a pattern of frequent absences from work without excuses, which became more critical in early 1996.

18. On April 15, 1996, the Claimant was terminated from [sic] employment due to "his repeated failure to report to work without a valid excuse."
19. During the filing period the Claimant contacted 39 prospective employers by sending job applications and through telephone contacts. He was not offered employment.
20. Claimant's not returning to work during the filing period was not the direct result of his impairment.
21. Claimant attempted in good faith to seek employment during the filing period.
22. The Claimant failed to prove by a preponderance of the evidence that he sustained disability from April 1, 1996 until January 13, 1997.

### **CONCLUSIONS OF LAW**

3. The claimant is not entitled to [SIBS] for the fourth compensable quarter.
4. Claimant did not sustain disability from April 1, 1996 through January 13, 1997.

The claimant appealed Findings of Fact Nos. 17, 18, 20, and 22 and Conclusions of Law Nos. 3 and 4. He contended that the hearing officer did not properly apply the law to the situation in which a claimant is returned to work at light duty and is terminated and that he established by a preponderance of the evidence that he had disability. The claimant also contended that the hearing officer did not properly apply the law concerning the requirement that a claimant's unemployment be a direct result of the impairment from the compensable injury and that he erred in requiring that it be the direct result of the impairment from the compensable injury. The claimant requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he had disability from April 1, 1996, through January 13, 1997, and that he is entitled to SIBS for the fourth quarter. The carrier responded, urging that the hearing officer correctly decided the issues and requesting that his decision be affirmed.

### **DECISION**

We affirm in part and reverse and remand in part.

Many of the findings of fact are set forth in this decision to avoid the need for a lengthy summary of the evidence. It is undisputed that the claimant sustained a compensable injury in \_\_\_\_\_; that that injury included injuries to his right upper extremity, right shoulder, and neck; that he returned to work at light duty in August 1995; and that in

(subsequent date of injury) he injured his lower back in a nonwork-related accident. The claimant testified that after he returned to work at light duty the employer assigned him duties not consistent with his restrictions but did not appeal a finding of fact that the employer accommodated his physical restrictions.

We first address Findings of Fact Nos. 17 and 18. The claimant and the president of the employer testified concerning those findings of fact and their testimony is in direct conflict. The hearing officer may believe all, part, or none of any witness's testimony because she or he judges the credibility of each and every witness and the weight to assign to each witness's testimony and resolves conflicts and inconsistencies in the testimony. Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. Findings of Fact Nos. 17 and 18 are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Those two findings of fact do not resolve the disputed issue of whether the claimant had disability. The hearing officer also made Finding of Fact No. 22, which is more in the nature of a conclusion of law. In his appeal, the claimant cited several cases concerning whether a claimant who was released to return to work at light duty was terminated after he returned to work at light duty. The Appeals Panel has often cited those cases. Essentially, the hearing officer must still determine whether the claimant is unable because of the compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. There is no showing that the hearing officer did not properly apply the law and Finding of Fact No. 22 and Conclusion of Law No. 4 are supported by sufficient evidence. We affirm the determination that the claimant did not have disability from April 1, 1996, through January 13, 1997.

We finally address Finding of Fact No. 20 that the claimant's "not returning to work during the filing period was not the direct result of his impairment" and Conclusion of Law No. 3 that the claimant is not entitled to SIBS for the fourth quarter. The Appeals Panel has on numerous occasions quoted "as a direct result of the employee's impairment" in Sections 408.142 and 408.143 and stated that the unemployment need only be a direct result and not the direct result. In Texas Workers' Compensation Commission Appeal No. 972062, decided November 24, 1997, the claimant sustained another injury. The Appeals Panel stated that where there is an intervening injury, the issue remains whether the claimant's unemployment "was a direct result (not necessarily the only result) of the compensable impairment." In Texas Workers' Compensation Commission Appeal No. 971524, decided September 18, 1997, the Appeals Panel cited several decisions and stated that the impairment need not be the sole cause of the unemployment and that when evidence provides a link of the unemployment to the impairment from the compensable injury, the carrier has the burden of showing sole cause with respect to a subsequent injury. In the case before us in Finding of Fact No. 11, the hearing officer found that the main reason, not the sole reason, for the claimant's limited ability to work was related to his noncompensable back injury. While that finding of fact does not include "direct result," it does appear to be somewhat related to the direct result criterion. He also made Finding of Fact No. 12 related to direct result and that finding of fact has not been appealed. We

reverse Finding of Fact No. 20 and Conclusion of Law No. 3 and remand for the hearing officer to make a finding of fact or findings of fact and a conclusion or conclusions of law related to the direct result criterion during the filing period and entitlement to SIBS for the fourth quarter not inconsistent 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.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge