APPEAL NO. 990517

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 February 8, 1999. The issue at the CCH was whether the respondent, who is the claimant, was entitled to supplemental income benefits (SIBS) for his first quarter of eligibility.

The hearing officer found that the claimant's underemployment was the direct result of his impairment. He further found that claimant made a good faith effort to find employment commensurate with his ability to work. He held that the claimant was entitled to SIBS.

The appellant (carrier) has appealed the direct result finding, arguing that claimant never testified that his underemployment was the result of his impairment and that there was evidence of other reasons he earned less than he had at the time of his injury The claimant responds that the decision should be affirmed and that the findings of the hearing officer are based on the evidence.

DECISION

Affirmed.

The claimant was employed as a purchasing manager for (employer), for four and one-half years at the time of his injury on _____. He injured his cervical and lumbar spine, resulting in surgery to both, when his boss took his foot off the clutch of a tractor he was driving, and it lurched forward, knocking the claimant down. Claimant said his annual salary was $38,000.00 Claimant detailed his work experience, which was in management and financial or accounting positions.

The claimant lost his job with the employer in December 1996. He was certified with an 18% impairment rating (IR), and released by his doctor back to full-time work, similar to that he was doing at the time of his injury, effective October 13, 1997. Claimant said that his injury resulted in both decreased range of motion in his neck and ability to lift, but his doctor did not impose express lifting restrictions because he would not be seeking a job that involved lifting.

The filing period for the first quarter of SIBS was the quarter preceding November 21, 1998. During that time, the claimant worked for (WM), a mortgage company that was also affiliated with three other companies. He said he served as comptroller for all four companies, and was paid less than he should have been given his responsibilities. His salary was an annual rate of $25,000.00. The claimant said that he continued to search, discreetly, for a higher paying job. He said he looked daily in the newspaper, and made inquiries through friends, and actually sent his resume to a few companies. Claimant emphasized that discretion was necessary because he feared that WM would fire him if it

knew he was searching for another job. (Claimant said that this indeed occurred a week before the CCH.)

The claimant, who was 51 years old at the time of the CCH, had sued the employer for terminating him, contending age discrimination. He said the case had not gone to trial, and he was precluded by a confidentiality agreement from discussing the terms of resolving the suit. The claimant said that he would do what he needed to do to get a job. He was not familiar with the usual pay scale for accountants in the area; however, he stated that he believed that the area economy was a growth economy and there were positions available. He conceded he had difficulty finding a job before he accepted the position for WM, and said this was because of being out of work due to a work-related injury. He said that he did not think most employers realized that the carrier would still be liable for medical costs, and that they shied away from hiring injured workers because they feared their own liability.

There are four eligibility criteria that must be met to qualify for SIBS, set out in Section 408.142(a): that the employee "(1) has an [IR] of 15 percent or more . . . ;(2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment; (3) has not elected to commute a portion of the impairment income benefit . . .; and (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work."

We cannot agree with the carrier's characterization of claimant's testimony as devoid of any linkage to his injury and resulting impairment. However, even if the claimant did not use "magic words," the trier of fact is permitted to make inferences from the evidence presented, and he could validly infer that the claimant's impairment, which existed as a measurable IR regardless of his release from his doctor, was a cause of his underemployment. The Appeals Panel decisions cited by the carrier do not restrict a finder of fact to determining direct result only if a claimant cannot return to his original job. We have stated before that the purpose of SIBS is to provide a benefit for the transition back to full employment; the fact that a worker may have returned to full- time employment, but paid less than he or she made when injured, was clearly contemplated and provided for through compensation for "underemployment." *See* Texas Workers' Compensation Commission Appeal No. 980153, decided March 11, 1998. Given that underemployment is defined in terms of wages that are lower than 80% of the pre-injury wage, a return to full employment may be regarded by the hearing officer not merely in terms of hours worked but of wages earned. We cannot agree that the hearing officer erred. Finally, we agree that the determination that the claimant made a good faith search for employment is supported by the record.

We find that the hearing officer's findings of fact and conclusions of law on direct result are supported by the evidence and the SIBS statutory scheme, and accordingly affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Alan C. Ernst
Appeals Judge