APPEAL NO. 990572

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 17, 1999. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 10th quarter. The appellant (carrier) appeals this determination contending that it is against the great weight of the evidence and legally erroneous. The appeals file contains no response from the claimant.

DECISION

We reverse and remand.

The claimant sustained a compensable low back injury on _____, and underwent fusion surgery. Our decision in Texas Workers' Compensation Commission Appeal No. 982749, decided January 11, 1999 (Unpublished), contains further background information about this case.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (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 "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 10th SIBS quarter was from December 9, 1998, to March 8, 1999, and the filing period for this quarter was the preceding 90 days. At issue in this case were the findings of the hearing officer that the claimant made the required good faith job search and that his underemployment was a direct result of his impairment.

The claimant testified that he worked part time during the filing period as a cook and helper at his son's barbecue stand. He said the hours he worked depended on how he felt and usually amounted to between nine and 12 hours per week. The barbecue stand was only open three days a week. According to the claimant, he was paid $247.30 in cash each month of the filing period, and he said he received this money whether he worked or not.[1] Tax records introduced by the claimant generally confirm the receipt of this money and the carrier does not dispute that the claimant received it.[2] The claimant testified that the hours

[1]There was no evidence addressing how this figure was arrived at.

[2]The tax return reflects the claimant as sole proprietor of a barbecue establishment and his earnings as earnings from self-employment. No attempt was made to identify this establishment with or distinguish it from the son's barbecue stand.

he worked depended on how he felt and that his condition was generally getting worse throughout the filing period. He considered his job a good one because it was without pressure or stress. The claimant testified that he intended to keep doing this job and not look for other work, no matter what anyone else said.

The medical evidence introduced by the claimant was sketchy at best.[3] A functional capacity evaluation (FCE) performed on September 20, 1997, noted that the claimant was uncooperative and refused to participate in some of the testing. It, nonetheless, concluded that the claimant could work at the "light" physical demand level. Reports of past efforts to provide the claimant with vocational counseling and job search help also reflect a lack of cooperation and threats from the claimant. A report of a visit to Dr. K, a treating doctor, on March 23, 1998, appears to agree with the conclusions of the FCE. A letter of December 16, 1998, from Dr. K refers to the "severity of the patient's incapacitating pain." Psychiatric evidence, to the extent legible, does not appear to address work limitations.

In cases of underemployment, a claimant must still establish a good faith effort to obtain employment commensurate with his ability to work, both in terms of the nature of the work and the hours of work. Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996; Texas Workers' Compensation Commission Appeal No. 951624, decided November 15, 1995. Clearly, there was evidence to support a finding that the claimant was limited to light duty during the filing period.

The carrier's argument on appeal regarding good faith is essentially that the claimant did not prove that he was limited to the number of hours he actually worked and notes that the FCE contains no limitations in terms of hours. The hearing officer commented that "[c]laimant has a very limited capacity for employment, and that such limited capacity is documented in the record of the [CCH]; for this reason, the Hearing Officer is inclined to determine that Claimant currently is working commensurate with his ability, and therefore has satisfied this aspect of [SIBS] entitlement." Given the importance of this statement and the manner in which the issue was joined at the CCH, *see* Texas Workers' Compensation Commission Appeal No. 970876, decided June 27, 1997, it would have been preferable for the hearing officer to identify the evidence on which she relied and to make express findings that quantified, either in absolute terms or in terms relative to the number of hours she found the claimant worked at the barbecue stand, the number of hours he was permitted by his physical condition to work. In Texas Workers' Compensation Commission Appeal No. 972329, decided December 22, 1997, the Appeals Panel commented that a claimant through his own testimony can establish "practical work restrictions" beyond what is expressly stated in a doctor's release. In our decision on remand in this case, Texas Workers' Compensation Commission Appeal No. 980158, decided March 11, 1998, we commented that the evidence showed that the claimant regularly looked for work and eventually found full-time employment toward the end of the filing period. Thus, we

[3]It was unclear whether the claimant introduced Appeal No. 982749, *supra*, for, among other reasons, the medical information contained therein. Such a practice has obvious limitations, particularly for the party relying on medical evidence to meet their burden of proof.

affirmed the award of SIBS. In Texas Workers' Compensation Commission Appeal No. 981684, decided September 8, 1998, we further noted that generally "self-assessment of limitations on the hours of employment cannot be given more weight than limitations contained in medical records" and that the claimant working less than full time must continue to search for work "along the lines of those restrictions." *See also* Texas Workers' Compensation Commission Appeal No. 960480, decided April 24, 1996. The import of these cases is that any testimony of a claimant about his or her work restrictions must be based on the medical evidence and cannot significantly depart from those limitations contained in medical evidence.

Another series of cases addresses efforts by a claimant to self-restrict employment in terms of hours worked. *See*, *e.g.*, Texas Workers' Compensation Commission Appeal No. 972349, decided December 31, 1997, and Texas Workers' Compensation Commission Appeal No. 972352, decided December 31, 1997. In Texas Workers' Compensation Commission Appeal No. 961649, decided October 4, 1996, we commented:

> We do not believe that the 1989 Act contemplates that part-time work, limited essentially by the initiative of the claimant and not his or her physical condition as a result of the compensable injury, can in itself excuse the job search effort.

In the case we now consider, and given that the issue of good faith was actually litigated in these terms, we are concerned that the hearing officer did not make an express finding, based on the medical evidence, of the claimant's work restrictions expressly in terms of the number of hours in a given time period he can work. Because of the importance of such a finding to a determination of a good faith job search and the state of the evidence, we are unwilling to imply a finding to this effect. *See* Appeal No. 972349, *supra*, and cases cited therein. For this reason, we reverse the hearing officer's finding that the claimant made a good faith effort to obtain employment commensurate with his ability to work and remand this issue for further express findings of the claimant's physical and hourly restrictions during the filing period.

The hearing officer explained her finding that the claimant's underemployment was a direct result of his impairment as follows:

> The Appeals Panel has stated that an injured worker meets the direct result criterion of [SIBS] entitlement by demonstrating that he has sustained a serious injury with lasting effects, and thereby is prevented from returning to the preinjury employment. Applying that standard to the facts of this case, it is clear that Claimant's underemployment during the filing period was a direct result of his impairment, since the compensable injury made the basis of this case, and the resulting impairment, are serious, and prevent Claimant from returning to his preinjury employment as a welder.

The carrier appeals this determination, contending that the finding of direct result is based on an error of law. It again argues that this is a case of underemployment wherein there were no limitations placed on the claimant in terms of hours of work, but only in terms of the nature of the work, that is, light duty. Under these circumstances, it argues, a claimant cannot prove direct result simply by proving he cannot return to his preinjury employment and that the evidence established that his underemployment was caused by a lack of effort to work more hours. The hearing officer's formulation of the standard for proving direct result may reflect a misappropriation of a standard of appellate review for affirming a finding of direct result to a too-simple formulation of what is sufficient as a matter of law to prove direct result at the CCH. In any case, because we are reversing and remanding the good faith finding, we also reverse and remand the direct result finding. On remand, the hearing officer should make a direct result finding consistent with her additional findings of the claimant's limitations.

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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Alan C. Ernst
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge