APPEAL NO. 990788

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 982149, decided October 21, 1998, we affirmed the hearing officer's determination that the respondent (claimant) was not entitled to fourth quarter supplemental income benefits (SIBS) and reversed and remanded the determination that the claimant was entitled to third quarter SIBS for further consideration of whether the claimant established that his underemployment during the filing period for this quarter was a direct result of his impairment. A hearing on remand was conducted on February 11, 1999, after which the hearing officer, again found that the claimant's underemployment was a direct result of his impairment and awarded third quarter SIBS. The appellant (self-insured) appeals this determination, contending that it was against the great weight of the evidence and that the hearing officer erred in placing a sole cause defense on the self-insured. The claimant replies that the decision on remand is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The facts of this case are contained in Appeal No. 982149 and will only be briefly restated here. The claimant sustained a compensable lumbar spine injury on _____. The filing period for third quarter SIBS began on or about September 12, 1997. The claimant returned to work in the summer of 1997 for a temporary employment agency and continued working on a more or less daily basis as work was available until December 15, 1997, when he was assaulted while working. As a result of the assault, he sustained rib and body bruises and his teeth were knocked out. The self-insured argued in its first appeal that the claimant was making at least 80% of his average weekly wage (AWW) prior to his first injury. In Appeal No. 982149 we rejected this contention and premised our decision on the assumption that he was not earning this amount and that his entitlement to third quarter SIBS depended essentially on the claimant's ability to prove his underemployment was a direct result of his impairment from his first injury. In its current appeal, the self-insured again argues that the claimant was earning more than 80% of his preinjury wage before and after the second injury because he was receiving temporary income benefits (TIBS) from another carrier for the second injury and that for this reason he was automatically excluded from third quarter SIBS entitlement. We again reject this argument and reiterate that the evidence did not establish that his wages during the third quarter filing period were at least 80% of his preinjury wage. If the wages did not meet this threshold requirement, then TIBS based on these wages could not meet the threshold requirement.

More germane to the direct result inquiry, we believe, is the concept that just because the claimant was not earning more than 80% of his preinjury AWW during the first third of the filing period does not mean that, absent the second injury, he would never have

made more than 80% of the AWW in the remainder, majority portion of the filing period. In any case, we remanded the direct result finding to insure that the hearing officer properly considered whether the second injury constituted evidence of an intervening cause for the unemployment or, stated another way, whether, after the second injury, there still was a "logical connection" between the impairment from the first injury and the underemployment. *See also* Texas Workers' Compensation Commission Appeal No. 962653, decided February 13, 1997, where Chief Judge Sanders describes the appropriate analysis in terms of a later circumstance "overshadowing the impairment as a direct result." *See also* Texas Workers' Compensation Commission Appeal No. 990163, decided March 10, 1999, where we commented that the focus of analysis should be on why a claimant was underemployed or unemployed and whether the impairment affected the underemployment or unemployment.

In his decision on remand, the hearing officer found that the second injury was not the "sole cause" of the underemployment during the filing period. Finding of Fact No. 3. In his discussion of the evidence, the hearing officer went to great lengths to point out that claimant need only prove that the underemployment is a direct result of the impairment and not that the impairment is the only cause of the underemployment. As a corollary to this proposition, the hearing officer again observed that to defeat a direct result contention based on an intervening injury or event, a carrier has the burden of proving that the intervening injury or event is the sole cause of the underemployment. The self-insured argues on appeal that it was error to introduce the concept of sole cause into this case and to shift the burden of proof of sole cause to the self-insured. Rather, it argues that the law simply is that the claimant must prove direct result.

To the extent that the self-insured is asserting that sole cause is never a player in the direct result analysis, we reject this notion.[1] We do, however, agree that in SIBS cases, as in cases involving the compensability of an injury, a claimant has an initial burden of presenting evidence of the entitlement and that a carrier may then choose to rely on a claimant's inability to meet this burden or to affirmatively assert a sole cause defense. The mere fact that a carrier may not label its position as a sole cause defense does not end the discussion or preclude a resolution of the issue on the basis of the failure of the carrier to meet the burden of proving sole cause. *See* Texas Workers' Compensation Commission Appeal No. 990618, decided May 7, 1999. In this case, we believe that the position of the self-insured can only fairly be characterized as a sole cause defense to the claimant's assertion that his underemployment in the third quarter filing period was a direct result of his impairment from his first injury. The self-insured has stressed throughout these proceedings that the claimant was able to and in fact did work up to the second injury and

[1]The self-insured asserts on appeal that it is inappropriate to rely on Texas Workers' Compensation Commission Appeal No. 970150, decided February 26, 1997, because this case "did not address sole cause." While the hearing officer did not use a sole cause analysis in that case, the case recognized the concept of sole cause, that the carrier has the burden of proving sole cause, and that a sole cause analysis was appropriate in that case even if the carrier did not specifically label its defense in these terms.

only because of the second injury did he stop working. Thus, we believe the question of sole cause was expressly raised and we find no error of law in the hearing officer's resolution of this case in terms of sole cause. Whether the claimant's underemployment continued to be a direct result of the impairment from the first injury rather than solely from the effects of the second injury was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 990385, decided April 9, 1999; Texas Workers' Compensation Commission Appeal No. 990048, decided February 18, 1999; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Under our standard of review of factual determinations of hearing officers, we find the evidence sufficient to support this determination and decline to reverse it on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

One final matter requires comment. The hearing officer postulated as a kind of "fall-back" position that under a doctrine of "liberal interpretation" of the 1989 Act, the claimant is owed SIBS. The self-insured replies that this formulation effectively reads the word "direct" out of the concept of "direct result." Our affirmance of the hearing officer's decision on remand should not be read as endorsing or relying on his application of "liberal construction" to the law or facts of this case or that such application was correct.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge