

APPEAL NO. 990940

A contested case hearing was originally held in (City 1), Texas, on September 9, November 4, and December 9, 1998, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues concerned supplemental income benefits (SIBS) for the fifth quarter. The filing period for the fifth quarter for SIBS began on February 27, 1998, and ended on May 28, 1998. In Texas Workers' Compensation Commission Appeal No. 990040, decided February 23, 1999, the Appeals Panel affirmed the determination of the hearing officer that the respondent (carrier) was relieved of liability for SIBS for the fifth quarter from May 29, 1998, through June 14, 1998, because of the appellant's (claimant) failure timely to file the application for SIBS for that quarter. The Appeals Panel reversed the findings of fact that during the filing period for the fifth quarter the claimant did not make a good faith effort to seek employment commensurate with her ability to work and that her underemployment was not a direct result of her impairment from the compensable injury and the conclusion of law that she is not entitled to SIBS for the fifth quarter and remanded for the hearing officer to make findings of fact and a conclusion of law on entitlement to SIBS for the fifth quarter. The hearing officer held another hearing on April 7, 1999, and rendered another decision dated April 9, 1999, in which she determined that the claimant had a light-duty release to return to work issued by her treating doctor concomitant with the beginning of the filing period, that during the filing period she sought employment with fewer than five employers, that she only sought employment in the community in which she resided and did not seek employment in nearby communities which were within driving distance, that the claimant was self-employed during the filing period and earned \$372.00, that she underwent surgery within five weeks of the last day of the fifth quarter (should have been filing period for the fifth quarter), that the claimant did not make good faith efforts to seek employment during the filing period (should have included commensurate with her ability to work), that her unemployment during the filing period was not a direct result of the impairment from her compensable injury (should have been underemployment), and that the claimant is not entitled to SIBS for the fifth quarter. The claimant appealed, stated her disagreement with comments of the hearing officer in eight of the paragraphs in her statement of the evidence in the Decision and Order, contended that she met the requirements for entitlement to SIBS for the fifth quarter, and requested that the Appeals Panel reverse the decision of the hearing officer. The carrier replied, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reverse and render.

The claimant testified at the hearing on remand. Appeal No. 990040, *supra*, and the Decision and Order on Remand contain summaries of the evidence. Briefly, the claimant was injured in Texas; received a 22% impairment rating consisting of 11% for a specific disorder of the cervical spine, five percent for loss of cervical range of motion, and eight percent for the left upper extremity. She developed throat cancer that was unrelated to the

compensable injury. She moved to State. During the filing period for the fifth quarter for SIBS that began on February 27 and ended on May 28, 1998, she lived in (City 2),. The claimant's testimony concerning job contacts was confusing, and it is not clear exactly how many jobs she sought during the filing period. Surgery on her shoulder was pending during the filing period, she stated that she was required to perform physical therapy to prepare for the surgery, and the surgery was performed on June 2, 1998. The claimant testified that the population of City 2 is approximately 30,000; that (City 3), is over a four-hour drive from City 2; that the doctor travels to City 2 to treat patients; that she does not drive at all; that one time she was taken by a medical unit to City 3 for treatment that was not available in City 2; that there is no industry in City 2; that "everybody goes down to [City 4] to work on the river at resorts"; that it is about 33 or 35 miles to City 4; that (City 5) is about 38 or 39 miles away; and that she has never been to City 5 and does not know how large it is. The claimant testified that she was offered a job, but that she was not able to start work until after she had the surgery on her shoulder and had recovered from it, and that someone else got the job.

A vocational rehabilitation specialist hired by the carrier to assist the claimant in finding employment reported that on April 15, 1998, he reviewed the advertisements in the City 2 newspaper; that 44 positions were advertised; and that only two looked promising. He also stated that on that same day he contacted a temporary placement agency in City 2 and that the agency advised him that it had no openings that would coincide with the claimant's physical limitations. He said that he told the claimant about one possible position and that the claimant told him that she had inquired about the job and was told that it required the full use of both arms and that she had tried to apply at casinos and was told that they did not hire people with open workers' compensation claims. He also reported that the claimant's throat cancer made it difficult for her to present herself adequately during interviews and made her incapable of applying for light-duty jobs in which she would have to use her voice.

In Texas Workers' Compensation Commission Appeal No. 951682, decided November 27, 1995 (Unpublished), the Appeals Panel stated that it was appropriate to consider pending surgery on both the direct result and good faith criteria concerning entitlement to SIBS. In Texas Workers' Compensation Commission Appeal No. 962495, decided January 22, 1997, the Appeals Panel reversed a decision that the claimant was not entitled to SIBS, rendered a decision that he was, and wrote:

Even if claimant had undergone a search for employment, a truthful disclosure of pending surgery and the need for recuperative time off could well have impacted the ability of claimant to accept offered employment. We believe that the hearing officer's decision that claimant had some ability to work and therefore did not undertake a bona fide search is against the great weight and preponderance of the evidence, as well as not sufficiently supported by the record. We hold the same to be true of the "direct result" holding, as there appears to be nothing but the injury in this case which resulted in unemployment.

In Texas Workers' Compensation Commission Appeal No. 981290, decided July 30, 1998, another case involving pending surgery, the Appeals Panel cited Appeal No. 962495; *supra*, reversed determinations that the claimant did not meet the good faith and direct result criteria and was not entitled to SIBS; and rendered a decision that she was entitled to SIBS. In Texas Workers' Compensation Commission Appeal No. 982569, decided December 17, 1998, the Appeals Panel stated that pending surgery situations apply when a claimant in fact had pending surgery and knew going into an interview or when filling out an application that he or she would have to start the job only to take leave time; quoted at length from Appeal No. 962495, *supra*; reversed the decision of the hearing officer as being against the great weight and preponderance of the evidence; and rendered a decision that the claimant is entitled to SIBS.

Considering all of the evidence, including the claimant's testimony, her job search and its result, the report of the vocational specialist, the medical evidence, and the surgery the claimant had; we find the determinations that the claimant's underemployment during the filing period was not a direct result of her impairment from the compensable injury, that during the filing period she did not in good faith seek employment commensurate with her ability to work, and that she is not entitled to SIBS for the fifth quarter to be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We reverse the decision of the hearing officer and render a decision that the claimant is entitled to SIBS for the fifth quarter. We affirm the determination that the carrier is relieved of liability for SIBS for the fifth quarter from May 29, 1998, through June 14, 1998, because of the claimant's failure to timely file the application for SIBS for that quarter.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR IN THE RESULT:

Joe Sebesta
Appeals Judge