

APPEAL NO. 991425

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 9, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that while the appellant (claimant) had made a good faith effort to seek employment (commensurate with his ability), claimant's unemployment was not a direct result of his impairment from the compensable injury and that claimant was therefore not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter. The good faith element has not been appealed and therefore we will not address it further.

Claimant appealed, stating that the issue on appeal was whether the claimant had established that his unemployment was a direct result of his impairment and contending that the hearing officer "failed to apply the proper standard in determining unemployment direct result from [the] compensable injury." Claimant takes issue with the hearing officer's interpretation of a cited Appeals Panel decision. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to 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, "[f]iling 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 employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

We emphasize the requirements of Section 408.143(a)(1) and Rule 130.102(c), which provide that claimant's unemployment or underemployment be "a direct result of the employee's impairment." The burden of proof of this element is on the claimant. At the outset, we point out that the only documentary evidence admitted at the CCH was claimant's Statement of Employment Status (TWCC-52) listing some 50 job contacts. There was no medical evidence of any kind. Although claimant testified that his treating doctor was Dr. S, there are no reports, releases to return to work or evidence of restrictions from Dr. S in evidence. Claimant both testified that Dr. S released him to return to work with a restriction that he rest and that he was unable to obtain retraining from the Texas

Rehabilitation Commission because Dr. S had not released him. It would have been immensely helpful to have some reports or evidence from Dr. S in the record.

The parties stipulated that claimant sustained a compensable low back injury on _____; that he was assessed as having reached maximum medical improvement on February 7, 1997, with a 17% impairment rating (IR); that impairment income benefits were not commuted; and that the filing period for the fifth quarter began November 1, 1998, and ended January 31, 1999. Claimant testified through a translator that he hurt his back, but there is no evidence whether he had spinal surgery or how the 17% IR was calculated. Nor is there evidence of how the injury affected him in the filing period of the fifth quarter. The vast majority of the CCH dealt with the quantity and quality of the job search efforts, how the job search was conducted, claimant's ability to perform the requirements of the jobs that he applied for and the English-language requirements of those jobs. Claimant did testify that he went back to the employer school district (where he had worked as a custodian) "to get his job back" within his resting restriction but the employer "refused to give [him] his job back."

The hearing officer found claimant had made a good faith effort to seek employment and further commented that another "requirement for [SIBS]" is that the "unemployment must be a direct result of the impairment." The hearing officer cites Texas Workers' Compensation Commission Appeal No. 961776, *supra*, decided October 23, 1996, stating in her Statement of the Evidence:

The Appeals Panel has held that direct result for [SIBS] eligibility purposes is satisfied if the Claimant can establish medical evidence of significant lasting effects from an injury and an inability to return to former employment. Appeal Panel Decision 961776. The Claimant provided no medical documentation, however, he testified that his treating doctor, [Dr. S], released him to return to work with the only restriction being that he be allowed to rest. . . . Therefore, the Claimant has failed to establish the first prong of the requirement listed in the above cited Appeals Panel decision, in that he failed to establish through medical evidence that he has sustained significant lasting effects from the compensable injury. As for the second prong, while the Claimant was released to return to his previous employment, he has been unsuccessful in his attempts to do so. The question then is was his inability to return to his previous employment a result of his impairment from his injury. The Claimant testified that many of the jobs he applied for required a highschool diploma or a highschool equivalency certificate. The Claimant had neither. It appears from the evidence Claimant's unemployment is due to his limited education as opposed to his injury. Based on the facts of this case, it is this Hearing Officer's finding the Claimant's unemployment during the filing period for the 5th quarter was not a direct result of his impairment.

We believe that Appeal No. 961776, *supra*, has been misread. What that decision actually says is:

The Appeals Panel has held that medical evidence of significant lasting effects of the claimant's injury and his inability to return to his former employment may provide evidence of direct result. A claimant must prove that his unemployment is "probably," not conclusively or beyond a reasonable doubt, directly linked to his impairment, which need not be the sole factor. See Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996.

Appeal No. 961776, *supra*, goes on to discuss the Americans with Disabilities Act and pointed out that employers are highly unlikely to state that they have not hired an injured worker because of his impairment, also citing Texas Workers' Compensation Commission Appeal No. 950298, decided April 10, 1995. Appeal No. 961776, *supra*, concludes:

This is one reason why the Appeals Panel has advised that the direct result criterion be analyzed on the basis of circumstantial evidence, including medical evidence of lasting effects of the injury and the absence of any intervening injury or illness.

This does not state, or require, that there must, in all cases, be medical evidence to establish "significant lasting effects of the claimant's injury and his inability to return to his former employment" It means that medical evidence may be helpful, or even determinative in some cases, although not necessarily required in all cases, to show that an injured worker "sustained a serious injury with lasting effects and . . . could not reasonably return" to his preinjury job. (See Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993; and Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995.)

In this case, there is no medical evidence, claimant only testified that he injured his back, there was little evidence as to the extent of the injury and claimant did testify that he applied to get his preinjury job back. Although, arguably, the hearing officer may have applied an incorrect standard, her decision could also be read as requiring medical evidence in this case because of the lack of any other persuasive evidence. If one reads her decision as requiring medical evidence to prove direct result, this is because there is no other evidence in the record which would support a finding of direct result, much less constitute the great weight and preponderance of the evidence necessary to reverse the hearing officer's decision.

Claimant, in his appeal, mis cites Appeal No. 961776, *supra*, and goes on to argue that the hearing officer erred in stating that claimant's unemployment was "due to his limited education as opposed to his injury." While we might agree that basing a decision on a speculation that the unemployment was due to claimant's "limited education" as opposed to at least being partly due to his impairment might be incorrect, in this case, absent any

other evidence on direct result, as noted in the previous paragraph, we cannot say that, based on the evidence in the record before us, the hearing officer's decision was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge