

## APPEAL NO. 991659

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A telephonic contested case hearing (CCH) was held on July 8, 1999. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 16th and 17th compensable quarters. The hearing officer determined that the claimant was entitled SIBS for the 16th and 17th quarters and the appellant (self-insured) has appealed. The self-insured points to evidence supporting its position that the hearing officer erred in his findings that the claimant's underemployment was a direct result of his impairment and that the claimant made a good faith effort to obtain employment commensurate with his ability to work and the conclusion that the claimant was entitled to SIBS for the two quarters. No response is on file.

### DECISION

Reversed and a new decision rendered.

The claimant, employed as a firefighter/emergency medical technician with the self-insured, sustained a back injury on \_\_\_\_\_; subsequently had surgery followed by instrumentation removal; and reached maximum medical improvement with an impairment rating of 15% or greater. He testified that he could not do anything for the first two years, that he could not return to his previous job, and that he went to state in 1994 where he worked full time in a casino/hotel. He stated that he resigned this position to go to college full time as it was not a good living and was below his potential and that he decided to do something with his life. In January 1995, he began a surgery technician program for a year after which he worked as a surgery technician for another year. He stated that his desire was to become a physician's assistant (PA) and that he had to complete prerequisites for entry into that program. He stated that he had not gotten into the PA program yet but thought he would qualify by December 1999. During the qualifying periods for the two quarters in issue (September 25, 1998, through March 24, 1999), the claimant stated that he was attending college full time (apparently to get background for the PA program) and that he worked part time some 12 to 15 hours a week. He stated that this was a program he developed himself and not through any rehabilitative or other services.

The claimant testified that he last saw his doctor in March 1999 after seeing an independent medical examination (IME) doctor and that it may have been a year before that when he had previously seen his doctor. He stated that he still experiences back pain and that he thought he had a lifting restriction of about 25 pounds and other restrictions such as twisting and stooping. Medical reports from his doctor indicate he has a stable back; that he has some restrictions; and that, in his doctor's opinion, he is at his current maximum ability in going to school full time and working his part-time job. The IME doctor indicates in a report of May 21, 1999, that his restriction are 25 pounds lifting, sitting for one hour, and no frequent or constant bending, twisting or stooping. There were no restrictions for walking or standing, and the opinion was expressed that he could work full time. The

claimant stated that his workers' compensation benefits were to run out in August 1999, and that he had gotten SIBS for the first 15 quarters under a different third party administrator.

Based on this evidence, the hearing officer found that the claimant's underemployment for the qualifying periods in issue was a direct result of his impairment and that he made a good faith effort to obtain employment commensurate with his ability to work. The appeal of these findings centers on the evidence that shows that the claimant can work full time with relatively moderate restriction and that he has demonstrated his ability to work full time at jobs prior to and during the quarters in issue, but that he has, of his own accord, embarked on a lengthy college program to qualify for and become a PA. The evidence in this case shows that the claimant is some seven years post injury and that he has received SIBS for the first 15 SIBS quarters. He testified that in 1994 he went to Santa Fe and worked for a period of time and decided he was not meeting his potential. According to his testimony, in January 1995, he began a year-long program to become a surgery technician after which he worked in that field for a year. At some later time and during the filing or qualifying periods for the 16th and 17th SIBS quarters, he began taking a full-time schedule of college courses which he indicates should qualify him for the PA program in December 1999, a program and career he states he has desired for some time. He states he worked part time while going to college.

Clearly, where an injury results in the necessity of retraining to reenter the job market and such a retraining program is undertaken as under the auspices of the Texas Rehabilitation Commission (Section 408.150; and, effective for qualifying periods after January 31, 1999, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102)), the injured worker may meet the qualifications for SIBS. See Texas Workers' Compensation Commission Appeal No. 951580, decided November 1, 1995. The emphasis is on retraining to return to the workforce in a timely and reasonable manner. Where there is a release to full (albeit with some restriction) employment and in fact employment is resumed, as here on two different occasions, "retraining" through a lengthy college-level program must be evaluated within the context of whether the injury or impairment is causing the unemployment or underemployment or whether there is some other overriding cause. Although voluntary educational efforts undertaken to meet the personal or professional desires of the injured employee are certainly commendable and worthy, the Appeals Panel has repeatedly held that this does not satisfy the requirements for SIBS. Texas Workers' Compensation Commission Appeal No. 980265, decided March 26, 1998; Texas Workers' Compensation Commission Appeal No. 960999, decided July 10, 1996; Texas Workers' Compensation Commission Appeal No. 960895, decided June 27, 1996. In all of these cases, the injured workers had returned to work, with restrictions, and subsequently resigned to voluntarily return to school to pursue a desired course of study and, in all cases, SIBS were denied for the periods in issue.

The Appeals Panel, in reversing and rendering a new decision, stated in Appeal 960999, *supra*, where the claimant quit his full-time (with restrictions) job to embark on a full-time college program, that, although his pursuit of his education could well be

considered laudable, "it does not meet the stringent requirements for qualifying for SIBS and returning to the work force" and that the evidence compellingly showed that the underemployment was due to the claimant's voluntary student status and not a direct result of the impairment. We find that to be virtually the identical situation here. Concluding the determination that the claimant's underemployment was a direct result of his impairment to be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, we reverse the decision that the claimant is entitled to SIBS for the 16th and 17th compensable quarters and render a new decision that the claimant is not entitled to SIBS for the 16th and 17th compensable quarters of SIBS.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge