APPEAL NO. 002036

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 3, 2000, a contested case hearing was held. With respect to the issues before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first compensable quarter, having made a good faith search for employment commensurate with her ability to work, and that the claimant's unemployment/underemployment for the first quarter was a direct result of her impairment. The parties stipulated that the claimant was entitled to SIBs for the second compensable quarter and that issue will not be addressed further.

Appellant (carrier) appeals the hearing officer's decision on entitlement to SIBs for the first quarter on both the good faith and direct result bases and requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds, controverting some of the statements in the carrier's appeal, and urges affirmance.

DECISION

Reversed and rendered based on the direct result criteria for the first quarter.

The hearing officer made certain findings of fact which are not challenged. Although there is no finding or stipulation on the point, we will infer that the claimant sustained a compensable "back" with left leg pain injury on _____. The hearing officer found that the claimant reached maximum medical improvement on March 8, 1999, with a 16% impairment rating (IR); the parties stipulated that impairment income benefits (IIBs) were not commuted; and the hearing officer found that the qualifying period for the first quarter was from October 27, 1999, through January 25, 2000. The claimant testified that she was a direct support person employed by (employer), which apparently contracted to provide services for handicapped (challenged) adults in group homes. While assisting or caring for a client, the claimant sustained her injury. The claimant testified that she was off work about two weeks and then returned to full-time work with the employer in some kind of light-duty capacity. Although the testimony is unclear and the hearing officer comments that the claimant's "compensable injury precluded her from working in a full duty capacity," it is our understanding that the claimant returned to full-time work at her preinjury salary, only at a lighter duty, perhaps not working with clients. The claimant testified that at some time her husband lost his job and that for economic reasons they moved from (city 1) to the "hill country" in (city 2), Texas. The claimant testified, the documentation supports, and the hearing officer found, that the claimant sought employment "every week during the qualifying period." Apparently, some time during the first quarter qualifying period, the claimant obtained employment with a well-known regional jewelry craftsman as a jewelry technician, a position which met her restrictions. Exactly what those restrictions were is not clear.

A chiropractic report dated December 2, 1999, recites that a functional capacity evaluation (FCE) has been requested and mentions that an "MRI study of February 5, 1999, reveals protrusion-type herniations at L3-L4 and L4-L5." That report concludes that the claimant "fits only into the light to light-medium work category at present and still has significant difficulties with basic functional tasks, several months post accident." An FCE performed on May 17, 2000 (some four months after the qualifying period), has a diagnosis of "HNP [herniated nucleus pulposus] L4-5 per MRI," has a lifting restriction of about 27 pounds, and assesses the claimant as classified at the light physical demand level.

The claimant does not challenge that she has the ability to do light-level work. Her job search efforts were for clerk, teller, teacher's assistant and similar light-duty jobs. The applicable SIBs rule is Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)), which provides, in part:

> an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

With regard to the documentation, this rule goes on to provide that the reviewing authority may consider such factors as applications or resumes documenting the efforts, cooperation with the Texas Rehabilitation Commission and the amount of time spent in attempting to find employment. The hearing officer found that the claimant applied for positions "every week during the qualifying period," that the positions were "within her light duty restrictions" and that she found employment before the end of the qualifying period and began work on January 3, 2000. The carrier complains of the quality of the job search efforts that the claimant did not search for employment in other smaller towns close to where she lived, that some employers were listed twice and that, in the carrier's opinion, the "Hearing Officer totally ignored the laundry list of criteria as found in Rule 130.102(e)." The carrier also incorrectly alleges that "Claimant did not contact the Texas Employment Commission (TEC) during the qualifying period." The claimant's testimony and documentation indicate that the claimant contacted the Texas Workforce Commission, the current name for the agency formerly known as the TEC. Rule 130.102(e) provides that the "reviewing authority shall consider the information . . . which may include, but is not limited to" the "laundry list of criteria." Our review of the evidence does not reveal that the hearing officer failed to do so.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period has expired if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. It is the direct result requirement with which we have problems. The hearing officer, in her Statement of the Evidence, comments:

> The Carrier asserted that the Claimant could not meet the direct result requirement since her move was for economic reasons rather than because of the compensable injury. While the Claimant's move may have been for economic reasons beyond her control, there is no evidence to indicate that she made the move so that she would be unemployed and thus entitled to [SIBs] from the Carrier. The Carrier's argument was not persuasive.

While there are several ways in which to meet the direct result requirement (a serious injury with long-lasting effects which preclude a return to the preinjury employment), requiring the claimant to prove that she has not become un- or underemployed so she would be "entitled to [SIBs] from the Carrier" is not among them. In this case, it is undisputed that the claimant had returned to work, presumably at her preinjury wage, with the employer in a light-duty capacity, and that the only reason that employment did not continue and the claimant became unemployed or subsequently underemployed was because of her move to city 2. While a claimant is not required to continue to reside in the location where he or she was living when injured, if that move, rather than the impairment, results in the un- or underemployment, the direct result criteria may not be met. The Appeals Panel has, on a number of occasions, cited 1 JOHN T. MONTFORD, *ET AL.*, A GUIDE TO TEXAS WORKERS' COMP REFORM § 4.28 at 4.122 (1991) that stated:

> The employee has, before the Commission [Texas Workers' Compensation Commission], the burden to prove that his lost or reduced earnings are "*a direct result*" of the employee's impairment, rather than, for example, economic factors unrelated to the employee's physical limitation. [Emphasis in the original.]

The hearing officer, in her Statement of the Evidence, comments that "[m]oving from [city 1] was for economic reasons; her husband was no longer working, and she could not meet the family's financial obligations with her salary with the Employer."

In Texas Workers' Compensation Commission Appeal No. 980265, decided March 26, 1998, we cited a number of cases where we have held that a direct result has not been shown. In Appeal No. 980265, the injured employee had resigned from post-injury employment "not because he was unable to do the work or because of his injury but because [another employer] offered better career opportunities." In another case, cited in Appeal No. 980265, the injured employee "resigned her position" in order to go to school. In this case, the claimant did not resign to go to what may be perceived as a better position but, nonetheless, resigned for other economic reasons to move to city 2 with her husband, not due to her injury or impairment. Consequently, her un- and underemployment was not a direct result of her impairment but was solely due to her moving to a rural area where light-duty jobs are, perhaps, more rare than in city 1. Had the claimant been laid off, for whatever reason, by her employer and then moved to city 2, the claimant could possibly have met the direct result criteria in the more traditional method. The hearing officer applied an incorrect standard (no showing the claimant made the move to be unemployed) and we reverse the hearing officer's decision on this point and render a new decision that

the claimant is not entitled to SIBs for the first compensable quarter because she failed to meet the direct result criterion.

While we give great deference to the hearing officer's factual determinations and we will reverse a decision only if it is so against the great weight and preponderance of the evidence, Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986), in this case we hold that the hearing officer applied an incorrect standard in determining the direct result (being that the move was not done in order to be unemployed) and that the claimant's un- or underemployment was not a direct result of the claimant's impairment, but was due to the move to city 2 for economic reasons.

The hearing officer's decision that the claimant is entitled to SIBs for the first quarter is reversed and we render a new decision that the claimant is not entitled to SIBs for the first compensable quarter.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Philip F. O'Neill
Appeals Judge