APPEAL NO. 002771

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 17, 2000. The hearing officer determined that appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fourth quarter. Claimant appealed that determination on sufficiency grounds. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and remand.

Claimant contends the hearing officer erred in determining that she did not make a good faith effort to obtain work commensurate with her ability to work. In this case, claimant was injured while working for (employer) as a seamstress. She returned to light-duty work, then the plant where she was employed closed. Claimant said she subsequently underwent elbow surgery related to the injury and then began working at a school. Claimant said she quit that job because of the lifting required and then began working as a self-employed seamstress in March 2000. Claimant had been self-employed for about one month when the qualifying period began. During the qualifying period, claimant earned $2,216.43. Claimant said she worked five days per week, eight hours per day. There was evidence that a few months after the qualifying period ended, claimant placed on light-duty status.

In this case, the hearing officer did not address whether claimant had returned to work that was relatively equal to her ability to work. He determined that she did not meet the good faith SIBS requirement. We must remand this case for an analysis of whether claimant's self-employment was relatively equal to her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(1) (Rule 130.102(d)(1)) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. *See* Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000. The focus of the "relatively equal" inquiry is not on whether the wages are the same. Rather, what is critical is evidence that supports the determination that the employment was relatively equal in terms of hours worked and whether The claimant is working within the restrictions. Texas Workers' Compensation Commission Appeal No. 000702, decided May 22, 2000; Texas Workers' Compensation Commission Appeal No. 000608, decided May 10, 2000.

Claimant next contends that the hearing officer determined that her "inability to obtain employment or to be fully employed" was not a direct result of her impairment. We first note that it is not clear why the hearing officer determined that claimant is not "fully employed." The hearing officer stated that: (1) claimant's restrictions do not "prevent her from obtaining many forms of employment or returning to the work she previously

performed"; and (2) "claimant's reduced earnings during the qualifying period are due to the number of jobs she obtained and not due to any limitation or restriction" from her impairment. We note that the fact that claimant did not have more customers during her first few months in business did not mean that, as a matter of law, her impairment from the compensable injury is not *a cause* of her reduced earnings.

In Texas Workers' Compensation Commission Appeal No. 982993, decided February 5, 1999, we discussed a similar situation where the injured worker was released to return to his former job doing sedentary work. We discussed whether a claimant who has been given a full-duty release to return to his or her former *sedentary* job, and yet who *also has continuing work restrictions*, may satisfy the direct result criterion for SIBS. In that case, we said:

> [D]uring the qualifying period for the third quarter, The claimant *was physically able* to return to his former employment: a sedentary job as an electronics technician. The Appeals Panel has stated that a hearing officer's direct result determination may be sufficiently supported by evidence that the claimant sustained a serious injury with lasting effects and that, during the qualifying period, *"he could not reasonably perform the type of work being done at the time of the injury."* Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993. However, while this is an accurate statement of the law, it is not necessarily true that if a claimant is physically able to do his former work, then, as a matter of law, he *cannot* establish that his unemployment is a direct result of his impairment. [Footnotes omitted.] [Emphasis added.]

We further said:

> When a claimant has work restrictions imposed after a compensable injury, this, in effect, will narrow the field regarding the number and types of jobs available to that claimant. A claimant who was injured at a sedentary job should not have a more difficult time proving direct result than a claimant who sustained an injury while doing a heavy job. Under the facts of this case, the focus should not be solely on what type of job The claimant had before, or on whether The claimant is physically able to perform that old job. Instead, one must consider (1) why was The claimant unemployed during the qualifying period and (2) did the impairment affect or impact claimant's unemployment or underemployment situation.

Claimant did have continuing work restrictions and, because of her restrictions of the amount she could frequently lift (five pounds) and occasionally lift (25 pounds), the hearing officer should consider whether claimant is able to perform as many types of jobs as she did before her injury. The fact of the matter is that claimant cannot go back to work for her former employer, because that employer closed its business. Therefore, claimant does have to find other work that she is able to do.

In analyzing direct result, we first note that SIBS compensates not just for unemployment, but underemployment. The Legislature clearly intended that SIBS be paid to people who may have returned to work, but who are not working at the same job, employed for the same hours, or making the same money (in other words, underemployment). Second, we note that SIBS were intended to assist injured workers in a return to the workplace. Texas Workers' Compensation Commission Appeal No. 992877, decided February 4, 1999. The question before us is whether an injured worker is automatically deemed to no longer need assistance returning to the workforce, where the injured worker takes a job during the qualifying period which involves the same general "type" of work being done at the time of the compensable injury.

In a case where The claimant has gone back to work, but is making less money, he or she is underemployed. The hearing officer should consider whether that claimant, who has looked for and found other work, has impairment that has affected his or her ability to make 80% of the AWW or more. In this case, there was evidence that after her injury, claimant returned to work for employer before it closed down, but not at full-duty. There was also evidence that, due to her impairment, claimant was unable to do at least one job, the job for the school. This may have forced claimant to seek alternative employment consistent with her restrictions due to her impairment. The alternative employment claimant chose was self-employment as a seamstress. The hearing officer may consider whether The claimant is now differently abled, due to impairment from the compensable injury, and whether this means that the impairment at least is *a cause,* or one reason why The claimant is making these lesser wages. Rule 130.102(c) states that an injured employee has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is *a cause* of the reduced earnings.

We note that whether certain work is actually the "same type" of work is a sub-issue to consider regarding direct result. As stated in Texas Workers' Compensation Commission Appeal No. 951045, decided August 8, 1995:

> Carrier appears to be arguing that merely because claimant was a welder at the time of his compensable injury and he found a welding position which he was able to perform in the qualifying period, albeit at a substantially lower salary, that he cannot prove that his underemployment was a direct result of his impairment. We do not find the carrier's argument to that effect persuasive. While we note that in the SIBS area frequently a claimant will not be able to return to the type of work that he had before his injury, it does not necessarily follow that if a claimant *does return* to the same or similar employment at lower wages, he is somehow precluded from demonstrating that his underemployment is the direct result of his impairment. We are unprepared to state that, as carrier asserts, all welding positions are the same. Within the broad category of welding jobs, we believe that there is a substantial range of duties and of difficulty in those positions. [Emphasis added.]

* * *

We note that claimant testified regarding her ability to perform her work duties during the qualifying period. A hearing officer may consider claimant's testimony about his or her abilities to do the work obtained during the qualifying period. *See* Appeal No. 951045.

We must remand for the hearing officer to reconsider the SIBS/direct result determinations, considering the evidence and the work restrictions found by the hearing officer in his decision and order, along with the cases and discussion set forth in this appeals decision. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165. On remand, the hearing officer must determine the following and give a rationale for his determinations: (1) was claimant's self-employment "relatively equal to the employee's ability to work; and (2) was claimant's impairment "a cause" for claimant earning less than 80% of her AWW during the qualifying period.

We reverse the hearing officer's decision and order and remand for reconsideration consistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Judy L. Stephens
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge