APPEAL NO. 950172

On December 16, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (carrier) disagrees with the hearing officer's determinations that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the first and second compensable quarters, that the claimant's current disability is related to her injury of (date of injury), and that the carrier is not entitled to contribution from a prior compensable injury. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor or remand the case for further proceedings. The claimant requests affirmance.

DECISION

The hearing officer's decision regarding no contribution is affirmed. The hearing officer's decision regarding entitlement to SIBS is reversed and a decision rendered that the claimant is not entitled to SIBS for the first and second compensable quarters.

The claimant testified that she injured her shoulder, neck, back, and right side at work in (month year) and that (Dr. P) treated her for that injury. The claimant did not say how the injury occurred. She said she did not miss any time from work due to that injury. The claimant further testified that she injured her right arm at work in December 1991 and that (Dr. W) treated her for that injury. She did not say how that injury occurred or how long she was off work for the injury. In regard to the current injury which is the subject of this case, the claimant testified that on (date of injury), she sustained a work-related injury to the same parts of her body that she injured in (month year) and that she has treated with Dr. P for the current injury since April 1993. She did not say how the current injury occurred; however, she was off work because of it for several months.

On April 2, 1993, Dr. P reported that the claimant injured her neck, back, and shoulders while working on (prior injury) (he does not describe how the injury occurred), and that he last treated the claimant for that injury on June 11, 1990. He stated that in December 1991 the claimant sustained an injury to her neck and right shoulder and that Dr. W treated her for that injury with the last visit being in April 1992. As to the current injury of (date of injury), he reported that the claimant injured her neck, back, and shoulders "while working due to repetitive movement," that the claimant was doing fine prior to this injury, and that the claimant attributes all of her "new pain" to the (date of injury), injury. Dr. P diagnosed "post traumatic cervical, thoracic, lumbar spondylogenic (annular tear) discogenic pain syndrome" and "post traumatic rotator cuff strain - right/left shoulders." An MRI of the lumbar spine done in May 1993 revealed "very minimal bulging disc at L5-S1." In June 1993, Dr. P reported that he anticipated that the claimant could return to limited type of work in August 1993 and to full-time work in September 1993. In a Report of Medical Evaluation (TWCC-69) dated August 10, 1993, Dr. P reported that the claimant had completed a work hardening program, that she reached

maximum medical improvement (MMI) on August 10, 1993, and that she has an impairment rating (IR) of 26% for impairment of the cervical, thoracic, and lumbar regions and for impairment of the right and left shoulders.

The claimant testified that when she completed her work hardening program in August 1993, Dr. P released her to light duty work, but that her employer, (employer), where she worked for seven years as a sewing machine operator, did not have light duty available at that time. There is no written light duty release for August 1993 in evidence which would show what work restrictions the claimant was under at that time. In another TWCC-69 dated September 14, 1993, Dr. P reported that the claimant reached MMI on September 14, 1993, with an IR of 21% for impairment of the cervical and thoracic regions and for impairment of the right and left shoulders (no impairment was given for the lumbar region). The claimant testified that in October 1993 she returned to work with her employer at full pay in a "reentry program" where she watched videos until the end of February 1994 when she began working a light duty job with the employer at full pay. In October 1993 Dr. P reported that the claimant could return to limited and to full time work on October 26, 1993.

In December 1993 the Texas Workers' Compensation Commission (Commission) selected (Dr. A) as the designated doctor to determine IR only. In a TWCC-69 dated January 5, 1994, Dr. A assigned the claimant a 16% IR for impairment of the cervical, thoracic, and lumbar regions and for impairment of the right and left shoulders. All of the impairment was due to loss of range of motion. He said that review of x-rays revealed no gross abnormalities and that the lumbar MRI revealed a minimal disc bulge. In a notice dated January 19, 1994, the carrier reported that it would pay impairment income benefits (IIBS) for 48 weeks based on Dr. A's 16% IR.

On January 25, 1994, Dr. P reported that the claimant's condition remained unchanged. In a report to the carrier dated April 12, 1994, which references injury dates of (date of injury), and (prior injury), Dr. P reported that the claimant was experiencing increased pain due to work activities, that she was on light duty work with no sewing, and that the claimant felt that she could continue on a light duty basis. His diagnosis remained the same as he had originally reported except he added "chronic pain syndrome." Dr. P stated:

> She continues with pain in the neck, upper and lower back, both shoulders which radiates to the arms and hands. There are no new injuries. There are no other doctors for this case. She is under treatment by myself for another injury, dated (date of injury) to the same parts of the body. This case is pending and will now get an update on her disability rating.

Dr. P also stated that "[h]er new case of [date of injury] aggravated her injury but she has never recovered from the first injury." Dr. P listed range of motion findings, but did not report a final figure. In an addendum to the April 12, 1994, report, Dr. P stated:

> This is an addendum to my subsequent narrative report April 12, 1994 on the patient [claimant]. I do find that [claimant's] disability for this injury of (date) is 25% of the body as a whole and 70% of this disability rating corresponds to this injury which is equal to 30% of the same (7.5) is being issued to the new injury of [date of injury) to the same parts of the body.

The parties represented to the hearing officer that the first compensable quarter for SIBS was from July 13, 1994, to October 11, 1994 (which means that the IIBS period ended on July 12, 1994), and that the second compensable quarter was from October 12, 1994, to January 10, 1995. Pursuant to Section 408.142(a), an employee is entitled to SIBS if on the expiration of the IIBS period the employee has an IR of 15% or more from the compensable injury; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the employee's impairment; has not elected to commute a portion of the IIBS; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), entitlement to SIBS is determined prospectively for each potentially compensable quarter, based on criteria met by the injured employee during the prior filing period. Under Rule 130.101, "filing 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 filing period for the first compensable quarter would have been from about the middle of April 1994 to July 12, 1994. The claimant testified that she worked at her light duty job with the employer until June 2, 1994, when she was "feeling bad" and Dr. P took her off work for about two weeks. On June 3, 1994, Dr. P reported that the claimant's condition "is worse in that she has been experiencing an exacerbation of her pain along with severe depression and anxiety." He stated that the claimant would continue with home care and would be taken off work for two weeks. In a note dated June 21, 1994, Dr. P stated that the claimant is able to return to light duty work on June 21, 1994. The claimant testified that when she returned to work on June 21, 1994, the employer told her that light duty was no longer available for her because it had a policy of allowing only 90 days of light duty per year. She said she returned to Dr. P and told him that the employer did not have any more light duty work for her and that Dr. P told her that if the employer didn't have "any type of job for me anymore, then I couldn't work," and that he gave her a "disability certificate" taking her off work. On June 21, 1994, Dr. P reported that:

> The patient was seen yesterday, 6-20-94 and was released to return to work within her limitations today, 6-21-94. When she went back to work, she was

> advised that no more light duty was available therefore she will remain off work until further notice.

In a note dated July 7, 1994, Dr. P stated that the claimant is to remain off work and return for a work status re-evaluation on August 4th.

The claimant testified that her condition has remained the same since she was released to light duty work in August 1993, that she was able to perform the light duty work the employer had given her, and that she could perform the light duty work at the employer if it was available. She said she wants to go back to work for the employer. She also said that the employer accepted all of her doctor's work restrictions and that she was allowed to take a break every hour and to have ice put on her arm when it got swollen. She said that after she was laid off she looked for work as a cashier at Furr's, Glamour Cuts, and K-Mart. She listed these three employers on her Statement of Employment Status (SES) dated July 8, 1994. She said she went to the three employers and filled out applications but that the employers were not taking applications, and that no one asked her if she had ever been injured. She said she has no experience as a cashier, that she does not think she is qualified for the jobs she applied for because she does not speak English, and that she thinks she is physically able to perform a cashier's job. She also listed on the SES for the first compensable quarter the wages she received from her employer for seven of the 13 weeks in the 13 week period preceding the first compensable quarter.

Also in evidence is a letter from the Texas Rehabilitation Commission (TRC) dated July 8, 1994, which advises that the claimant is a client of the TRC. The claimant said she began going to the TRC prior to July 8, 1994, with the intention of getting a job but that TRC did not get her a job because of Dr. P's letter stating that "I could not work." She said that prior to August 1994, she took care of getting documentation together in order to determine her eligibility for a TRC program.

The filing period for the second compensable quarter was from July 13, 1994, to October 11, 1994. On September 2, 1994, the claimant filed an SES in which she stated that she had not returned to work and in which she listed no employer contacts. The claimant testified that she did not look for work during the filing period for the second quarter because Dr. P had taken her off work and because she was attending school as part of a TRC program. On August 18, 1994, Dr. P reported that since the claimant's last visit her condition had remained unchanged and in a note dated August 18, 1994, he stated that the claimant was to remain off work and return for a work status re-evaluation on September 16, 1994. In a note dated September 16, 1994, Dr. P stated that the claimant was to remain off work and return for a work status re-evaluation on October 14, 1994. On October 20, 1994, Dr. P reported that the claimant continued to have back and shoulder pain and that he would re-evaluate the claimant in three weeks. In a letter dated October 28, 1994, a counselor for the TRC stated that the claimant is a client of the TRC

and that she is currently receiving training to be a computer technician and that "[i]t is appropriate for her disability as she cannot do her previous job per doctor's orders."

The claimant testified that since August 1994, she has been enrolled in a community college studying English 12 hours a week with a four hour lab period. She said she attends school from 1:00 p.m. to 4:00 p.m. on Monday, Wednesday, and Friday, and from 2:30 p.m. to 4:00 p.m. on Tuesday and Thursday. She said she does some household chores such as cooking, laundry, sweeping, and dusting, but that she cannot perform these activities like she had before her injury in (month year). She said she has constant pain, but reiterated that her condition has not changed since she was released to light duty work in August 1993, and she also testified that Dr. P has not changed her work restrictions, although he has stated that she is to remain off work. She also testified that her job experience consists of working for seven years as a sewing machine operator for the employer and prior to that working for about four to six months as a sales clerk in a clothing store. She said she would be unable to perform her preinjury job at the employer but would be able to perform her light duty job at the employer if it were available. She also said that her education consists of attending school through the ninth grade in (state).

The carrier does not challenge the hearing officer's findings that the claimant suffered a compensable injury on (date of injury); that the claimant has a 16% IR as assigned by the designated doctor; that the claimant did not commute any portion of her IIBS; and that the claimant was able to work light duty until she was laid off on June 21, 1994, because of the employer's policy of no more than 90 days of light duty per year. The carrier does dispute the following findings of fact and conclusions of law:

FINDINGS OF FACT

7.Claimant has no skills of abilities other than those of a sewing machine operator.

8.Claimant's educational level is only through the ninth grade, and that was in (state).

9.Claimant does not read, write or speak English.

10.During the 90 day period prior to the first compensable quarter, claimant worked for her employer and sought work commensurate with her ability to work.

11.On June 21, 1994, claimant's doctor said that she may not return to work.

12.Claimant is currently undergoing re-training with the [TRC].

13.During the 90 day period prior to the second compensable quarter, claimant did not have any ability to work and sought employment commensurate with that ability.

14.Claimant's underemployment and unemployment during the 90 day periods prior to the first and second compensable quarters is the direct result of the impairment from her injury of (date of injury).

15.Claimant's inability to obtain and retain employment at her pre-injury wage is due to the compensable injury she sustained on (date of injury).

16.There is no documented impairment from claimant's injury of 1990.

CONCLUSIONS OF LAW

2.Claimant is entitled to [SIBS] for the first compensable quarter, from July 13, 1994, to October 11, 1994.

3.Claimant is entitled to [SIBS] for the second compensable quarter, from October 12, 1994, to January 10, 1995.

4.Claimant's current disability is related to her injury of (date of injury).

5.Carrier is not entitled to contribution from a prior compensable injury.

In regard to the issue of SIBS for the first and second quarters, the carrier contends that the hearing officer's findings that the claimant sought work commensurate with her ability to work and her finding that the claimant's unemployment or underemployment is a direct result of the impairment from her injury are unsupported by the evidence. The carrier contends that the claimant did not make a good faith effort to obtain employment commensurate with her ability to work and that her underemployment and unemployment is not as a direct result of her impairment from her compensable injury.

The claimant has the burden to prove her entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. In regard to good faith efforts to obtain employment, in Texas Workers' Compensation Commission Appeal No. 94882, decided August 18, 1994, we stated:

We point out that the requirements of Section 408.142(a) and [Rule 130.103] require good faith efforts to obtain any employment commensurate with claimant's physical ability to work. The key is commensurate with the ability to work. The requirements are not to go back to one's previous employment or employment at a particular pay scale.

Whether a claimant attempted in good faith to obtain employment commensurate with her ability to work is generally a question of fact. Texas Workers' Compensation Commission Appeal No. 94150 decided March 22, 1994. As to the filing period for the first quarter, it is undisputed that the claimant worked for approximately seven weeks in a light duty position with her employer until she was laid off and that she then sought employment with three other employers in positions that she believed she was physically capable of doing. The fact that the claimant did not believe she was qualified for the jobs because she could not speak English and the fact that the claimant offered that the employers were not taking applications when she applied were matters for the hearing officer to weigh in determining whether the claimant attempted in good faith to obtain employment commensurate with her ability to work. We cannot conclude that the hearing officer's finding that the claimant sought work commensurate with her ability to work during the filing period for the first quarter is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, we noted that the employee's treating doctor's notes indicated she was unable to work at all, and we commented as follows: "If this is true, the claimant had an inability or no ability to work. Seeking employment commensurate with this inability to work would be not to seek work at all." However, in Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994, we stated:

> It is important to emphasize, however, that Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, did not do away with the requirement in Section 408.142(a)(4) that a claimant for SIBS must demonstrate that he or she attempted "in good faith" to obtain employment commensurate with an employee's ability to work. That case stands for the proposition that where it is demonstrated that a claimant's "ability" is "no ability," compliance with this requirement is effectively met by no search. However, we believe the burden is firmly on the claimant to prove that he indeed has "no ability" due directly to the physical injury.

In Texas Workers' Compensation Commission Appeal No. 941559, decided January 5, 1995, we stated:

> The hearing officer appears to view as significant to the job search requirement the fact that claimant has never been "released" by Dr. B. The long-range interests of this claimant, let alone her future qualification for SIBS, would best be served by appraisal of her abilities vis-a-vis the job market as a whole, not just her previous job. The SIBS statutes arguably contemplate that the claimant will not be able to return to the prior employment and wage

> level, because what SIBS compensates for is unemployment or "underemployment."

In the instant case the overwhelming weight of the evidence demonstrates that the claimant could perform light duty work during the filing period for the second compensable quarter and that the only reason Dr. P began reporting on June 21, 1994, that the claimant was to remain off work was because the claimant's employer no longer had light duty work available for her. The claimant did not attempt to find any work during the filing period for the second compensable quarter. Having reviewed the record, we conclude that the hearing officer's finding that the claimant did not have any ability to work during the filing period for the second compensable quarter is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The claimant had an obligation to attempt in good faith to obtain employment commensurate with her ability to work and she did not do so during the filing period for the second quarter. As to the claimant's cooperation with the TRC in attending school to learn English during part of the filing period for the second compensable quarter, we have previously stated that "attendance at a study or retraining program is a factor to be considered in determining entitlement to SIBS, but it does not automatically remove the claimant from the requirement of making a good faith effort to find some employment commensurate with her ability to work." Texas Workers' Compensation Commission Appeal No. 931188, decided February 9, 1994.

Concerning the criteria for SIBS that the employee has not returned to work or has returned to work earning less than 80% of the employee's AWW as a direct result of the employee's impairment, we noted in Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, that in 1 MONTFORD, BARBER & DUNCAN, A Guide to Texas Workers' Comp reform, Sec. 4.28 at 4-122 that it is stated that:

> The employee has, before the 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.

In the instant case the uncontradicted evidence is that the claimant was laid off from her light duty job with the employer on June 21, 1994, which was several weeks before the filing period for the first quarter ended, because the employer has a policy of allowing only 90 days of light duty per year. Dr. P did not change his recommendation that the claimant could perform light duty, but instead stated that "she was advised that no more light duty was available therefore she will remain off work until further notice." The evidence amply demonstrates that the claimant was capable of light duty work during the filing periods for the first and second compensable quarters. The only evidence relating to her unemployment during that part of the filing period for the first compensable quarter which remained after her lay off was that she applied for jobs with employers who were not hiring, and the only evidence in regard to her unemployment during the filing period for the

second compensable quarter was that she did not apply for jobs and went to school part of that filing period for 16 hours a week to learn English. There is simply no evidence to support the hearing officer's finding that the claimant's underemployment and unemployment during the filing periods prior to the first and second compensable quarters was the direct result of the claimant's impairment from her injury of (date of injury).

We reverse the hearing officer's conclusion of law and decision that the claimant is entitled to SIBS for the first and second compensable quarters and render a decision that the claimant is not entitled to SIBS for the first and second compensable quarters.

Without any explanation, the parties added the issue of whether the claimant's "current disability," if any, is related to her injury of (date of injury), or her injury of (prior injury). "Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). An employee is entitled to temporary income benefits (TIBS) if the employee has disability and has not attained MMI. Section 408.101(a). The income benefit in issue at the hearing was SIBS, not TIBS. The criteria for eligibility for SIBS does not include the definition of disability, but rather depends on good faith efforts to obtain employment commensurate with the ability to work and unemployment or underemployment as a direct result of the impairment from the compensable injury. The carrier disagrees with the hearing officer's finding that the claimant's inability to obtain and retain employment at her preinjury wage is due to the compensable injury she sustained on (date of injury), and her conclusion that the claimant's current disability is related to her injury of (date of injury). Such finding and conclusion do not support entitlement to SIBS, which is the income benefit in issue, and as such may be disregarded.

In regard to the issue of whether the carrier is entitled to contribution from the claimant's prior compensable injury, the carrier disagrees with the hearing officer's finding that there is no documented impairment from the claimant's injury of 1990, and her conclusion that the carrier is not entitled to contribution from a prior compensable injury. Section 408.084 pertains to contributing injury and provides as follows:

> (a)At the request of the insurance carrier, the commission may order that [IIBS] and [SIBS] be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.
>
> (b)The commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction under this section.

(c)If the combination of the compensable injuries results in an injury compensable under Section 408.161, the benefits for that injury shall be paid as provided by Section 408.162.

The carrier has the burden to prove that an injured employee has a documented impairment from a prior compensable injury. Texas Workers' Compensation Commission Appeal No. 931084, decided January 12, 1994. In his addendum to his April 12, 1994, report, Dr. P indicates that the claimant has a 25% "disability rating" for her injury of (prior injury), that 70% of the claimant's "disability rating" corresponds to that injury, and that "30% of the same (7.5) is being issued to the new injury of 2-17-93 to the same parts of the body." In Texas Workers' Compensation Commission Appeal No. 941440, decided December 8, 1994, we pointed out that disability and impairment are not the same thing and that under the 1989 Act, disability is used to determine entitlement to TIBS whereas impairment is used to determine entitlement to IIBS. In Texas Workers' Compensation Commission Appeal No. 931084, decided January 12, 1994, the claimant had sustained an injury in 1990 and in 1992, the carrier offered a report from a doctor to show that the claimant had 10% impairment from the 1990 injury. In the report the doctor stated that the claimant had a permanent partial disability of 10% "percentage of loss." The hearing officer determined that the carrier had not shown a documented impairment relating to the claimant's prior compensable injury. In affirming the decision we stated:

Carrier offered only the one-page report of Dr. JM, which its own attorney described as a "disability" rating. The hearing officer apparently believed that the document in question, standing alone and unexplained, fell short in that carrier failed to demonstrate that a 10% loss or disability under "old law" would necessarily equate to impairment under the 1989 Act. Dr. H, the designated doctor, opined that it did not. While the Appeals Panel has held that contribution from an "old law" injury is not precluded by the statute we nevertheless agree that the carrier should show that the basis for assessing any previous percentage was similar to that used to assess impairment under the 1989 Act.

* * * *

At best, the evidence might persuade a finder of fact that there could have been an impairment from the prior injury. With no evidence to equate the premise underlying the previous rating to the basis for the current rating, there is no support for a proportionate reduction in benefits.

In Texas Workers' Compensation Commission Appeal No. 941338, decided November 22, 1994, we stated in regard to contribution from a prior compensable injury that:

> Although it is not required that the documented impairment be in the form of a TWCC-69, or based upon the AMA Guides, an impairment from the contributing injury must nevertheless be recorded in medical records.
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> * * * *
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> We have previously stated that while contemporaneous medical records are not necessarily required, the requirement for documentation of an "impairment" from the prior injury is not obviated; the later records must contain evidence that an impairment resulted from the prior injury.

In the instant case it is undisputed that the claimant suffered a work-related injury to her neck, back, and shoulders in (month year). "Impairment" means "any anatomic or functional abnormality or loss existing after [MMI] that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). In this case there is a distinct lack of medical evidence to document impairment, as defined in the 1989 Act, from the 1990 injury. In her discussion of the evidence the hearing officer states that "it is unclear that [Dr. P] is talking about the same thing when he talks about the disability rating for Claimant's prior compensable injury and the [IR] for this injury." The carrier had the burden of proof on the contribution issue, and having reviewed the record, we cannot conclude that the hearing officer's finding that there is no documented impairment from the claimant's 1990 injury, and her conclusion that the carrier is not entitled to contribution from a prior compensable injury, are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*. *Compare* Texas Workers' Compensation Commission Appeal No. 950130, decided March 13, 1995, and Texas Workers' Compensation Commission Appeal No. 94637, decided July 1, 1994.

The hearing officer's decision and order that the claimant is entitled to SIBS for the first and second compensable quarters are reversed and a decision is rendered that the claimant is not entitled to SIBS for the first and second compensable quarters. The hearing officer's decision and order that the carrier is not entitled to contribution from the prior compensable injury are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge