APPEAL NO. 950298

A consolidated contested case hearing was convened by the hearing officer, (hearing officer), in (city), Texas, on December 1, 1994, and was continued to and completed on January 11, 1995. The two disputed issues were whether the respondent (claimant) was entitled to supplemental income benefits (SIBS) for both the third and fourth compensable quarters and the hearing officer issued separate decisions and orders for the two quarters. In this case, the hearing officer determined that claimant was entitled to SIBS for the fourth compensable quarter and the appellant (carrier) has appealed pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.202(a) (1989 Act). The carrier asserts that the decision is against the great weight of the evidence. Claimant's response asserts the sufficiency of the evidence to support the decision.

DECISION

Affirmed.

Section 408.142(a) provides that an employee is entitled to SIBS if on the expiration of the impairment income benefits (IIBS) period the employee has: (1) an impairment rating (IR) of 15% or more; (2) has not returned to work or has earned less than 80% of the average weekly wage "as a direct result of the employee's impairment;" (3) has not elected to commute a portion of the IIBS; and (4) "has attempted in good faith to obtain employment commensurate with the employee's ability to work." This case concerns continuing entitlement to SIBS. Tex. W.C. Comm'n, 28 TEX. ADMIN CODE § 130.104(a) (Rule 130.104(a)), which states the continuing entitlement criteria, provides that an injured employee initially determined by the Texas Workers' Compensation Commission (Commission) to have been entitled to SIBS will continue to be entitled for subsequent compensable quarters if during each filing period the employee (1) has been unemployed or underemployed "as a direct result of the impairment from the compensable injury" and (2) has "made good faith efforts to obtain employment commensurate with the employee's ability to work." *And see* Section 408.143(a).

At a hearing held on June 22, 1994, involving these parties, the hearing officer determined that claimant was entitled to SIBS for the second compensable quarter. The carrier appealed asserting the decision to be against the great weight and preponderance of the evidence and the Appeals Panel affirmed in an unpublished decision. Texas Workers' Compensation Commission Appeal No. 941273, decided November 4, 1994. In this case, the hearing officer incorporated into his decision the following stipulated facts from the earlier hearing: that the carrier accepted liability for claimant's September 8, 1991, injury; that claimant had an IR in excess of 15% and reached maximum medical improvement (MMI) on November 18, 1992; that all IIBS had been paid; that claimant did not commute IIBS; and that claimant made application for and was paid SIBS for the first compensable quarter. The parties further stipulated that the filing period for the fourth compensable quarter was from March 30 through June 27, 1994.

Claimant testified that he had been trained as a railroad car mechanic and in welding. According to his resume he also had studied computer electronics. The evidence showed he had previously worked as a shipping and receiving clerk, a tile setter, and a railroad car mechanic, and at the time of his injury was an order selector for a food company. The evidence, including claimant's testimony, indicated that his compensable injury consisted of bilateral carpal tunnel syndrome (CTS); that he had undergone bilateral operations for the injury; that he was thereafter restricted from performing work involving repetitive hand and finger motions, use of vibrating tools, and heavy lifting; that he had no secretarial, clerical or managerial training or experience; that his doctor advised him to change occupations and to obtain retraining through the Texas Rehabilitation Commission (TRC); that he attended (college) full time during the spring semester of 1994, which commenced on January 16 and ended in mid-May 1994, and would come home from school and go to bed; that he did not attend a summer school session; and that he resumed his studies in late August 1994 for the fall semester. There was no evidence as to whether the college held a summer session which claimant could have attended. He further testified that he began working part time on October 5, 1994, in a bar.

There were no medical records in evidence. Nor were there any college records in evidence to show the hours claimant was in school and, thus, the hours he was available for work. Claimant introduced a March 11, 1994, letter from the TRC stating that he is presently a client of the TRC, is currently cooperating and following through with his planned program, that his vocational goal is to be trained in the technical/vocational field, which training should last about two years, and that he has completed one semester under TRC sponsorship and is currently attending the spring 1994 semester. The evidence did not indicate whether the Commission referred claimant to the TRC. *See* Section 408.150(a), Section 408.150(b) and Rule 130.103(e) which provide that an employee who refuses services or fails to cooperate with the TRC loses entitlement to SIBS.

Claimant's Statement of Employment Status (TWCC-52) form dated July 22, 1994, stated that he had not worked during the period from the week ending on April 15 through the week ending on July 8, 1994. Attached to the form was a list of 18 prospective employers claimant indicated he had contacted for employment at unspecified times during that period, including in some instances the names or titles of the persons contacted. The carrier signed the form on August 15th stating that claimant was not entitled to SIBS because he was "not making a good faith effort at seeking employment" and there was "no documentation supporting any applications for employment." The form also stated that claimant was cooperating with the TRC by attending school and that he had called the Texas Employment Commission (TEC) which only had jobs in welding and construction. In his testimony, however, claimant stated that it was in January or February 1994 that the TEC told him there were only welding and construction jobs available and that when he advised the TEC he could no longer perform that kind of work he was told the agency would get back to him when something came up. Claimant said that the last time he called the TEC, in June or July 1994, he was told that only office jobs involving typing and clerical work were available and that experience was required. He said he had no experience in such

positions. He also mentioned that the college had to provide him with special support pads for use with the computer because his hands would go numb.

With respect to the 18 potential employers contacted at unspecified times during the qualifying period, which claimant identified both on his TWCC-52 form and in his response to a carrier interrogatory, claimant testified that all the jobs were for full-time positions, that he was told that none were hiring, and that he was never turned down because of his injury. There was no evidence that the business entities on the list were aware that claimant had any impairment. Several were individuals for whom he could not mow or continue to mow their grass because of his work restrictions. When asked why he inquired about full-time positions, he replied that he was looking for a full-time position. Claimant also testified to actually going to the premises of certain of those prospective employers and to calling the others. He said that one prospective employer, the Holiday Inn, accepted his application but was not hiring. He also testified that he perused the employment advertisements in the newspaper from time to time and that in most instances he realized he would not be qualified, either because he lacked experience or because of his inability to perform the job because of his physical limitations.

The carrier called (Mr. L), a vocational counselor, whose testimony essentially repeated the content of his reports in evidence. He stated that his company was hired by the carrier to determine whether claimant had "registered" with the TEC and that in December 1994 when he inquired, he was advised the agency had no record of claimant's having registered within the past 12 months.

(Mr. H), an adjuster, was called by the carrier and his testimony, too, basically repeated the content of his reports in evidence. He stated that his company was hired by the carrier to verify that claimant had applied for jobs with the prospective employers he listed on the TWCC-52 and to do a newspaper search for available jobs during the January through September 1994 period. Mr. H indicated that in November and December 1994 he visited the premises of those employers he could locate and was unable to verify the submission of employment applications by claimant during the qualifying period. Claimant maintained that in some instances he talked to different persons than did Mr. H and that in nearly every instance was informed that the prospective employer was not then hiring. He did not indicate he filed applications upon being informed the employers were not hiring. Mr. H also conceded that he did not know what claimant's job restrictions were nor did he know what jobs in the newspaper ads claimant was capable of performing.

The hearing officer reached the legal conclusion that claimant met the eligibility criteria for and was entitled to SIBS for the fourth compensable quarter. In support of that conclusion the hearing officer found that during the filing period, March 30 to June 27, 1994, claimant was a full-time student at the college attending a vocational rehabilitation program devised by the TRC to train him for other occupations because of his impairment; that he did not attend school after May 15, 1994, and up to the end of the eligibility period, a period of six weeks, because of the summer recess; that during the eligibility period claimant was

limited from certain kinds of work involving heavy lifting, repetitive hand motions, or using vibrating tools; that such limitations resulted from nerve damage from the CTS; and that he made good faith efforts to find employment in (city) commensurate with his rehabilitation training, his status as a full-time student, his medical condition, and his ability to work.

The carrier's position on appeal is that the decision is against the great weight of the evidence because it shows that claimant failed to prove both of the continuing entitlement criteria, namely, that his unemployment during the eligibility period was "a direct result of [his] impairment" and that he "in good faith sought employment commensurate with [his] ability to work."

With respect to the "direct result of the impairment" requirement the carrier cites to Texas Workers' Compensation Commission Appeal No. 93630, decided September 9, 1993, and points to evidence that the prospective employers contacted by claimant were simply not hiring, to the absence of evidence that claimant ever discussed his physical limitations with such employers, and to the absence of evidence that claimant was ever advised by any prospective employer that he would not be hired because of his limitations. The opinion in Appeal No. 93630 affirmed the decision of the hearing officer, based on the evidence in that case, that the injured employee's failure to return to work was not a direct result of her impairment. The opinion discussed the "direct result of impairment" criterion at some length including citing a text for the proposition that the employee's burden is to prove the lost earnings are "a direct result of the employee's impairment, rather than, for example, economic factors unrelated to the employee's physical limitation." In contrast to the case we here consider, the evidence in that case did not show the employee to have been enrolled, for any part of the filing period, in a full-time course of instruction as a client of the TRC so as to qualify for other occupations; and the evidence did show that the employee could, as she said, "handle any type of job" so long as she did not have to stand or sit for three to four hours at a stretch. Our opinion also recognized the difficulty of proving that prospective employers did not hire because of impairment. Observing that potential employers may well not indicate the reason an applicant is not hired, the opinion suggested reliance on other evidence, including medical evidence, to show that the unemployment was a direct result of the impairment.

The hearing officer in this case made no specific finding on the "direct result of impairment" criterion, as such. In Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993, we remanded for further development of the evidence on the "good faith attempt" criterion. Regarding the "direct result of impairment" criterion, the opinion stated:

> We agree with the implicit determination (not specifically set out as a finding but necessary for the result reached) of the hearing officer that the evidence established that the claimant's unemployment or underemployment was a direct result of the impairment from the compensable injury. All of the medical evidence tends to support the fact that the claimant suffered a serious

> injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury. Indeed, there has never been a question of various limitations being imposed on the claimant. And, the claimant's testimony is consistent with this as is the report of Dr. W. There is sufficient evidence of a direct linkage between what the claimant was earning at the time of his injury and the subsequent reduced wage level resulting from that injury.

Similarly, in Texas Workers' Compensation Commission Appeal No. 950114, decided March 7, 1995, the carrier urged on appeal that the employee failed to demonstrate that his lower wage was a direct result of his impairment. In affirming the decision for the employee the Appeals Panel stated: "Although inartfully phrased, we are persuaded from reviewing the findings of fact and decision as a whole that the hearing officer agreed that it was claimant's impairment that caused him to be returning to work where . . . he earned less than 80% of his average weekly wage." *Compare* Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, where the Appeals Panel remanded for failure of the hearing officer to make factual findings on either of the continuing entitlement criteria and the carrier had asserted specific error in the failure to make any findings on the "direct result of impairment" criterion. That opinion stated: "We are unwilling to imply such findings from a boiler plate legal conclusion of eligibility when a record presents greatly conflicting evidence on `direct result,' and minimal evidence on the matter of `good faith' job search." The carrier here has not complained of the lack of a specific finding on the "direct result of impairment" criterion but rather complains of the failure of the evidence. While making a specific finding on both criteria would certainly have been preferable, we believe that the findings, read together, fairly imply such a finding on this criterion.

We have previously written on the inherent dilemma in establishing that an employee's failure to obtain employment was the direct result of the impairment. In Appeal No. 93630, *supra*, the Appeals Panel stated that "it is unreasonable to expect a potential employer to say, much less write, that the reason they are not hiring an applicant is because the applicant has an impairment or a handicap." We went on to state, however, that "neither can we engage in speculation that an employer has somehow divined that an applicant has a workers' compensation claim and impairment which would preclude them from employment." That opinion cited 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO WORKERS' COMP REFORM § 4.28 at 4.119 to the effect that the employee's burden is to prove that lost or reduced earnings are a direct result of the impairment rather than, for example, economic factors unrelated to the employee's physical limitation. There was no dispute that claimant had sustained compensable bilateral CTS injuries resulting in surgery and subsequent restrictions preventing him from doing repetitive motion or heavy lifting work nor was there any dispute that claimant was pursuing a full-time course of instruction as a client of the TRC in order to pursue other occupations. Such evidence was seen as sufficient to support the "direct result of impairment" criterion in Appeal No. 93559, *supra*, and Appeal No. 950114, *supra*. *Compare* Texas Workers' Compensation Commission

Appeal No. 95011, decided March 3, 1995, and Texas Workers' Compensation Commission Appeal No. 950172, decided March 17, 1995.

The findings are less problematical regarding the "good faith effort" criterion and, again, we are satisfied the evidence sufficiently supports the hearing officer's findings. The carrier points to the claimant's testimony that the jobs he contacted employers about were full-time positions and to the negative results of its investigator's efforts to verify claimant's having applied for jobs with the prospective employers. However, claimant acknowledged looking of a full-time job though it was not clear whether his intent was to find a full-time job during or after the spring semester ended in mid-May. In that regard, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993, has stated:

> In sum, because an injured employee is in a study program with TRC does not automatically remove him from the statutory requirements of making a good faith effort to obtain employment commensurate with his ability to work. Section 408.142(a). It may well be an appropriate factor to be considered along with other factors in determining his good faith efforts and eligibility for SIBS. We in no way state a requirement that an injured employee who is cooperating with TRC to assist him in alleviating or overcoming the effects of an on-the-job injury is required, nonetheless, to seek out full or any particular level of employment to be entitled to SIBS. Rather, all the factors affecting the qualifications for SIBS must be considered under the particular circumstances of the case. [Texas Workers' Compensation Commission Appeal No. 931019, decided December 17, 1993.]

As for the carrier's investigation, the hearing officer could consider that claimant made his contacts during the qualifying period whereas the investigation took place in November and December, that in certain instances claimant testified to having talked to different persons than did the investigator, and that claimant never contended he submitted applications after being told the employers were not hiring. The hearing officer could have viewed the minimally developed evidence as showing that claimant contacted numerous prospective employers throughout the filing period in an effort to obtain full-time employment whenever it became available during the filing period notwithstanding the time demands of his courses.

Claimant had the burden of proving his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. Whether claimant satisfied his burden to prove he met the continuing entitlement criteria for SIBS for the fourth compensable quarter presented the hearing officer with questions of fact to resolve. The hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). It is for the hearing officer to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As an

appellate reviewing body, we will not substitute our judgment for that of the hearing officer and disturb his factual findings unless we find them to be so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find them so in this case.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge