APPEAL NO. 980090

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 December 17, 1997. With respect to the only issue before her, the hearing officer determined that since claimant's underemployment during the applicable filing period was not a direct result of the compensable injury (impairment), claimant was not entitled to supplemental income benefits (SIBS) for the seventh compensable quarter of August 14 through November 12, 1997 (all dates are 1997 unless otherwise noted).

Claimant appeals contending that the hearing officer "applied the wrong test," that carrier had paid SIBS for at least four quarters and should have asserted any defense earlier and that since claimant is working at his old job but earning substantially less he should be entitled to SIBS. Claimant requests that we "review the record" and inferentially that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds urging that claimant's contentions are "purely speculative" and that the decision be affirmed.

DECISION

Affirmed.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling 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 employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The parties stipulated that claimant sustained a compensable (left hip) injury on _____, reached maximum medical improvement with a 15% impairment rating, has not commuted impairment income benefits (IIBS) and that the applicable filing period was from May 15th through August 13th. The parties stipulated that claimant's preinjury AWW was $1,202.33 and the hearing officer determined that claimant's earnings during the applicable filing period were $8,563.40 (for an approximate after injury AWW of $658.72). The hearing officer determined that during the applicable filing period claimant's earnings were less than 80% of his preinjury AWW.

This case is somewhat unusual in that the sole dispute is whether claimant's underemployment is a (not necessarily the) direct result of claimant's impairment. The background facts are not in dispute. Claimant was employed as an outside salesman selling assorted hoses, gaskets, valve seats, tubing, etc. Claimant testified that his specialty was selling these products for use on tanker trucks and chemical haulers. It is undisputed that claimant worked strictly on a commission basis, based on the employer's profit. One of claimant's largest accounts was the (G) account which consisted of 20% to 30% of claimant's sales (and income). G had been one of claimant's clients for 17 years and only claimant serviced that account. Claimant's stipulated preinjury AWW was $1,202.33 (claimant testified that he had earned $70,000.00 or so the calendar year prior to his injury). Shortly before his injury claimant had submitted a bid or proposal to G, apparently for its business for a period of time. Claimant fell and fractured his hip, was hospitalized a few days and was in traction at home for seven weeks. While at home claimant received a call from G advising him that he had lost that account. There was considerable testimony why the account was lost and the hearing officer made a specific determination, based largely on claimant's own testimony, that the loss of the G account was due to "pricing and variety of products." (Claimant testified that the competitor had a wider range of products where G could consolidate its purchases.) Claimant retained some of G's business that was leased out but that accounted for only 10% of claimant's overall sales. (In other words the loss of the G account resulted in about a 20% loss of claimant's earnings.) Claimant eventually had a total left hip replacement in 1994. As a result of the left hip replacement, claimant's left leg "is shorter" than the right, claimant has a built up left shoe, and walks with a limp. Claimant continues to takes some medication. Claimant testified that he has been restricted from climbing ladders because of the danger of "throwing his hip out." The only medical report in evidence recommends pool therapy but does not address the undisputed climbing restriction. Claimant returned to work for his employer with annual earnings of $36,000.00 in 1994 (the year claimant had his hip surgery), $24,000.00 in 1995, and $25,000.00 in 1996.

Claimant testified that he has attempted to tap what he perceives as a vast unserviced market selling gaskets, valves, etc. for sea containers. The employer was not involved very much in selling to sea containers either before or after claimant's injury. Claimant testified that he had one sea container customer before his injury but that customer had gone "C.O.D." Claimant testified that post injury, the problem he had in soliciting sea container business was that selling his products required meticulous measurements using metric measurements and that sea containers required climbing on top of the container to measure the domes and other top-side couplings, and that since he could not climb ladders he was unable to tap into this market.

The hearing officer, in her Statement of the Evidence, commented:

> Much of the hearing was dedicated to the new business involving sea containers that Claimant would be able to pursue if he could climb. In regard to the potential business, this is essentially based on speculation. To date,

> Claimant's employer has not pursued this avenue and none of the other sales personnel have pursued sea containers to the point it is reflected in their salaries.

Claimant first contends that the hearing officer "applied the wrong test" in that the hearing officer applied the direct result test of Section 408.142(b)(3) rather than Section 408.142(a)(2). We do not agree. There is no indication that the hearing officer used Section 408.142(b)(3) or that the direct result test would have been applied any differently. Furthermore, in that claimant has apparently been receiving SIBS for one or more compensable quarters the provisions of Rule 130.104(a)(1), apply. That rule provides that an employee will continue to be entitled to SIBS if the employee, during the applicable filing period, has been underemployed (earning less than 80% of the preinjury AWW) "as a direct result of the impairment from the compensable injury." We find that the hearing officer applied the correct statutory provision and rule.

Claimant next contends that the carrier "did not contest that the decrease in earnings were a direct result of the accident [compensable impairment]." Claimant contends that carrier "should have asserted [the lack of direct result] argument at the time [IIBS] ended and before [claimant] received his first quarter of [SIBS]." We disagree. The Appeals Panel has held that each compensable quarter stands alone and the determinations in one quarter are not necessarily binding on subsequent quarters. *See* Texas Workers' Compensation Commission Appeal No. 951752, decided December 8, 1995, for a discussion on a hearing officer's finding on direct result criteria in one quarter not being binding on subsequent quarters. Neither have we required a carrier to assert any and all defenses it may have prior to IIBS ending and would note that circumstances may change from quarter to quarter.

Claimant raises some rhetorical questions of situations where a hypothetical employer has gone bankrupt, or the factory burned, questioning whether claimant would have to prove the bankruptcy or factory destruction was the cause of claimant's decreased earnings. We observe that in the usual SIBS case the claimant is unable to return to his preinjury employment because of his injury in which case the claimant still has the burden to prove that his unemployment or underemployment was a direct result of the impairment. Whether or not the employee returns to the employment of the preinjury employer claimant has the burden of proving the statutory elements of Section 408.142(a) and requirements of Rule 130.104. *See* Texas Workers' Compensation Commission Appeal No. 950849, decided July 7, 1995, for an analysis of how economic factors are applied to the direct result criteria.

We agree with claimant's contention that he is "working every bit as hard as he worked before he was crippled . . ." however, it is incumbent on the claimant to prove that the decreased earnings are due to the impairment rather than other factors. In this case we have only claimant's speculation that were it not for his impairment he could have had substantially greater earnings by tapping the sea container market. We also note, as does

the hearing officer, that the employer has not, and presently is not, actively pursuing the sea container market for its products. The hearing officer's comments that potential increased earnings from the sea container business is based on speculation is supported by the evidence. Even if claimant had no impairment, there is only claimant's speculation that his earnings would increase based on his ability to climb sea containers.

As noted previously, the hearing officer determined that the loss of the G account was not related to claimant's injury in that claimant had submitted his proposal prior to his injury and that claimant's own testimony appeared to support the hearing officer's determinations that the loss of the G account was due to pricing and G's desire to consolidate purchase of products with one supplier.

Although a different fact finder may have reached a different conclusion based on the same evidence, that alone does not provide a basis on which to reverse this decision. We find the hearing officer correctly applied the law and that the factual determinations are supported by the evidence. Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Christopher L. Rhodes
Appeals Judge