APPEAL NO. 982993

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 November 13, 1998, in (city), Texas, with (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the second or third quarters and that respondent (carrier) is not liable for second quarter SIBS because claimant filed his Statement of Employment Status (TWCC-52) after the filing period for that quarter ended. Claimant appeals regarding only third quarter SIBS and contends that his unemployment was a direct result of his impairment. The hearing officer made a good faith determination in claimant's favor regarding both quarters, determining that "Claimant made a good faith effort to seek employment." Neither party appealed the good faith determinations in claimant's favor. Claimant did not appeal the determination regarding the late filing of his TWCC-52 for the second quarter. Carrier replies that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and remand.

This decision concerns only third quarter SIBS and the direct result criterion. Claimant contends that there was error in the direct result finding in this case.

The parties stipulated that: (1) claimant sustained a compensable injury on (date of injury); (2) claimant's impairment rating (IR) is 23%; and (3) claimant did not elect to commute his impairment income benefits (IIBS). The filing period for the third quarter was from approximately April 21, 1998, to July 20, 1998.

The hearing officer discussed and summarized the facts regarding claimant's good faith effort during the third quarter filing period and we will not repeat the facts except as necessary to the direct result issue. Regarding direct result, this case involved an unusual fact situation. As the hearing officer correctly noted, during the filing period for the third quarter, the claimant *was physically able* to return to his former employment: a sedentary job as an electronics technician.[1] 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 filing 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. [Emphasis added.] 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.

[1]Dr. D, who was, apparently, the designated doctor, stated that this was sedentary work.

The claimant in this case apparently sustained a compensable lifting injury in late July (year) and later underwent lumbar spinal surgery. Claimant testified that before his injury, he did not have the work restrictions imposed by his doctors after his compensable lumbar injury. He asserts that he was told his restrictions are permanent. Carrier asserts that, "there is little if any evidence in the record . . . that [claimant's] functional abnormality or loss resulting from the compensable injury even exists at this point, let alone that such functional abnormality or loss was or is presumed to be permanent . . . ." Apparently, carrier is asserting that claimant had no work restrictions during the third quarter filing period. However, there was evidence that claimant had permanent impairment and restrictions. In January 1997, the designated doctor certified a 23% IR, which included impairment for a surgically treated disc lesion, loss of lumbar range of motion, and behavioral disorders (apparently anxiety, sleep disturbance, and reactive depression due to "chronic pain state"). Dr. R, claimant's surgeon and former treating doctor, noted that it is "not uncommon to see ongoing axial low back pain following [claimant's] particular injury." The designated doctor certified that the 23% was a "permanent" IR. On January 13, 1997, Dr. R checked a box stating that claimant "can perform his job as outlined in his job description." That form noted that in 1996, Dr. R had imposed restrictions of no lifting over 20 pounds. It is not clear that, by signing this form sent to him by carrier, Dr. R released claimant to do *all* kinds of work, including heavy work, with no restrictions. The evidence shows only that Dr. R released claimant to go back to his former job, which was a sedentary job. A June 1, 1998, office note from Dr. C states that: (1) claimant had sustained a low back injury at work; (2) "he was given an [IR] of 23% and permanent restrictions of 20 lbs. with no repetitive bending and pushing"; and (3) claimant was referred for a functional capacity evaluation (FCE). Dr. C stated that "[t]his man has already had an [IR] and it is permanent in nature. I do not think he will need an FCE for now. . . ." A September 10, 1998, employment capacities report signed by Dr. P indicated that: (1) claimant's diagnosis is degenerative lumbar disc disease, post-op disckectomy; (2) the prognosis is "guarded for complete recovery"; (3) the date of onset was August 4, (year); (4) that claimant takes pain management medications; (5) claimant is restricted regarding walking, sitting, standing, climbing, kneeling, stooping, and other listed activities; (6) claimant's lifting restriction is 20 pounds; (7) claimant is physically able to do part-time work; (8) *claimant may return to his previous occupation*; and (9) "the above condition constitutes a barrier to employment."

Although both Dr. R and Dr. P released claimant to return to his former work, the designated doctor's report states that claimant had already been fired for being away from work for over one year. Claimant testified that he moved out of state and was actually working for 54 days of the filing period doing light yard work and office work for his brother's business, earning minimum wage.[2] Claimant testified to his job search during the third quarter filing period, and that evidence will not be repeated here. We do note that claimant

[2]Claimant said he was living with his brother and left because he had promised to stay only a short period. He said he then moved to another state and testified about his job search there.

testified that, during the third quarter filing period, he attempted to train for a job as a dealer at a casino, but he was unable to stand for long periods as the job required, so he did not complete the training.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBS when the impairment income benefits (IIBS) period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the 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.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there is a conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, (year).

A release to full duty in the context of a specific, sedentary job is not the equivalent of a release to all forms of work. The fact that claimant was physically capable of returning to his former sedentary job is not dispositive of the direct result issue in this case. There have been cases involving other claimants who also were physically able to return to their former jobs, but yet still were held to have established that their unemployment was a direct result of their impairment. *See* Texas Workers' Compensation Commission Appeal No. 961689, decided October 10, 1996; Texas Workers' Compensation Commission Appeal No. 962356, decided January 2, 1997. In both of those cases, the Appeals Panel reversed and rendered that the claimant had satisfied the burden to prove the direct result criterion.

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 filing period and (2) did the impairment affect or impact claimant's unemployment or underemployment situation.

The claimant in this case was working at the time of his (year) compensable injury and did not have the restrictions he has now. He indicated that, had he not been injured, he would still be employed with his former employer. There is evidence that claimant had some work restrictions when he was working/making his good faith job search during the filing period in question. It must be considered whether work restrictions would generally change or limit the type and number of jobs that claimant looked for or was physically able to do. It can be assumed that a worker with restrictions has fewer options available to him than a

worker with no restrictions. Therefore, if there are job restrictions due to impairment from a compensable injury, then a hearing officer should consider whether any unemployment could be at least a direct result of the impairment from the compensable injury. A claimant need only prove that the unemployment or underemployment is a direct result of the impairment, but need not prove that it is the *sole cause* of the unemployment or underemployment. Texas Workers' Compensation Commission Appeal No. 960008, decided February 16, 1996.

There is not a finding of fact regarding whether claimant has any permanent restrictions or what any such restrictions encompass in this case. There is evidence, as set forth above, regarding work restrictions and permanent impairment. We reverse the hearing officer's direct result determinations regarding the third quarter. We remand this case for the hearing officer to: (1) determine whether claimant had work restrictions during the filing period for the third quarter; (2) determine what the restrictions were, if the hearing officer finds there were work restrictions; and (3) reconsider the SIBS/direct result determinations, considering these two findings and the cases and discussion set forth in this appeals decision. The issue of direct result involves fact issues for the hearing officer to determine.

We reverse the hearing officer's direct result determination and remand this case to the hearing officer 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 Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge