APPEAL NO. 93559

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on June 9, 1993, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS). Appellant (carrier) urges error in several of the hearing officer's findings of fact and conclusions of law and asks that the decision be reversed. No response has been filed.

DECISION

Concluding that there is a need for further development of the evidence concerning the initial entitlement criteria for supplemental income benefits set forth in the statute and commission rules, we reverse and remand.

The record in this case, a case of first impression on SIBS, is not well developed on either side; however, what evidence there is when measured against the statutory and regulatory provisions relating to supplemental income benefits leads us to reverse and remand. There is evidence to show that the claimant suffered a knee injury in the course and scope of his employment on (date of injury), for which he underwent arthroscopic surgery in May 1991 and reconstructive surgery in July 1991. He was subsequently determined to have reached maximum medical improvement by his treating doctor, (Dr. O) on January 27, 1992, and was assessed an 18% whole body impairment rating. In a letter to the employer from Dr. O dated December 27, 1991, the claimant was released to work with limitations as follows:

> At this point in time, he probably can do a job where he can lift repetitively between 30 and 40 pounds. If occasionally he needs to lift 70 pounds, I think that is reasonable, but I will not recommend that he do this on a very continuous basis. My advice to this patient is to use a rule of common sense because he didn't have a normal knee before the operation, and he does not have a normal knee now. He now has a stable knee which is a better knee. Therefore, he has to use his common sense and not wear out his knee too much. Nevertheless, he is very concerned about his health and well-being as well as his job security. He will have to strike a balance between his desire to keep his job and his ability to do heavy labor.

Although the record is not clear, the claimant apparently did not go back to work for the employer and apparently was not employed anywhere until January 4, 1993, when he obtained a part time job working 18 to 22 hours a week. He indicated that he did not seek employment between the period January 1992 and December 1992 (when he applied for the part time job) and did not make any contact with the Texas Employment Commission because he did not know he had to. He stated that he was referred to the Texas Rehabilitation Commission even before his first surgery (May 1991) and that he was accepted in their program and that they had paid for his schooling. He states that he has

about 18 college hours, that although he currently was not taking any courses, he indicated he had taken a full course load sometime in the past (not further developed). He stated he intended to begin again in the 1993 summer session and that he was working toward an associate degree in physical therapy which he figured would take him about two and a half years. Although he was not taking any courses, he responded to a question at the hearing that the only reason he was not able to work 40 hours a week was because he was going to school full time. He stated that no doctor had told him he could not work 40 hours a week, that he had not attempted to get a full time job, and that the only way to get up to full time with his current employer was by seniority. He also testified that if his current employer had full time work available he would be able to work it. He stated that the reason that he applied for the position with his current employer in December 1993 was because "I needed some extra money to help pay for Christmas."

The claimant's impairment income benefits (IIBS) ended in February 1993 and application was made for SIBS. Pursuant to a commission order, The claimant was seen by(Dr. W) on March 26, 1993, for purposes of determining if the "claimant's under employment is a direct result of his impairment." In a report dated March 31, 1993, Dr. W gave the following assessment:

In consequence of these Cybex testings the patient is felt to have a strong knee after his operation. However, his strengths in his involved left knee are approximately 50% of his strengths in his uninvolved extremity. It is felt that his complaints of limited work endurance are associated with this anatomical condition. In this context, his under employment is a direct result of his left knee injury and his anatomic impairment.

A May 3, 1993, letter from Dr. O states that: "I think that (claimant) is capable of working 40 hours per week provided that he doesn't do repetitive lifting over 50 #, and doesn't do excessive squatting and climbing."

Carrier urges error in the hearing officer's finding that the claimant has in good faith attempted to obtain employment commensurate with his ability to work and with the resulting calculations of benefits. At the hearing, the carrier urged the position that the claimant was not entitled to any SIBS because his underemployment was not due to the impairment of his knee and that, alternatively, any SIBS benefits should be based upon his capability to work a 40 hour week. The hearing officer determined the SIBS rate based upon the wages of the claimant's part time work.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.103 (TWCC Rule 130.103), implementing Article 8308-4.28 of the 1989 Act sets forth the criteria for establishing the initial entitlement to SIBS and provides that "[a]n injured employee who received an impairment rating of 15% or greater, and who has not commuted any impairment income

benefits, is entitled to receive supplemental income benefits upon termination of the impairment income benefits period if the employee:

(1)has been unemployed, or underemployed as defined in § 130.101 of this title, (relating to Definitions), 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.

The parties stipulated that the claimant had an impairment rating of 18%, had not elected to commute any portion of IIBS, and that his IIBS period ended February 7, 1993. The matter in contest revolved around the conditions set forth in (1) and (2) above.

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.

What causes us trouble is the somewhat equivocal and confusing state of the evidence concerning the claimant's "good faith efforts to obtain employment commensurate with (his) ability to work." It is this area that needs to be further developed in the evidence since a significant portion of the evidence concerning the degree of his ability to work concerns a period of time outside the period under consideration (initial entitlement period). In this regard, TWCC Rule 130.103(c) provides that a determination of entitlement to SIBS shall be made not later that the last day of the IIBS period impairment, stipulated as February 7, 1993. *See* Texas Workers' Compensation Commission Appeal No. 93531, decided August 10, 1993, where we commented in a somewhat analogous situation that "what an employee was offered in the way of light duty in March of 1992 may affect the payment of TIBS as a bona fide offer of employment (Rule 129.5), but does not impact on SIBS where claimant's status at the expiration of IIBS is the determining factor." The claimant testified that at the time of the hearing (June 9, 1993) he was capable of working 40 hours per week and his treating doctor, Dr. O, in his May 3, 1993 statement indicated the claimant's ability to work a 40 hour week, with certain provisos, apparently consistent with the part time job requirements. The remaining evidence is not so compelling that the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work at the

inception date for SIBS that we can conclude there is no evidence in support of the hearing officer's decision. Rather, given the confused state of the evidence on this critical matter, we do not feel able to reach an informed decision and believe the interest of reaching a fair and just result dictates that the case be returned for further development of the evidence. As stated, the claimant sustained a serious injury with lasting effects. He repeatedly indicated that he could not perform the kind of work he was doing at the time of the injury or at the wages he received, and he was apparently concerned with his physical condition. This is corroborated by the medical reports and advice he received from his physicians which established limitations on his work activity, and described the permanent effects of his knee injury. And, he apparently cooperated with the referral to the Texas Rehabilitation Commission to assist in preparing for a less strenuous work opportunity, a matter that we do not believe the commission would want to discourage.

The alternate position of the carrier at the hearing, that is, if entitlement to SIBS were found, that the rate of SIBS should be based upon a 40 hour week as supported by evidence that the claimant could work a 40 hour week. While that remedy might sound attractive under the circumstances as presented in this case, and presupposing the capability to work 40 hours per week related to the inception period for SIBS entitlement, we can find no statutory or regulatory authority to accomplish that remedy. Except for Article 8308-4.28(m) which deems the employee's weekly wages to be equivalent to the weekly wages of a position offered under a bona fide offer of employment, the provisions for the calculation of the SIBS benefit does not factor in such matters as whether an employee could work a greater number of hours or that he is earning the highest wage possible under the circumstances. The question is one of whether the injured employee has made good faith efforts to obtain employment commensurate with his ability to work. (Unlike the provision governing entitlement to temporary income benefits where there is no specific requirement to actively seek out employment, Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, entitlement to SIBS hinges on making good faith efforts to obtain employment). If the claimant's ability is to work a full time, 40 hour week and he has not made good faith efforts to obtain employment commensurate with that ability, he would not meet the requirement of TWCC Rule 130.103(a)(2) for entitlement to SIBS benefits for the period involved. While he testified, and there was other evidence, that he could work 40 hours a week and that he had not sought any employment save the part time job, the confused state of the evidence does not permit us to determine if these factors were present during the particular time period in question, that is, the inception or initial entitlement period.

For the above reasons, the decision is reversed and the case remanded for further consideration and development of evidence, not inconsistent with this opinion. 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 Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge