APPEAL NO. 980046

On November 18, 1997, a contested case hearing (CCH) was held, with the record closing on December 12, 1997. with hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were the respondent's (claimant) entitlement to supplemental income benefits (SIBS) for the seventh, eighth, ninth, and 10th quarters, and whether the claimant permanently lost entitlement to SIBS. The appellant, a self-insured school district, who will be referred to as the employer and the self-insured, requests review and reversal of the hearing officer's decision that the claimant is entitled to SIBS for the seventh, eighth, ninth, and 10th quarters and that he has not permanently lost entitlement to SIBS. The claimant responds that the hearing officer's decision is supported by the evidence and requests affirmance.

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 an impairment rating (IR) of 15% or more; has not returned to work or has returned to work earning less than 80% of the employee's average weekly wage 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 claimant during the prior filing period. Rule 130.104(a) provides that an employee initially determined by the Texas Workers' Compensation Commission to be entitled to SIBS will continue to be entitled to SIBS for subsequent quarters if the employee, during each filing period: (1) has been unemployed, or underemployed as defined by Rule 130.101, 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 claimant has the burden to prove his entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

This case concerns an assertion of no ability to work. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, we stated that if an employee established that he or she had no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we held that the burden is on the claimant to prove that he or she had no ability to work (if that was being relied on by the claimant) due directly to the impairment that resulted from the injury. In Texas Workers' Compensation

Commission Appeal No. 960123, decided March 4, 1996, we stressed the need for medical evidence to affirmatively show an inability to work if that was being relied on by the claimant, and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." In addition, in Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996, we noted that a finding that a claimant's unemployment or underemployment is a direct result of the impairment is "sufficiently supported by evidence that a claimant sustained 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." In Texas Workers' Compensation Commission Appeal No. 960721, decided May 24, 1996, we stated that a claimant's unemployment must be a direct result of the impairment, but the impairment need not be the sole cause of the unemployment or underemployment.

The claimant, who is 68 years of age, worked for the employer school district as a bus driver and maintenance worker for about 26 years and he injured his low back on _____, while lifting a heavy trash barrel at work. The parties stipulated that on _____, , the claimant suffered a compensable low-back injury while working for the employer; that he has a 22% IR; that he did not commute IIBS; that the seventh quarter was from November 16, 1996, to February 14, 1997, with a filing period of August 17 to November 15, 1996; that the eighth quarter was from February 15 to May 17, 1997, with a filing period of November 16, 1996, to February 14, 1997; that the ninth quarter was from May 18, to August 16, 1997, with a filing period of February 15 to May 17, 1997; and that the 10th quarter was from August 17 to November 15, 1997, with a filing period of May 18, to August 16, 1997.

The claimant's testimony was translated by a Spanish-speaking interpreter. The claimant said that he had three back injuries prior to his injury of _____; that he speaks a little English; that he has a fourth-grade education; that he cannot write; that (Dr. G) is his treating doctor; that Dr. G has not released him to return to work; that he asked Dr. G what things he could do and Dr. G told him he could do nothing; that he has back and leg pain; that he is unable to do any kind of work; that he wears a back brace prescribed by Dr. G; that he cannot walk much and uses a cane to walk; that he cannot sit very long because of pain; that he cannot drive because of lack of strength in his legs; that when his legs hurt he falls down; that he takes pain medication every day; that he cannot bend over so his wife bathes his feet and puts his shoes on for him; that he retired from employment with the employer in 1994 because he could no longer work; that he would still be working for the employer if he could work; and that at some point during the relevant filing periods he did look for work because he was told to look by the self-insured's representative, but that he was unable to work and was not hired. In his Statement of Employment Status (TWCC-52) dated March 3, 1997, the claimant indicated that he had looked for three jobs. The other three TWCC-52s in evidence reflect that the claimant did not look for work during the 13-week periods preceding the dates of those TWCC-52s. The claimant's wife testified that she does not think that the claimant can work because of his pain, that he cannot drive, that

he takes pain medication four times a day, and that she washes his feet and puts his shoes and socks on for him.

A CT scan done in 1993 showed that the claimant has degenerative disc disease at L5-S1 and spondylosis and spondylolisthesis at L5. As noted, the filing period for the seventh quarter began on August 17, 1996, and the filing period for the 10th quarter ended on August 16, 1997. In October 1996 Dr. G wrote that the claimant was under his care for a work-related back injury and that due to that condition the claimant is unable to work. (Dr. P) examined the claimant at the self-insured's request in November 1996 and he wrote that the claimant had preexisting degenerative disc disease, spondylosis, and spondylolisthesis; that the mechanism of injury was consistent with a severe muscle strain; that the cliamant exhibited some symptom magnification; that the claimant has chronic low back and leg pain; that he did not feel that the claimant would be able to find or perform any kind of gainful employment; that the claimant is capable of short durations of sitting, standing, and walking for 20 to 30 minutes; and that the claimant's back strain was an "exacerbation on the previous condition." The medical report in which the claimant was assigned a 22% IR was not in evidence.

On December 1, 1996, Dr. G wrote that he felt that the claimant should be able to return to some type of employment, that the claimant would benefit from retraining, and that the claimant has a lifting restriction of 30 pounds and a push/pull restriction of 30-40 pounds. However, on December 19, 1996, Dr. G wrote that the claimant is unable to work and that he is 100% disabled from working as a laborer. In February 1997 Dr. G wrote that the claimant is 100% disabled from any type of employment and that he has degenerative disc disease and spondylosis at L5-S1. In May 1997 Dr. G wrote that the claimant is "unable to do any lifting, prolonged standing, prolonged walking, bending and twisting," and that the claimant "will not be able to seek gainful employment as a laborer." In September 1997 Dr. G wrote that the claimant's degenerative disc disease was an ongoing problem, that the claimant is not able to engage in gainful employment currently or in the future, that the claimant is 100% disabled, and that the claimant's permanent restrictions are to avoid prolonged walking, standing, and sitting, and to avoid bending, squatting, and twisting.

The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the evidence, including the medical evidence, and may believe all, part, or none, of the testimony of any witness. The hearing officer found that during the relevant filing periods the claimant's unemployment was a direct result of his impairment from his compensable injury and that the claimant was unable to work. He concluded that the claimant had no ability to work during the relevant filing periods because of his compensable injury and resulting impairment, and that he was unemployed during the relevant filing periods as a direct result of his impairment. While the hearing officer did make a finding that at the time of the injury the claimant was 63 years old; had a fourth-grade education; could not read or write in English; speaks very little English; and had worked manual labor jobs all of his life, that finding was limited to "the time of the injury," and we cannot conclude, as contended by the

self-insured, that the hearing officer laid great weight on factors other than the claimant's impairment from his injury, because he also found that the claimant's impairment was the primary factor of the claimant's unemployment and that the back injury of _____, was the primary cause of the claimant's not working since the injury and being forced into retirement. We have previously held that an employee's retirement does not in and of itself foreclose entitlement to SIBS. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995.

The self-insured's argument that the claimant only suffered a back strain and that any inability to work is due to preexisting conditions ignores the claimant's 22% permanent impairment for his low-back injury and Dr. P's report that the claimant's injury exacerbated his previous condition. Case law holds that the aggravation of a preexisting condition can constitute an injury. *See* Gulf Insurance Company v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.). Dr. G did give conflicting opinions on the claimant's ability to work during the relevant filing periods, but those conflicts were for the hearing officer to resolve as the finder of fact. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision that the claimant is entitled to SIBS for the seventh, eighth, ninth, and 10th quarters, and that the claimant has not permanently lost entitlement to SIBS is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Christopher L. Rhodes
Appeals Judge