APPEAL NO. 980129

On December 19, 1997, a contested case hearing (CCH) was held the 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 issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 12th quarter. The appellant (carrier) requests review and reversal of the hearing officer's decision that the claimant is entitled to SIBS for the 12th quarter. The claimant 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 Mach 4, 1996, we stressed the need for medical evidence to affirmatively show an inability to work, 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 or underemployment must be a direct result of the impairment, but that the impairment need not be the sole cause of the unemployment or underemployment.

The claimant, who is 68 years old, testified that on _____, he was working as an auto parts delivery person for the employer when he slipped in a puddle of antifreeze, fell, and injured his right knee. His answers to written interrogatories reflect that he has not worked since his injury. The parties stipulated that the claimant has an 18% IR; that he did not commute IIBS; that the 12th quarter was from August 15 to November 13, 1997; that the filing period for the 12th quarter was from May 16 to August 14, 1997 (filing period); and that the claimant did not seek employment during the filing period.

The claimant testified that (Dr. G) performed right knee surgery on him in _____; that (Dr. O) performed right knee surgery on him in April 1992; that Dr. O performed a right total knee replacement on him in January 1993; and that the prosthesis used in the 1993 surgery came loose and resulted in surgery by Dr. O in July 1994 to revise the prosthesis. (Dr. T) examined the claimant at the carrier's request in April 1995 and he wrote in May 1995 that due to the knee replacement and revision surgery the claimant is permanently restricted from maintaining full-time employment and that, at best, the claimant is capable of sedentary work. Dr. O wrote in August 1995 that he was releasing the claimant from his care and referring him to (Dr. P), and that the claimant "may return to his permanent light duty work status; sedentary work only." The claimant testified that the prosthesis was too small for his knee and that he underwent a second right total knee replacement in September 1996 by (Dr. M), who became his treating doctor.

The claimant testified that he moved into a first floor apartment because he was unable to climb the steps to his second floor apartment. He said that he is unable to perform the duties of the job where he was injured because of his limitations on driving and lifting. He said that during the filing period he could not drive for more than five or 10 minutes; that his right knee became severely painful when he sat for 30 to 45 minutes; that when he walked or stood for 45 minutes his right knee swelled, became inflamed, and was painful; that he had to elevate his right leg four to six times a day for about 30 minutes each time and apply ice packs to his right knee; that he constantly used a cane when walking; that his knee was not stable and gave out at least once a day; that he had right knee pain everyday and took pain medication everyday; that his fiancee did most of the household chores; and that he spent most of his time in a chair at home with his right knee elevated. He said that he was unable to work during the filing period due to the physical limitations of his right knee.

In February 1997 Dr. M wrote that the claimant's right knee had good range of motion and was developing better strength, and that the claimant did not have the same type of pain on weight bearing that he had before the September 1996 surgery. In April 1997 Dr. M wrote that the claimant had weakness from his surgery, that the claimant had decreased ability to flex and extend his leg, that the claimant would require a cane for walking, that the claimant could not do prolonged standing, that the claimant could not bend or stoop, and that the claimant should not do any type of lifting. In July 1997 Dr. M wrote that the claimant had pain on walking for any amount of time, that the claimant was doing well, and that the claimant could not do prolonged walking. In October 1997 Dr. M wrote that the claimant had constant pain of the right knee, that the claimant required an ancillary walking aid, that the claimant was doing well from the complex reconstruction surgery of September 1996, and that he did not consider the claimant to be a good candidate for delivery-type employment because of limitations on right leg movement, difficulty driving, and inability to walk for extended periods of time due to swelling. Dr. M also wrote in October 1997 that the claimant "is not very employable because of limitations imposed by his complex total joint reconstruction." In a letter dated December 4, 1997, Dr. M wrote that the claimant was under his care and that the claimant has had significant problems with his knee which causes "the inability of him to be employable." Dr. M also wrote in the letter of December 4th that:

> Per our records, he was under our care during the period of 5-16-97 to 8-18-97 at which time he was fully disabled. His disability is related to the fact that he has chronic swelling, aching and pain in his lower extremity. He is unable to drive for more than 5 minutes at a time, and must elevate his leg on a frequent basis. He has difficulty with ambulation for a long period of time or even standing. Therefore, I deem that he is fully disabled.

The hearing officer found that during the filing period the claimant's unemployment was a direct result of his impairment from his compensable injury and that during the filing period the claimant had no ability to work. The hearing officer concluded that the claimant is entitled to SIBS for the 12th quarter. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier 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. We conclude that the hearing officer's findings are supported by sufficient evidence and that his decision is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge