APPEAL NO. 001080

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 25, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second and fourth quarters as he had not made a good faith attempt to obtain employment commensurate with claimant's ability to work and that claimant's "decrease in earnings" (unemployment) is not a direct result of his compensable injury.

Claimant appeals, contending that his legs, arms, head, and depression are all related to his injury (the issues before the hearing officer were entitlement to SIBs for the second and fourth quarters) and that he has a total inability to work. Claimant asserts that his unemployment is a direct result of his compensable injury. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

Claimant had been employed as a plumber trainee when, on _____, as he was lifting a "plumber's snake" (a long metal hose device used to unclog drains), he felt a sharp pain in his back and when he straightened up suddenly he hit his head on the top of the van. Claimant testified that on _____, as he was walking to the dinner table, his leg gave way and he sustained a left knee injury. Claimant also testified about another fall in January 2000. Claimant, at least twice, testified that the left knee injury was not part of the compensable injury. There is no stipulation regarding a compensable injury; however, the hearing officer makes a finding that claimant "sustained a [compensable] injury to his back and head, but not to his legs" on _____. The parties stipulated that claimant reached maximum medical improvement on July 10, 1998, with a 15% impairment rating (IR); that impairment income benefits (IIBs) were not commuted; that the qualifying period for the second quarter was from May 9 through August 7, 1999; and the qualifying period for the fourth quarter was from November 6, 1999, through February 4, 2000. Claimant testified that he has not had any surgery but has been treated by physical therapy, work hardening, and medication. Claimant was apparently wearing some kind of brace, ACE bandages and using crutches at the CCH.

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the 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 employee's 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. At issue in this case are subsections (2) and (4) dealing with direct result and whether claimant made the requisite good faith effort to obtain employment commensurate with his ability to work.

Addressing the good faith element, the standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)) (the version then in effect), which requires the employee (claimant) to prove three elements, namely (1) that he is unable to perform any type of work in any capacity; (2) that a narrative from a doctor specifically explains how the injury causes a total inability to work; and (3) that "no other records show that the injured employee is able to return to work." In evidence are a number of reports from Dr. H, claimant's treating doctor; however, most of the reports do not address claimant's ability or inability to work. A functional capacity evaluation (FCE) performed on May 11, 1999, on referral by Dr. H, found claimant able to perform light work with restrictions, which was agreed to by Dr. H. In a report dated October 12, 1999, Dr. H referenced another doctor's opinion (not in evidence) that claimant could not work; that claimant's return to work in April 1999 "was unsuccessful for several reasons"; and concluded that claimant "would have benefitted from continuing his off work status. . . . At this time the patient is considered unable to do any work." A CT scan of the brain was normal. In a report dated January 18, 2000, referencing claimant's January 2000 fall, Dr. H commented:

> The patient is at this time unable to do any work due to the restrictions on his activities. There was a recent MRI done on his cervical spine which showed a 1 to 2 mm bulge at C4-C5 and a 2 mm bulge at C3-C4. We are still awaiting the results of the EMG and at that time we will have some more information regarding this patient's long-term problems and his prognosis. Due to the concurrent problems and the ongoing work-ups, it is recommended that the patient be considered unable to do any work and this will be retroactive to May 27, 1999, and into the near future. The patient is given the off duty slip as required by the TRC [Texas Rehabilitation Commission] and will be re-evaluated as needed.

In a report dated March 22, 2000, Dr. H stated:

> This patient's medical history is very complicated and we have been unable to make a complete diagnostic and/or therapeutic work-up of his symptoms which have included, at various times, weakness, swelling of the extremities, peripheral neuropathies and herniated disks. This patient has a knee injury which is being evaluated at [hospital] from another injury, at this time. After the above work-up including the FCE, we will completely or more completely delineate his restrictions of activities. However, at this time he is not free to return to work due to the above notations.

A letter dated July 20, 1999, from the TRC, requests that claimant come in to "discuss future vocational rehabilitation services." Another letter dated September 1, 1999, from the TRC, states that claimant "was not able to seek gainful employment at this time" and that claimant's case has been closed "due to his medical prognosis."

Evidence to the contrary, in addition to the May 1999 letter, includes another FCE dated January 11, 2000, performed by Dr. O. Dr. O outlines claimant's restrictions in some detail and comments that claimant "should be able to perform any work in the sedentary or light duty category."

The hearing officer did not specifically reference Rule 130.102(d)(3), the version in effect during both qualifying quarters, but found that during the applicable qualifying quarters "claimant was able to work, as evidenced by the [FCEs] of May 11, 1999 and January 11, 2000." Having found an ability to perform some work, the hearing officer was not required to address whether Dr. H's narratives specifically explained how the injury causes a total inability to work.

Although claimant, in his appeal, more so than at the CCH, asserts that the compensable injury also includes his legs, arms, head, and depression, extent of injury was not an issue. The hearing officer nonetheless found that claimant's injury was limited to his back and head "but not to his legs." That finding is supported by both claimant's testimony and at least some of the medical evidence and there is no medical evidence that establishes such causation.

The hearing officer also found that claimant's "decrease in earnings" was "not a direct result of Claimant's impairment from his compensable injury." Claimant testified that his compensable injury caused back pain and headaches and that was the reason claimant was unable to return to his preinjury work. There is no evidence to the contrary and even carrier concedes that claimant could only perform light to sedentary work. We have frequently noted that in the absence of other reasons for the injured employee's unemployment, the fact that claimant has sustained a serious injury with lasting effects and that during the filing or qualifying periods could not reasonably perform the type of work being done at the time of the injury would support a finding of direct result. Texas Workers' Compensation Commission Appeal No. 960905, decided June 25, 1996; and Texas Workers' Compensation Commission Appeal No. 992895, decided February 7, 2000. On this appealed issue, we hold that the hearing officer's findings and decision on direct result are not supported by the evidence and, accordingly, we reverse that decision and render a new decision that claimant's unemployment during the qualifying periods at issue was a direct result of his impairment.

We affirm the hearing officer's decision and order that claimant did not make a good faith effort to obtain employment commensurate with his ability to work and, therefore, claimant is not entitled to SIBs for the second and fourth quarters.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge