

APPEAL NO. 030719  
FILED APRIL 30, 2003

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 February 26, 2003. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the third quarter. The appellant (carrier) appealed, and the claimant responded.

DECISION

Affirmed, as reformed herein.

We reform Conclusion of Law No. 2 to state "Venue is proper in the \_\_\_\_\_ Field Office." As reformed, Conclusion of Law No. 2 is consistent with the parties' stipulation that venue is proper in the \_\_\_\_\_ Field Office.

The parties stipulated that the claimant sustained a compensable injury to his low back and right knee and that he reached maximum medical improvement with a 16% impairment rating. Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criteria in dispute are whether, during the qualifying period for the third quarter, which was from July 11 to October 9, 2002, the claimant earned less than 80% of his average weekly wage (AWW) as a direct result of the impairment from the compensable injury, and made a good faith effort to obtain employment commensurate with his ability to work. The claimant contended that he had no ability to work during the qualifying period due to his compensable injury. It is undisputed that the claimant did not work or look for work during the qualifying period.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's AWW as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings.

The hearing officer found that, during the qualifying period for the third quarter, the claimant did not return to employment as a direct result of his impairment; that he was unable to perform any work, and that he made a good faith effort to seek employment. The hearing officer concluded that the claimant is entitled to SIBs for the third quarter.

In Texas Workers' Compensation Commission Appeal No. 022757, decided December 11, 2002, the Appeals Panel affirmed the hearing officer's decision that the claimant was not entitled to SIBs for the second quarter based on the hearing officer's determination that the claimant did not provide a narrative report from a doctor which specifically explained how the injury caused a total inability to work. The carrier contends that the hearing officer is relying on the same evidence that she did not find sufficient for the second quarter to determine that the claimant has no ability to work during the qualifying period for the third quarter. We cannot agree that the same evidence was presented at the CCHs for the second and third quarters because there are medical reports in evidence for the CCH for the third quarter that are dated after the date that the CCH for the second quarter was held.

We also note that there are two narrative reports in evidence from a doctor who is treating the claimant's compensable right knee injury, which are dated March 4, 2002, and December 18, 2002, that explain that the claimant needs additional right knee surgery in the form of a knee replacement, that he cannot walk without significant knee pain, that prolonged sitting increases his knee pain, and that he is unable to work. There is also a report from the same doctor dated January 29, 2003, which explains, with regard to the need for further knee surgery in the form of a knee replacement, that the claimant has had progressive deterioration of the medial compartment of his right knee, that he has pain when he walks or stands, that he continues to have severe pain that limits his activities of daily living, and that he has failed all forms of conservative care. In Texas Workers' Compensation Commission Appeal No. 960880, decided June 18, 1996, the Appeals Panel stated that "medical evidence from the filing periods is clearly relevant but other medical evidence from outside the periods, especially that which is relatively close to the filing periods, may be relevant to the condition of the claimant during those periods." In Texas Workers' Compensation Commission Appeal No. 001055, decided June 28, 2000, the Appeals Panel noted that medical evidence from outside the qualifying period may be considered insofar as the hearing officer finds it probative of conditions in the qualifying period. Whether there was a narrative report in evidence that specifically explained how the injury caused a total inability to work during the qualifying period for the third quarter presented a fact question for the hearing officer to resolve from the evidence presented. We note that Appeal No. 022757, *supra*, which affirmed the denial of second quarter SIBs, did not mention anything about a doctor's recommendation for a right knee replacement.

Other evidence, not in the form of a narrative report, showed that a doctor the claimant treated with for pain management during the qualifying period for the third quarter reported that the claimant's medical condition resulting from the compensable injury prevented the claimant from returning to work during the qualifying period.

With regard to whether other records showed an ability to work, the Appeals Panel has noted that whether another record shows an ability to work is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 000625, decided May 11, 2000. The hearing officer noted that in February 2002, the doctor who is treating the claimant's back injury reported that the claimant

should try to get back to some kind of light-duty work, but that the claimant was waiting for the doctor who is treating his knee injury to release him. The doctor who is treating the claimant's knee injury has not released the claimant to return to work and is seeking approval for a right knee replacement, which the carrier denied in January 2003. The December 2002 functional capacity evaluation (FCE) concludes that the claimant would be at greater risk for reinjury with return to work, and that after being cleared by his orthopedic surgeon, he may benefit from some retraining in order to allow him to return to a job which would not require any lifting. The hearing officer apparently determined that the February 2002 report from the doctor who is treating the claimant's back injury and the December 2002 FCE did not constitute other records that show that the claimant was able to return to work during the qualifying period for the third quarter.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision that the claimant is entitled to SIBs for the third quarter is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

As reformed herein, we affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Chris Cowan  
Appeals Judge

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Roy L. Warren  
Appeals Judge