

APPEAL NO. 950217

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer on December 7, 1994, with the record closing on December 22, 1994. With respect to the only issue before him, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the fifth compensable quarter. The claimant appealed arguing that his unemployment is a result of the injury he sustained on (date of injury), and that he should be entitled to SIBS for the fifth quarter. The respondent (carrier) replied that the evidence is sufficient to support the determination of the hearing officer and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The claimant testified that he has not returned to work from his (date of injury), injury to his left knee and that his doctor said that he would release him to return to work for that injury in January 1995. On cross-examination claimant testified that he had returned to work after his (date of injury), injury but that he had not fully recovered. On redirect-examination he said that his left knee was not involved in his (date), injury. Claimant said that he had surgery on his left knee on May 2, 1994, and that his left knee has not healed enough so that he could perform the type of work he used to do. He said that the employer would not let him return to work until he has a release to return to work from each doctor for each injury. In response to questions from the hearing officer, the claimant said that he looked for work to comply with Texas Workers' Compensation Commission (Commission) rules; that he has not reached maximum medical improvement from his (date), injury and is currently receiving temporary income benefits for that injury; that both injuries keep him from working; and that he cannot go against policies at work that require that he have a release to return to work for each injury before he can return to work.

At the request of the carrier, the hearing officer took official notice of Texas Workers' Compensation Commission Appeal No. 94234, decided April 7, 1994; the hearing officer's decision in (Docket No. redacted) conducted on May 24, 1994, and September 8, 1994; the petition in Cause No. 94-2297 filed with the district court in (city), Texas, on February 25, 1994; and a Statement of Employment Status (TWCC- 52) on which a disability determination officer of the Commission stated that the claimant was not entitled to SIBS for the second quarter from December 20, 1993, to March 19, 1994. The hearing officer kept the record open and introduced as a hearing officer's exhibit Texas Workers' Compensation Commission Appeal No. 941435, decided December 5, 1994. In Appeal No. 94234, *supra*, the Appeals Panel affirmed a determination that the claimant is not entitled to SIBS for the first quarter and in Appeal No. 941435, *supra*, the Appeals Panel affirmed determinations that the claimant is not entitled to SIBS for the second, third, and fourth quarters. In the petition referenced above, the claimant alleged that was injured while working for the

employer on (date), and that he was prevented from working and will continue to suffer a loss of wage earning capacity in the future.

The hearing officer determined that the fifth quarter for SIBS began on September 16, 1994; that the claimant's failure to return to work is not a direct result of his impairment from the injury sustained on (date of injury); that it has been determined that the claimant has not been entitled to SIBS for 12 consecutive months, and that the claimant is not entitled to SIBS for the fifth quarter. Tex. W.C. Comm'n, TEX. ADMIN. CODE § 130.106(a) (Rule 130.106(a)) provides "an injured employee who is not entitled to [SIBS] for a period of 12 consecutive months permanently loses entitlement to such benefits." We find the evidence to be sufficient to support these determinations of the hearing officer.

The claimant also urges that the carrier waived its right to dispute his entitlement to SIBS for the fifth quarter by failing timely to request a benefit review conference (BRC). The record does not indicate when the claimant filed an application for SIBS for the fifth quarter beginning on September 16, 1994, or when the application was denied. The record does indicate that the BRC was held on October 10, 1994, which is less than a month after the close of the period used to establish the entitlement to SIBS for the fifth quarter. The issue of timely requesting a BRC was not raised at the hearing, evidence was not presented on the issue, and we see no basis to disturb the determination of the hearing officer that the claimant is not entitled to SIBS for the fifth quarter.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge