

## APPEAL NO. 990858

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 11, 1999, a contested case hearing (CCH) was held. The hearing officer determined that respondent (claimant) is not entitled to supplemental income benefits (SIBS) for the fourth through eighth quarters because she failed to prove that her underemployment was a direct result of her impairment. She also determined that appellant (carrier) was relieved of liability for SIBS for the fourth, fifth, and sixth quarters and a portion of the seventh quarter. The Appeals Panel remanded the case to the hearing officer for reconsideration of the direct result issue. Texas Workers' Compensation Commission Appeal No. 990163, decided March 10, 1999. The hearing officer did not hold another CCH, but issued a decision and order on remand. She determined that the claimant is entitled to SIBS for the fourth, fifth, sixth, seventh, and eighth quarters and that carrier is relieved of liability for SIBS for the fourth, fifth, and sixth quarters and for a portion of the seventh quarter. Carrier appealed the hearing officer's determinations concerning the direct result criterion regarding the seventh and eighth quarters. Carrier further contended that the hearing officer did not make findings regarding claimant's earnings during the filing periods in question so that it could calculate the amount of SIBS due. Carrier also complained that the hearing officer did not list all the exhibits in the decision and order on remand. Claimant responds that sufficient evidence supports the hearing officer's decision and order.

### DECISION

We affirm.

Carrier first contends that the hearing officer failed to consider and/or list all the exhibits in this case. Carrier asks for a remand for consideration of "additional evidence as may be necessary to properly consider" the case. A comparison of the first decision and order and the decision and order after remand reveals that the hearing officer did not list all of carrier's exhibits on the latter. No new evidence was taken on remand nor did the hearing officer hold a second CCH. However, it is very likely that the same file containing all the same exhibits was returned to the hearing officer for consideration on remand. It appears that the last 11 carrier exhibits were inadvertently not listed as exhibits in the decision and order on remand. We are not persuaded that the hearing officer refused to consider them. These exhibits are contained in the same file, which is now back before the Appeals Panel on appeal after remand; they have not been removed. In any case, we note that we have used our one remand and we may not remand again. Section 410.203(c). We will not presume error in this case.

Carrier next contends that the hearing officer failed to make findings regarding claimant's "wages" regarding her self-employment. The hearing officer ordered carrier to pay accrued and past due SIBS in a lump sum with interest. Carrier asserts that it is unable to calculate the amount of SIBS accrued because it does not know what claimant's "wages" were. The hearing officer did not make specific findings regarding claimant's wages earned

during the applicable filing periods. The hearing officer did find that claimant returned to work earning less than 80% of her average weekly wage (AWW). We cannot make fact findings regarding the amount of “wages” claimant earned during the filing periods in question. We also cannot remand a second time. The parties should cooperate in fixing a figure, but may resolve this issue through further dispute resolution proceedings, if necessary.

Carrier next contends that the hearing officer erred in determining that claimant's underemployment is a direct result of her impairment. Carrier asserts that claimant was not earning less than 80% of her AWW as a result of her impairment. Carrier contends that the hearing officer should not have permitted claimant to “unilaterally allocate half of the income” from the aviary business she ran with her husband to her husband as his income.

Claimant testified that she and her husband ran a pet store, selling birds and related supplies. Claimant testified that both she and her husband ran the business and performed certain duties. Claimant said her husband's duties included cage cleaning, heavy lifting, sales to Spanish-speaking clients, and bookkeeping. She indicated that the amounts she listed each month as her half of the “wages” or earnings represented “gross earnings” or “sales,” whether or not the money was actually collected in full. These amounts apparently were not net regarding expenses. Claimant said her husband also did some automotive work, but indicated that he did not spend very much time doing that work. Whether claimant's husband actually worked a significant amount of time in the pet store business was a question of fact for the hearing officer to consider. After reviewing the evidence, we conclude that the hearing officer's determination that claimant returned to work earning less than 80% of the AWW is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We decline to reverse it on appeal.

We affirm the hearing officer's decision and order.

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Judy Stephens  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

CONCUR IN RESULT:

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Robert W. Potts  
Appeals Judge