

APPEAL NO. 000572

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 March 1, 2000. The issue at the CCH was whether the appellant (claimant) was entitled to supplemental income benefits (SIBs) for the ninth quarter. The hearing officer determined that the claimant was not entitled to SIBs from a 1994 injury for the ninth quarter and that his unemployment was the direct result of a second 1999 injury.

The claimant appeals, requesting that we reverse the hearing officer's decision and render a decision in his favor. The claimant points out that he is not seeking SIBs for "unemployment"; rather, he seeks only a supplement that represents the difference between the SIBs he would have continued to receive, and the wages he would have been paid by the second employer (considered as "offered" wages), for his finite period of being off work due to the second injury. The respondent (carrier) responds, urging affirmance, and arguing flatly that SIBs and temporary income benefits (TIBs) cannot ever be paid together when there are two injuries.

DECISION

Affirmed that claimant was not entitled to SIBs because his unemployment during the time under review was the direct result of an intervening injury.

Initially, although some cases were cited at the CCH and in the appeal brief, we observe that the Appeals Panel has not had the occasion to render a decision on the exact issue and evidence that is presented in this case. That is, whether a claimant who is indisputably "underemployed" in a second job and continues to suffer the effects of his previous injury while so employed may continue to be paid SIBs for a brief period when he is off work due to another injury on the second job, for which he is paid TIBs based on his "underemployed" average weekly wage (AWW).

The carrier in this case was the carrier liable for the claimant's first injury, which occurred on _____, while he worked as a baggage handler for (employer). His AWW for this job was \$806.37. The claimant injured his neck, right shoulder, and developed carpal tunnel syndrome (CTS), and had surgery for all three components of his injury. There are no medical records relating to this injury in evidence. His impairment rating was 34%. He was off work for a long period of time, but returned to work for (second employer) on January 5, 1998. The job he performed was assembly work, and was lighter duty than his previous job. The claimant testified that due to his _____, injuries, he would be unable to ever again work in baggage handling. This was not disputed.

The claimant testified (and presented some payroll records) showing that he was paid, on average, \$310.00 per week by the second employer, sometimes less, sometimes more, depending upon leave time taken and overtime worked. Moreover, for the sixth, seventh, and

eighth quarters, he was paid SIBs (a time period that would span some of 1998 and most of 1999 in terms of filing or qualifying periods). The calculation of the amount of SIBs took into account his wages from the second employer.

The claimant sustained a bilateral CTS injury, the date of injury being _____, while working for the second employer. Due to CTS release surgery, he was off work for this second injury from August 25, 1999, through January 4, 2000, when he again returned to work for the second employer on a light-duty job. The stipulated qualifying period for SIBs for the ninth quarter ran from September 2 through December 1, 1999. (We note that the SIBs application for this quarter listed the qualifying period dates as September 13 through December 12, 1999.) The claimant still maintained his employed status by the second employer during the time he was out recovering from surgery.

A letter from claimant's physician, Dr. D, stated on December 2, 1999, that the claimant was unable to obtain employment since September 13, 1999, because of his operation on both hands. He said that the inability to work was due to the fact that the problem was bilateral, and that the nerve compression had been severe.

On his SIBs application for the quarter in issue, the claimant listed the TIBs amount, \$228.78, as his gross wage for each week of the quarter. We note that although part of claimant's _____, injury involved CTS, no medical evidence was presented indicating the nature of that syndrome or subsequent surgery, or that the condition continued through and beyond the July 16, 1999, injury.

The Texas Workers' Compensation Commission (Commission) has addressed the specific issue presented here in its "QRL" advisory process. The hypothetical question and answer are as follows:

QRL 95-47:

Can an injured worker draw [SIBs] for a prior injury and simultaneously receive [TIBs] for a current injury?

RESOLUTION:

Yes, if the injured worker's [AWW] prior to his second injury was less than 80% of his [AWW] prior to his first injury, he may be entitled to [SIBs]. The reason for the reduction in the injured worker's wages must be a direct result of impairment from the first injury.

When reviewing each case for entitlement to [SIBs], the four requirements provided in Section 408.142(a) must be met.

We cannot agree with the proposition that SIBs and TIBs can never be paid concurrently "as a matter of law," nor have we previously so held. Although the carrier has cited Texas Workers' Compensation Commission Appeal No. 94234, decided April 7, 1994, and Texas Workers' Compensation Commission Appeal No. 991911, decided October 15, 1999, as precluding any payment of both SIBs and TIBs, we cannot agree that they apply. First of all, the second job in Appeal No. 94234, *supra*, paid more, not less, than the first job. Second, in Appeal No. 991911, *supra*, it does not appear that satisfactory evidence was developed to show the wages earned in the second job proved underemployment, nor did the case involve continuing SIBs (it was for the first quarter of SIBs). That case also depended upon the factual finding (on reversal) that the unemployment period for which SIBs was sought was NOT the direct result of the impairment from the first injury but solely due to the second injury.

Moreover, that decision does not deal with the subtle complexities of the issues presented in this case, and it appears that the appeal in that case simplistically was cast as an issue of whether "two income replacement benefits" could be paid at the same time. Casting the issue in this fashion conjures up an impression that a claimant is seeking to have two checks paid as if the other injury did not exist. To simply classify benefits as "income replacement benefits" and then attempt a "one size fits all" prohibition on ever paying both during the same period will not appropriately resolve every case, like the one before us. Thus, to the extent that the decision in Appeal No. 991911 is argued to preclude payment of SIBs and TIBs together in every situation, we hold that interpretation of that decision to be erroneous, and we endorse the approach taken in QRL 95-47. Thus, the hearing officer's finding that SIBs and TIBs cannot be concurrently drawn is erroneous.

This does not, however, mandate a reversal in this case in favor of the claimant, because this was not the only rationale upon which the hearing officer's decision was based. The hearing officer has also applied the SIBs criteria to the facts of this case, as QRL 95-47 requires.

The claimant has pointed out that he does not seek a windfall, or double payment, only a continuation of the benefit that he would have continued to receive, for underemployment, had the second accident not occurred. He argues that he only seeks SIBs for "underemployment." However, the hearing officer had to deal with the fact that the second accident did happen. And while the carrier here should not necessarily obtain a windfall from not paying benefits that are otherwise due, neither does the carrier lose the right to have the SIBs criteria applied to each quarter simply because benefits were paid in earlier quarters. The status of unemployment or underemployment during the quarter in issue must be a direct result of the first injury's impairment, and the claimant must make a good faith search for employment commensurate with his ability to work, subject, in this case, to the administrative rules of the Commission that shape and define these criteria.

In this regard, the fact findings of the hearing officer in this case and the record here are significant in our affirmance. The claimant was not only underemployed (in the sense of working and earning less than 80% of his preinjury AWW) during the period from August 26, 1999, through January 4, 2000. He was unemployed utterly. The hearing officer had to look at what his status actually was, not what it might have been. While the hearing officer held that claimant met the requirements of a good faith search for employment under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)), he also found that this status resulted directly from the second injury, not from the first. The evidence in this case supports these findings. (We note that the status of inability to work as set out in Rule 130.102(d)(3) is not expressly tied to the underlying injury but to the entire physical ability.) Had there been evidence, for example, that the 1994 CTS injury was a factor leading to claimant's surgery in 1999, the outcome might have been different.

The claimant's suggestion that this matter be treated similar to a "bona fide offer" adjustment, as set out in Section 408.144(c), has equitable appeal in such a situation as this. However, those facts do not exist in this case and there is otherwise no statutory basis for applying the bona fide offer adjustment where no job "offer" or ability to have worked exists.

We therefore affirm the hearing officer's decision for the reason that the claimant's unemployment during the qualifying period for the ninth quarter of SIBs was not the direct result of his impairment from his _____, injury.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge