APPEAL NO. 000702

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 6, 2000. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the second, third, fourth, and fifth quarters; and that the appellant (carrier) did not waive its right to contest entitlement to SIBs for the second, third, and fourth quarters. The carrier appealed the SIBS entitlement determinations, contending that they were contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The determination that the carrier did not waive the right to contest entitlement to SIBs has not been appealed and has become final. Section 410.169.

DECISION

Reversed and rendered in part and affirmed in part.

The claimant, a journeyman electrician, sustained a compensable low back injury on _____, and underwent two surgeries. He reached maximum medical improvement on April 29, 1997, and was assigned a 29% impairment rating (IR). The carrier paid first quarter SIBs.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. The claimant had the burden of proving each of these elements of SIBs entitlement for any quarter claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ) The second SIBs quarter began March 31, 1999, and ended June 29, 1999. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(b) (Rule 130.102(b)), in effect for this quarter (the so-called "old" rule), the quarterly entitlement to SIBs is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBs]." The second quarter filing period was from December 30, 1998, to March 30, 1999. The third, fourth, and fifth quarters began on June 29, September 29, and December 29, 1999, respectively. Pursuant to Rule 130.102(b) in effect for these quarters, the entitlement to SIBs is determined prospectively and depends on whether the employee met the criteria during the "qualifying" period. Under Rule 130.101(4), the qualifying period ends on the 14th day before the beginning date of the SIBs quarter and consists of the 13 previous consecutive weeks. The qualifying periods for these quarters began on March 18, June 17, and September 15, 1999.

The claimant was self-employed during the second and third quarter qualifying periods. He described his business as involving the buying, refinishing, and selling of used furniture. He said he would go to various estate sales and the like to purchase the furniture and transport it to his business location, which was 500 square feet of rented sales space. In his Statement of Employment Status (TWCC-52) for the second quarter of SIBs signed by the claimant on March 12, 1999, the claimant listed no income, but attached a statement of "Gross Sales" and expenses. The gross sales were listed as $9,595.00. The expenses totaled $11,439.31, for a net loss of $1,844.31. Included in the expenses were $6,629.38 for "Purchase of Inventory."[1] Apparently at the benefit review conference, the carrier asked for a further accounting of income and expenses. In response, the claimant engaged an accountant, who produced a "Balance Sheet" as of March 31, 1999. In a cover letter to this report, the accountant wrote:

> The owner has elected to omit substantially all of the disclosures required by generally accepted accounting principles included the statement of cash flow. If the omitted disclosures were included in the financial statement, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

The balance sheet lists total assets of $10,841.59. It also includes the same figure of $10,232.10 for sales "THIS MONTH" and for the prior 3 months, with net sales for the same periods of $8,583.92. The claimant testified that he was unable to explain the entries on the balance sheet, but admitted that personal expenses (many of which he identified) were included. The carrier argued both at the CCH and again on the appeal that this information was so confusing that it was unable to determine whether the claimant earned 80% of his preinjury AWW.[2] The hearing officer found, without further explanation, that during this filing period, the claimant "earned less that 80% of his pre-injury [AWW]." Finding of Fact No. 7.

We have stressed in the past that a claimant is responsible for producing sufficient information to enable the carrier to arrive at an informed determination of SIBs entitlement for a given quarter. In some cases, the information may be so deficient as not to amount to a filing of an application for SIBs. Texas Workers' Compensation Commission Appeal No. 960730, decided May 28, 1996. In this case, we do not believe that the information supplied was necessarily deficient, though the comment of the accountant clearly raises this proposition. Rather, we consider the information so confusing, inconsistent, and ultimately unintelligible as to be useless in reaching a reasoned determination that the claimant did or did not earn 80%

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[1] We cannot agree that inventory should be listed as a current expense, but is an asset.

[2] The AWW was 747.87. Eighty percent of this figure is $590.29.

of his preinjury AWW. For this reason, the hearing officer's finding that the claimant did earn less than 80% of the preinjury AWW has no basis in the evidence presented. We will reverse a factual determination of a hearing officer only if that determination is 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, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Under this standard of review to the record of this case, we reverse the hearing officer's determination that the claimant earned less than 80% of his preinjury AWW and render a decision that (1) the claimant failed to prove this essential element of SIBs entitlement and (2) is not entitled to second quarter SIBS.

A similar problem exists with regard to the TWCC-52 filed by the claimant for third quarter SIBs. Attached to this form was a statement which reflected "Gross Sales" of $5,075.77. Among the expenses were again erroneously included inventory in the amount of $2,955.00. The attachment shows a net loss of $2,357.23. The financial statement provided by the claimant for this quarter contains the same advisory quoted above. It reflects assets of $15,901.96 and net sales for "this month" (which we interpret as June 1999, only half of which was in the qualifying period). Net sales for the prior six months were $16,617.51. Net operating income for the current month was a loss of $2,067.33 and $2,504.78 for the prior six months. The attachment to the TWCC-52 and the financial statement are irreconcilable and for the reasons cited in connection with the second quarter SIBs application we find it non-probative on the question of whether in the third quarter qualifying period, the claimant earned 80% of his preinjury AWW. Thus, we reverse the finding that the claimant during the qualifying period for third quarter SIBS earned less than 80% of his preinjury AWW and render a decision that he failed to prove his earnings during this period. For this reason, was not entitled to third quarter SIBs. *See also* Rule 130.101(1)(D), then in effect for third quarter SIBs prescribing what should be attached to the application for SIBs of self-employed individuals.

Around the beginning of the fourth quarter qualifying period, the claimant dissolved his sole proprietorship. His wife then incorporated the business and, we assume, was the sole shareholder. According to the claimant, the motivation for this change in business structure was the desire to expand to a 2000 square foot sales area and to handle furniture on consignment only. The business would then receive a percent of the sales price. This change in operations also meant that the claimant would no longer have to go out and buy furniture, but would only sell furniture brought in by consignors. He also said he became an employee of the corporation, worked about 40 hours per week, and was paid minimum wages.[3] The claimant said that this was the same amount he paid coworkers when needed. His wife, the owner of

[3]The parties were not aware of what this figure was, but we assume it was $5.15 per hour.

the corporation, confirmed that this was the wage she would have to pay others if they had to be hired.[4]

Rule 130.102(d)(1) in effect for fourth and fifth quarter SIBs provides that an injured employee has made the required good faith effort if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work[.]" There was very little objective medical evidence of the claimant's work restrictions. These include the comment on March 10, 1999, by Dr. K that the claimant "is released to return to light electrical work." This was not further explained. The claimant testified that his condition more and more deteriorated in the summer of 1999 and more tests were performed. On September 7, 1999, Dr. S wrote that because of back pain radiating into the right leg, the claimant has "difficulty either standing or sitting for a long time" and that his sleep is disturbed by the pain. Dr. S also said "he definitely cannot carry any weight" and was on narcotic pain killers which "will interfere with his judgment." On December 14, 1999, Dr. S wrote that the claimant was unable to bend forward and "definitely cannot carry any weight over 10 lbs.," or to climb, stoop, or sit for extended periods. The claimant testified that the work he did allowed him to take required breaks.

The hearing officer found that the claimant was paid substantially the fair market value for his services in the fourth and fifth quarter qualifying periods and that he "had returned to work in a position that was relatively equal to claimant's ability to work." Finding of Fact No. 12. The carrier argues that this determination is not supported by sufficient evidence. We observed that the focus in determining whether Rule 130.102(d)(1) applied in a given case was not so much on the actual wages earned but on whether the employment is more or less commensurate with the claimant's ability to work. Texas Workers= Compensation Commission Appeal No. 000616, decided April 26, 2000; Texas Workers= Compensation Commission Appeal No. 000321, decided March 29, 2000; Texas Workers= Compensation Commission Appeal No. 000219, decided March 22, 2000. Thus, even though there was evidence that the claimant was paid wages based on the type of work he was doing, the more important question is whether the work was relatively equal to his ability. The claimant testified to this continuous pain and requirement for strong pain medication and his need to frequently change positions. This was consistent with the limited medical evidence. The hearing officer found the claimant and his doctors credible in their descriptions of his ability to work. He also found the claimant credible in his testimony that this job accommodated those restrictions. Under our standard of review of findings of fact, we affirm the determinations that the claimant returned to work in a position relatively equal to his ability to work.

[4]This comment is belied somewhat by her additional comment that the claimant brought operational expertise to the business, while she developed the business plan and kept the books.

Finally, the carrier argues on appeal that the hearing officer failed to expressly find that the claimant's underemployment in the fourth and fifth quarter qualifying periods was a direct result of his impairment. We first observe that for these quarters there was never a question that the claimant did not earn less than 80% of his AWW. In addition, in Conclusion of Law No. 4. The hearing officer made what was in effect a finding of fact that the clamant's underemployment in the fourth and fifth quarter filing periods was a direct result of his impairment. Given the hearing officer's acceptance of the claimant's evidence about his job restrictions and his inability to return to his preinjury employment together with the undisputed nature of his injury and subsequent course of treatment, we find the evidence sufficient to support this determination.

For the foregoing reasons, we affirm the determinations that the claimant was entitled to fourth and fifth quarter SIBs. We reverse the determinations that the was entitled to second and third quarter SIBs and render a decision that he failed to prove he earned less than 80% of his AWW for these quarters and was not entitled to SIBs for these quarters.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge