

## APPEAL NO. 001181

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 3, 2000. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 13th quarter. The appellant (carrier) appeals, asserting that the claimant's self-employment in her business during the qualifying period did not amount to a good faith effort to obtain employment commensurate with her ability to work. The carrier bases its position upon its contentions that the claimant's business is not a viable business in that the claimant failed to factor in wages for herself and her husband, allocated 50% of the gross profits to her husband rather than a more appropriate 25%, and failed to adequately document the business expenses. The claimant urges, in response, that the evidence sufficiently supports the challenged factual findings and legal conclusions.

### DECISION

Affirmed.

It is well-settled that a claimant's entitlement to SIBs must be determined quarterly based on the evidence pertaining to the qualifying period for each quarter. We note that the Appeals Panel has affirmed the hearing officer's determinations that the claimant was entitled to SIBs for the 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 12th quarters. See Texas Workers' Compensation Commission Appeal No. 990858, decided May 26, 1999; Texas Workers' Compensation Commission Appeal No. 991972, decided October 13, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 000470, decided April 10, 2000. The carrier's appeal of the 11th quarter determination was not timely filed.

The parties stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury; that she reached maximum medical improvement on January 19, 1996, with an impairment rating of 19% and has not commuted any portion of her impairment income benefits; that the 13th quarter began on February 19 and ends on May 19, 2000; and that the qualifying period for the 13th quarter began on November 8, 1999, and ended on February 6, 2000; and that the claimant's average weekly wage (AWW) is \$341.25.

The hearing officer's statement of the evidence contains a thorough recitation of the evidence with which neither party takes issue. Accordingly, we will set out only so much of the evidence as is necessary to support this decision.

The claimant testified that at the time of her injury she was employed by the employer as a secretary/receptionist. She said that she sustained the compensable injury when she bent over to pick up some paper on the floor at work and her left hip pulled and that her back "popped" as she twisted and turned in straightening up. The claimant indicated that she underwent various modes of conservative treatment; that she tried, unsuccessfully, to find employment within her restrictions; that she also contacted the

Texas Rehabilitation Commission (TRC), the Texas Workforce Commission (TWC), and the Council of Governments and sought employment at every place suggested to her by these agencies; and that, "being at [her] wits end" by her lack of success in finding employment, she started her own business, an aviary. She said she initially worked at her business on weekends while searching for employment during the week; that the TRC felt that developing her own business was "the thing to do"; and that after some time, she began to work at the business full-time with the help of her husband.

A December 9, 1998, letter from the TRC states that the claimant applied for employment daily from December 27, 1995, through October 1, 1997; that after the claimant's exhaustive efforts and those of employees of the TRC, the TWC, and other agencies, "it was mutually decided that self employment would best serve [the claimant] due to her inability to remain sitting for extended periods because of her injury" and that self-employment would allow the claimant to work at a pace which would not exacerbate her injury.

Dr. N wrote on September 5, 1997, that the claimant was apparently let go from her job because of some restrictions on her, which included not to be sitting for extended periods of time, and that she worked with the TRC and applied for many jobs without success because of her back problem. Dr. N further stated that the claimant has started her own business raising and selling birds which she should be able to handle reasonably well in that she can pace herself and is not required to do a lot of sitting, "which is her major problem."

The July 20, 1999, report of Dr. P comments on a functional capacity evaluation the claimant underwent at that time and states that all of the claimant's testing appeared valid and she failed none of the symptom magnification signs. The report concludes that the claimant tested in the light physical demand level; that the claimant is fully capable of continuing her employment in her own pet supply business; that he would limit the claimant's lifting to 20 pounds; and that the claimant should avoid twisting and bending.

The claimant indicated that she worked approximately 40 hours per week at the business and her husband approximately 20 hours but made clear that the hours fluctuate depending on the time of year and volume of business. She said that her husband concentrates on the aviary while she concentrates on the buying and selling of the birds and that she allocates 50% of the net profits to herself and 50% to her husband.

The claimant further testified that the business has increased its income each of the three years she has operated it although large sales are sporadic and business falls off early in each new year. The claimant introduced meticulous documentation of the income and expenses of her business.

The claimant attached to her Application for Supplemental Income Benefits (TWCC-52) for the quarter at issue an attachment detailing the dollar amounts of the weekly sales, weekly credits, weekly expenses, and weekly "gross profits." The latter figure totaled

\$4,299.95 and the claimant allocated one-half that amount or \$2,149.98 to her husband, noting that \$2,149.98 equaled \$165.38 per week for 13 weeks. She also amended the total gross profits column to add \$7.95 after discovering an error during the hearing.

The carrier challenges findings that the claimant's earnings were \$2,153.84; that the claimant's earnings were less than 80% of her AWW as a direct result of her impairment; and that the claimant attempted in good faith to obtain employment commensurate with her ability to work.

The statutory elements for continued SIBs are contained in Section 408.123. The applicable Texas Workers' Compensation Commission rules are found in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(c) and (d) (Rules 130.102(c) and(d)). We have previously set out in the aforementioned decisions various matters pertaining to self-employment and meeting the good faith criterion which a hearing officer may consider. We are satisfied that the evidence is sufficient to support the challenged findings and conclusions. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge