

APPEAL NO. 001335

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 January 12, 2000. The entitlement to supplemental income benefits (SIBs) was at issue for three quarters. The hearing officer found that the respondent (claimant) was not entitled for any quarters. For the fourth and fifth quarters, the hearing officer rejected the claimant's contention that he had a complete inability to work. This determination was upheld by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 000347, decided March 27, 2000.

However, that Appeals Panel decision reversed and remanded regarding the hearing officer's determination that the claimant was not entitled for his sixth quarter. During this quarter, the claimant was actually employed in (state). The hearing officer had held that the claimant was underemployed as a direct result of living and working in (state). The Appeals Panel remanded this, noting that the 80% "cutoff" made no allowance for diminished wages based upon working in another country.

The hearing officer held a hearing on remand on May 9, 2000, where apparently no record was made and the claimant was excused from attending. Additional evidence was submitted as to the claimant's average weekly wage (AWW), and the appellant (carrier) submitted a brief in argument, making essentially the same points as its appeal in this matter. The hearing officer held that the claimant was underemployed as the direct result of his impairment and was entitled to SIBs for the sixth quarter.

The carrier has appealed, arguing that the wages paid in Mexico must be measured by living standards in that country, not those within the United States. Essentially, the carrier argues that the claimant's wages do not render him underemployed with respect to the Mexican living standard, and are consistent with wages paid there. The carrier argues that the fact the claimant is employed by a family member should have been considered by the hearing officer.

DECISION

We affirm the hearing officer's decision.

The claimant, in his early 30s, sustained a compression fracture of his neck at C4. He had surgery at this level and the adjacent C3-4 and C4-5 levels. The claimant experienced significant range of motion loss and was found by a doctor of the carrier to have a 15% impairment rating. Although the exact dates were not found in the decision, the qualifying period for the sixth quarter ran from late July through late October 1999. This was during and after the claimant completed a several-week course of work hardening therapy. He was discharged August 27, 1999, and, as the hearing officer pointed out in his first decision, the restrictions were not clearly delineated, although from the work hardening notes, it appears he was performing at a medium-duty level for lifting.

The hearing officer accepted as evidence of the conversion rate an affidavit from the claimant asserting a ten to one exchange rate. The hearing officer then took the wages and in-kind remuneration about which the claimant testified and converted these into a weekly wage. The claimant testified that he was paid 350 pesos a week, and 1,300 pesos a month rent and utilities. The hearing officer calculated that the claimant's weekly earnings from his job in (state) amounted to 650 pesos weekly, or \$65.00 a week. The evidence presented by the claimant as to his AWW was noted in the discussion of the hearing officer (although not in a finding of fact) to be \$278.46 from a wage statement,¹ and 80% of this was \$222.77.

It is worth pointing out that while much is asserted by the carrier, nothing has been proven with respect to the standard of living, the economic conditions, the prevailing wages, or any of the elements involving life and the economy of Mexico that the carrier cites as fact in its appeal. The trier of fact was presumed to know, rather than be shown, facts such as this that were pertinent to the claimant's argument. Such speculation would be no more than a scintilla of evidence to sustain a finding that economic conditions, rather than the impairment, resulted in the claimant's underemployment. As we stated in our first decision, the carrier's suggestion that wages paid outside of Texas should be extrapolated to regional standards of living is problematic and appears to have no basis in the 1989 Act.

In Texas Workers' Compensation Commission Appeal No. 93559, decided August 20, 1993, the Appeals Panel indicated that a finding of "direct result" was sufficiently supported by evidence that the employee sustained a serious injury with lasting effects and that during the filing period he could not reasonably perform the type of work he was doing at the time of the injury. *And see* Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994; Texas Workers' Compensation Commission Appeal No. 950376, decided April 26, 1995; and Texas Workers' Compensation Commission Appeal No. 950771, decided June 29, 1995. We also noted in Texas Workers' Compensation Commission Appeal No. 952082, decided January 10, 1996, that "direct result" does not require a claimant to prove that his impairment is the sole cause of unemployment or underemployment.

Although the Appeals Panel has quoted Senator John Montford's observation² that economic conditions, rather than impairment, are an example of something other than the injury that could be the direct cause of unemployment or underemployment, we believe this refers to situations where the general economic conditions in the area impact all workers, rather than the fact that some of the prospective employers contacted by one person had no current openings. The impact on all workers is a matter of evidence, not mere

¹ It is not clear why this could not have been the subject of a simple stipulation, since the carrier has presumably paid other income benefits based upon an established AWW.

² Montford, Barber & Duncan, A Guide to Texas Workers' Comp Reform, Butterworth Legal Publishers 1991, at Section 4-122.

assertion. See Texas Workers' Compensation Commission Appeal No. 950362, decided April 20, 1995. Local economic conditions are not the proper subject of official notice where no evidence is presented. Texas Workers' Compensation Commission Appeal No. 000505, decided April 20, 2000. In summary, once the claimant presented evidence that he sustained a serious injury with lasting effects and that he had a job accommodating those limitations but was nevertheless underemployed, the burden of proof shifted to the carrier to prove that the direct result relationship was overcome by other factors resulting in such underemployment. See Texas Workers' Compensation Commission Appeal No. 990048, decided February 18, 1999.

The decision of the hearing officer is sufficiently supported by the record, and we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge